



STATUTORY INSTRUMENTS.

S.I. No. 107 of 2022

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION ACT 2014
(CODE OF PRACTICE ON EQUAL PAY) ORDER 2022

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION ACT 2014
(CODE OF PRACTICE ON EQUAL PAY) ORDER 2022

WHEREAS the Irish Human Rights and Equality Commission (“the Commission”) has, under section 31(1) of the Irish Human Rights and Equality Commission Act 2014 (No. 25 of 2014) (“the Act of 2014”) and in furtherance of the aims specified in paragraphs (b) and (c) of the said section 31(1), prepared a draft code of practice on equal pay;

WHEREAS the Commission has, in relation to the said draft code of practice, complied with section 31(2) of the Act of 2014;

AND WHEREAS the said draft code of practice has, in accordance with section 31 of the Act of 2014, been submitted to the Minister for Children, Equality, Disability, Integration and Youth;

NOW I, RODERIC O'GORMAN, Minister for Children, Equality, Disability, Integration and Youth, in exercise of the powers conferred on me by section 31 of the Irish Human Rights and Equality Commission Act 2014 (No. 25 of 2014) and the Disability, Equality, Human Rights, Integration and Reception (Transfer of Departmental Administration and Ministerial Functions) Order 2020 (S.I. No. 436 of 2020) (as adapted by the Children and Youth Affairs (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. No. 437 of 2020)), hereby order as follows:

1. This Order may be cited as the Irish Human Rights and Equality Commission Act 2014 (Code of Practice on Equal Pay) Order 2022.

2. It is declared that the code of practice set out in the Schedule is an approved code of practice for the purposes of the Irish Human Rights and Equality Commission Act 2014 (No. 25 of 2014).

SCHEDULE
Code of Practice on Equal Pay

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<i>Irish Human Rights and Equality Commission</i>	<ol style="list-style-type: none"> 1. The Irish Human Rights and Equality Commission (IHREC) is an independent public body mandated to protect and promote human rights and equality in Ireland¹. Established in 2014, IHREC has absorbed the functions of the former Equality Authority and the former Irish Human Rights Commission; it has extensive powers, including the drafting of codes of practice to promote equality of opportunity in employment and to eliminate discrimination.
<i>Status</i>	<ol style="list-style-type: none"> 2. This Code of Practice (code) has been prepared by IHREC with the approval of the Minister for Children, Equality, Disability, Integration and Youth and after consultation with relevant organisations representing equality interests. 3. The code seeks to promote the development and implementation of procedures that establish workplaces where employees receive equal pay for like work. 4. The provisions of this code are admissible in evidence in proceedings before a court or in proceedings under Part VII of the Employment Equality Acts 1998-2015 (the EEA), and, also in proceedings before the Workplace Relations Commission or the Labour Court.
<i>Aims</i>	<ol style="list-style-type: none"> 5. The code aims to give practical guidance to employers, employers' organisations, trade unions and employees on: <ul style="list-style-type: none"> • The right to equal pay • The elimination of pay inequality, and • The resolution of pay disputes
<i>Application and adaptation of the code</i>	<ol style="list-style-type: none"> 6. This code does not impose any legal obligations in itself, nor is it an authoritative statement of the law — that can only be provided by the Workplace Relations Commission, the Labour Court and the courts. It is the employer's responsibility to ensure compliance with the EEA and European equality law. 7. The code is applicable to all employments that are covered by the EEA. Employers are encouraged to follow the recommendations in a way which is appropriate to the size and structure of their organisation. It may be relevant for small and medium sized enterprises to adapt some of the practical steps to their specific needs. Any adaptations that are made however, should be fully consistent with the code's general intention.

¹ Irish Human Rights and Equality Commission Act 2014.

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| <i>The right to equal pay</i> | 8. The right to equal pay for like work means that a person covered by the legislation who is performing work that is the same or similar or of equal value to that of another person employed by the same or associated employer, who differs in respect of one of the protected grounds, has a right to be paid the same as that other; that person must not be paid less on any of the nine prohibited grounds. ² |
| | 9. Irish law on equal pay is grounded in the law of the European Union (EU). As a member state, Ireland is obliged to implement the relevant directives ³ and follow the decisions of the Court of Justice of the European Union (CJEU). |
| <i>European law</i> | 10. Irish courts and tribunals must interpret domestic implementing legislation in a way that is consistent with the relevant EU directives. Where there is a conflict between Irish and EU law an Irish court must disapply any contrary provision of national law if necessary to ensure the full effectiveness of EU law. ⁴ |
| | 11. Article 157 ⁵ of the Treaty on the Functioning of the European Union is fundamental to European law on equality; it sets out the principle of equal pay for men and women for equal work. |
| <i>Benefits of pay equity</i> | 12. A fair and transparent pay system is likely to be non-discriminatory and is likely to ensure a greater sense of equity in an organisation. The benefits of pay equity are well documented ⁶ such as the avoidance of legal costs and lost management time associated with litigation, greater efficiency, improved retention of employees, and better quality of products and services. Indirect costs of a system that does not guarantee pay equity include lower productivity, high employee turnover, absenteeism, low morale, reduced productivity and damage to the reputation of the organisation. |

² Initially Irish legislation on equal pay covered only the gender ground but now covers nine grounds.

³ The most relevant directives in the area of equal pay are: the Employment Equality Framework Directive 2000/78/EC, which prohibits discrimination in employment and occupation on the grounds of religion, disability, age and sexual orientation; the Race Equality Directive 2000/43/EC, which prohibits discrimination on the ground of race or ethnic origin in employment and other matters; and Council Directive 2006/54/EC, the ‘Recast Directive’, which implements the principle of equal opportunities and equal treatment of men and women in employment.

⁴ *Dansk Industri (DI), acting on behalf of Ajos A/S v Rasmussen*, Case C-441/14.

⁵ Formerly Article 119 EEC and Article 141 EC.

⁶ See for example, Chicha, Marie-Thérèse, ‘Promoting Equity: Gender Neutral job evaluation for equal pay: A step-by-step guide’, ILO, 2008, and *Gender Pay Equity*, Fair Work Ombudsman, Australia (2012)

**Who
is
covered?**

13. The EEA cover all employees, whether full-time, part-time⁷, permanent or temporary, working under a contract of employment, or providing personal services in another person's home⁸.
14. Where a person is employed as an agency worker through an employment agency the person who is liable for the pay of the agency worker is deemed to be the employer⁹. Persons employed by the Garda Síochána, the Defence Forces, the civil service or by various authorities such as health or education and training boards, are deemed to be employed¹⁰ under a contract of service by the State or Government or the relevant authority/board, as the case may be.
15. The EEA define 'employer' as the person with whom the employee has entered into a contract of employment¹¹. The equal pay for equal work legal provisions apply to all employers regardless of size. However, the way in which employers comply with their obligations to avoid discrimination in pay may vary in practice according to the size of the organisation.

Discrimination on prohibited grounds

**Prohibited
grounds**

16. For the purposes of the EEA, discrimination occurs where a person is treated less favourably than another 'is, has been, or would be' treated, in a comparable situation, on any of the specified grounds.¹²
17. Section 6(2) EEA defines the nine grounds on which discrimination is prohibited, these are: gender, civil status, family status, sexual orientation, religion, age, disability, race/colour/nationality or ethnic or national origins, and membership of the Traveller community.
18. 'Gender' discrimination covers women and men.¹³ Discrimination because of pregnancy or maternity leave is also defined as gender discrimination.¹⁴ Under EU law a

⁷ Part-time employees are covered by the EEA as are other employees in respect of discrimination in pay on any of the prohibited grounds. A part-time employee may be discriminated against, for example, on grounds of gender or religion or civil status. Discrimination against part-time employees *per se* is addressed under separate legislation in the Protection of Employees (Part-Time Work) Act 2001, as amended.

⁸ Section 2(1).

⁹ Section 2(3)(c)

¹⁰ Section 2(3)(a) and (b).

¹¹ Section 2(1).

¹² Section 6(1)(a).

¹³ Section 6(2A).

¹⁴ Section 6(2A).

transgender person who experiences discrimination arising from their gender reassignment, or transition, is protected under the gender ground.¹⁵

19. ‘Civil status’ is defined as single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner.¹⁶
20. ‘Family status’ means responsibility for a person under the age of 18 years or responsibility as a parent or resident primary carer of a person of 18 years or over with a disability requiring care or support.¹⁷
21. ‘Disability’ is defined broadly as, for example, the total or partial absence of a person’s bodily or mental functions, the presence of organisms that cause or are likely to cause chronic disease, or a condition or illness which affects a person’s thought processes, perceptions of reality or emotions. The definition includes a disability that exists, that previously existed, that may exist in the future or that is imputed to a person.¹⁸
22. ‘Sexual orientation’ is defined as heterosexual, bisexual or homosexual.¹⁹
23. ‘Age’ refers to the protection against age-related discrimination in employment which applies only to employees over the maximum age at which a person is statutorily obliged to attend school.²⁰ The minimum school leaving age is currently 16 years, or the completion of three years of post-primary education, whichever is the later.
24. ‘Race’ includes race, colour, nationality or ethnic or national origins.²¹
25. ‘Religious belief’ includes different religious background or outlook, (including the absence of religious belief).²²
26. ‘Membership of the Traveller Community’, means a member of the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history,

¹⁵ See Recital 3, Gender Recast Directive 2006/54/EC which reads “The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person”.

¹⁶ Section 2(1).

¹⁷ Section 2(1).

¹⁸ Section 2(1).

¹⁹ Section 2(1).

²⁰ Section 6(3)(a).

²¹ Section 6(2)(h).

²² Section 6(2)(e).

culture and traditions including, historically, a nomadic way of life on the island of Ireland.²³

Expansive definition

27. The prohibition on discrimination extends to situations where a ground actually exists and also covers situations where a ground once/used to exist but no longer exists (for example a past period of illness); where a ground may exist in the future (for example, family status or pregnancy); or where a ground is imputed to a person (for example, where a person is assumed to be a member of the Traveller community or is assumed to be HIV positive)²⁴. Discrimination also covers people associated with people covered ('discrimination by association'), for example a person without a disability who is caring for a person with a disability²⁵.

Pay / remuneration

28. While, generally, the phrase 'equal pay' is used, the relevant provisions of the EEA refer to 'remuneration', which is a broader term than 'pay'. It is defined in section 2(1) EEA as including 'any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment...' The definition is wide and includes, for example, allowances, bonuses and eligibility for same, performance payments, and non-cash benefits such as cars and mobile phones.
29. Although pensions constitute 'pay' and are covered by the principle of equal pay as set out in EU legislation and in the case law of the CJEU, they are expressly excluded from the EEA²⁶; equality in pensions is addressed under separate pensions legislation²⁷.
30. In this code, references to 'pay' include 'remuneration' as defined in the EEA.

Pay differentials

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

²³ Section 2(1).

²⁴ Section 6(1)(a).

²⁵ *Coleman v Attridge Law & Steve Law*, Case C-303/06.

²⁶ Section 2(1).

²⁷ Pensions Act 1990, as amended.

Important aspects of equal pay claims

- Contract of employment** 32. A ‘contract of employment’ means a contract of service or apprenticeship or any other contract whereby a person agrees to personally execute any work or service or a person is employed as an agency worker. The contract of employment need not be in writing and may be express or implied.²⁸ Every contract of employment includes an implied term²⁹ requiring equal pay on the gender ground, if one is not already in the contract; a similar term is mandatory regarding equal pay on the non-gender grounds.
- 'Like work'** 33. In order to establish an entitlement to equal pay under the EEA a employee (or ‘complainant’ in proceedings) must show that s/he is performing ‘like work’ with that of a chosen comparator, that s/he is receiving less pay than that comparator, and that the reason for the pay differential is one or more of the prohibited grounds.
34. A person performs ‘like work’ when that work is the same, similar or of equal value to that of the comparator³⁰.
- Same work** 35. ‘Same’ work means that the work performed must be the same or interchangeable for the complainant and the comparator. The conditions in which the work is done must also be the same or similar. This might mean, simply by way of example, that the assessment of factors such as the nature of the work space, the heating, the presence or absence of natural day light, and the noise levels may be relevant in a particular case to determining whether, or not the conditions are similar.
- Similar work** 36. Similar work means that differences between the work of the complainant and the comparator are insignificant in relation to the work, or so infrequent as not to be significant to the work as a whole. For example, male and female general operatives on a factory floor operate the

²⁸ Section 2(1)

²⁹ Section 20.

³⁰ Section 7(1) of the EEA provides that a person performs ‘like work’ where:

- ‘(a) both perform the same work under the same or similar conditions, or each is interchangeable with the other in relation to the work,
- (b) the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant to the work as a whole, or
- (c) the work performed by one is equal in value to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.’

same machinery, but the male operatives occasionally lift heavy items.

Equal value

37. Work that is equal in value requires equivalence in matters such as skill, physical and mental requirements, level of responsibility and working conditions. These matters are not exhaustive. What is relevant or most important will differ from case to case. Indeed, the equal value provision permits entirely dissimilar jobs to be compared, e.g. cooks with painters, or care assistants with gardeners. Notwithstanding the differences in the work, these comparisons may result in a finding of equal value.

Clerical assistants in the Irish civil service successfully claimed³¹ that their work was of equal value to that of paper keepers. In the United Kingdom³² speech therapists claimed work of equal value with senior hospital pharmacists and clinical psychologists. In another case³³ caterers and care assistants claimed their work was of equal value with street sweepers, refuse collectors and gardeners.

38. The EEA do not provide for proportionate pay for work of proportionate value. In a situation where a person is performing work of greater value than a comparator but is being paid less, then for the purposes of the EEA the work is considered of equal value.

Comparators

39. An equality claim is generally based on a comparison. The right to be treated equally is the right to be treated the same as another who is performing like work, but is of a different protected characteristic. For example, a woman claiming sex discrimination will need to find a male comparator who is being paid more than she is even though both are doing like work. A person claiming age discrimination will need to find a person of a different age who is being paid more than she is even though both are doing like work.
40. A comparator is the person to whom a complainant compares him or herself for the purposes of an equal pay claim. The comparator must differ from the complainant on one of the nine prohibited grounds. The comparator must be performing ‘like work’ as defined in the EEA. The comparator must receive greater remuneration than the

³¹ *Doran & Ors v Minister for Finance & Ors*, [2001] 2 I.R.

³² *Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993] IRLR 591.

³³ *Redcar & Cleveland Borough Council v Bainbridge & Ors* [2008] IRLR 776, UK Court of Appeal.

complainant. A complainant must identify an actual named comparator for an equal pay claim to be successful³⁴; a hypothetical or notional comparator will not suffice³⁵.

- 41. An agency worker must identify another agency worker as a comparator; likewise, a non-agency worker must make a comparison with a non-agency worker³⁶.
- 42. The comparator must be employed³⁷ by the same employer as the complainant, or by an associated employer³⁸. In circumstances where the complainant and comparator work for associated employers, they must have ‘the same or reasonably comparable terms and conditions of employment’³⁹.
- 43. A complainant who seeks to establish indirect discrimination must identify a group of comparators who satisfy the criteria set out above. In addition, the comparator group must be predominantly composed of persons who differ from the complainant group with regard to the protected characteristic.
- 44. A comparator is not required in order to establish pay discrimination related to pregnancy or maternity leave (as distinct from pay discrimination alleged on the gender ground which is unrelated to either pregnancy or maternity leave, in which case a named comparator is required.)
- 45. Although the period of employment does not have to be contemporaneous, there are limits on the length of time for which like work can be compared in relation to all nine protected grounds. The EEA provide for a reference period⁴⁰ of three years before and after the complainant’s period of relevant employment in which s/he may compare her/his work with that of a comparator whom s/he considers was engaged in like work during that reference period⁴¹.

³⁴ *Mentel v Top Heights Ltd. t/a Foys Bar & Lounge*, (DEC-E2014-017): here the equal pay claim failed because no comparator had been identified.

³⁵ As happened for example in *Hlistova & Ors v We Clean Ltd. (in liquidation)*, DEC-E2014-001.

³⁶ Section 7(2).

³⁷ The law requires that complainants and comparators be employed by an entity which is responsible for the disparity in pay and can therefore remedy that disparity if appropriate. This is what evolving case law describes as a ‘single source’ that is, effectively, responsible for the inequality and can restore equal treatment.

³⁸ Section 19(1) and section 29(1). Employers are “associated” if one corporate body controls another, or if one corporate body controls two others, for example where a parent company controls subsidiary companies involved in retail or catering businesses (section 2(2)).

³⁹ Section 19(3) and 29(3).

⁴⁰ Section 19(2); section 29(2).

⁴¹ In order to be able to make a comparison of like work in respect of a non-contemporaneous comparator therefore, the complainant must be able to show that the comparator was doing like work at some point during the three years before the time s/he was engaged on the relevant work, or at some point during the three years after that time. (See *McCarthy's Ltd. v Smith*, Case 129/79, CJEU.)

- Burden of proof**
- 46. The onus of proof is on the person making the complaint to establish the basic facts. They must identify a comparator, or group of comparators if indirect discrimination is alleged, with whom s/he is performing like work. (This requirement does not apply if the discrimination relates to maternity leave or pregnancy.) They must also establish the discriminatory ground, and the pay differential. In indirect discrimination claims, the indirectly discriminatory practice or system which results in the pay differential must be identified. If an employee can establish these facts, then the onus of proof shifts to the employer to establish a ground other than the prohibited ground for the pay differential or, in indirect discrimination claims, objective justification for the system or practice at issue.
 - 47. Section 85A EEA reflects the approach in case law: where facts are established from which discrimination may be presumed it is for the respondent to prove the contrary.
 - 48. As recognised in case law, transparency is an important aspect of any pay system⁴² and may determine where the burden of proof lies.
 - 49. Complainants may seek information from the employer using the Freedom of Information Act 2014, Data Protection Acts 1988-2018 or the statutory questionnaire system under the Workplace Relations Commission Act 2015 referred to below. If an employer fails to respond to the statutory questionnaire, or gives answers which are false or misleading, inferences may be drawn from this and this may operate to shift the burden of proof from the complainant to the employer.
- Equal pay on the gender ground**
- 50. Where two employees are persons of different sex⁴³, perform like work and one is paid less than the other, the EEA provide that the lower paid employee is entitled to the same pay as the comparator of the other sex⁴⁴.
 - 51. The complainant and comparator do not have to be employed at the same time in order to make a

⁴² In *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, Case 109/88, the then ECJ found that where a pay system lacks transparency and the average pay of women is less than that of men in a relatively large number of employees, it is for the employer to prove that the system is not discriminatory.

⁴³ Section 18.

⁴⁴ Section 19(1) provides '(1) It shall be a term of the contract under which A is employed that, subject to this Act, A shall at any time be entitled to the same rate of remuneration for the work which A is employed to do as B who, at that or any other relevant time, is employed to do like work by the same or an associated employer.'

comparison⁴⁵. For example, a woman who replaces a man in a particular job and is paid less for performing like work can make a claim for equal pay even though she never actually worked with her comparator, subject to the three-year reference period discussed above.

Maternity leave and pregnancy 52. Discrimination because of maternity leave or pregnancy is defined as gender discrimination⁴⁶.

53. A woman's entitlement to her normal contractual remuneration ceases during her maternity leave. A woman may of course be entitled to maternity-related pay under her contract of employment. A woman on maternity leave is entitled to any pay increases⁴⁷, even backdated increases, awarded during her leave. She is also entitled to be assessed, while on maternity leave, for any performance-related pay increase⁴⁸.

Equal pay on the non-gender grounds 54. Where two people differ on one or more of the protected grounds and are performing like work but one is being paid less than the other, the lower paid person has an entitlement to claim equal pay.⁴⁹ The relevant differences on the protected grounds are⁵⁰:

- in relation to the civil status ground, the two employees have different civil status;
- in relation to the family status ground, one employee has family status and the other does not, or *vice versa*;
- in relation to the sexual orientation ground, the two employees are of different sexual orientations;
- in relation to the religion ground, the two employees have different religious beliefs or one has a religious belief and the other does not, or *vice versa*;
- in relation to the age ground, the two employees are of different ages;

⁴⁵ Section 19(2). See also *Macarthy's Ltd v Smith* (1980) 2CMLR 217, ECJ, where the complainant was paid £50 per week but the man who had held the same job prior to her had been paid £60 per week.

⁴⁶ Section 6(2A), which provides that discrimination on the gender ground 'shall be taken to occur' where, on a ground related to her pregnancy or maternity leave, a woman employee is treated less favourably than another employee is, has been or would be treated.

⁴⁷ *Gillespie v Northern Health and Social Services Boards*, C-342/93, [1996] ECR I-475.

⁴⁸ *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries (CNAVTS) v. Thibault*, Case (C-136/95) [1998] ECR I-2011

⁴⁹ Section 29(1) EEA provides: 'It shall be a term of the contract under which C is employed that, subject to this Act, C shall at any time be entitled to the same rate of remuneration for the work which C is employed to do as D who, at that or any other relevant time, is employed to do like work by the same or an associated employer.'

⁵⁰ Section 28(1).

- in relation to the disability ground, one employee is a person with a disability and the other is not, or *vice versa*, or the two employees are persons with different disabilities;
- in relation to the ground of race, the two employees differ as to race, colour, nationality or ethnic or national origins or any combination of those factors; and
- in relation to the Traveller community ground, one employee is a member of the Traveller community and the other is not, or *vice versa*.

55. As with the gender ground, the employment of the two employees during a period of comparison need not be contemporaneous, subject to the three-year reference period discussed above.⁵¹

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| <i>Disability and pay</i> | <p>56. An employer is entitled, although not obliged, by section 35(1) EEA to pay an enhanced rate of pay to a person with a disability who performs less work than a comparator⁵². The Act also permits⁵³ an employer to provide special treatment or facilities to a person with a disability, for example, in order to enable that person to work or undergo training⁵⁴.</p> <p>57. However, an employer is not required to pay the same remuneration to an employee who does less work or work of less value. The EEA do not require enhanced pay for persons with a disability whose productivity may be restricted because of their disability, and it permits a lower rate of pay for such work⁵⁵. A person with a disability who is performing like work with another employee without a disability or with a different disability and is being paid less is however protected by section 29 EEA; s/he is entitled to equal pay for their work.</p> |
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Direct and indirect discrimination

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| <i>Direct discrimination</i> | <p>58. Discrimination can be divided into two different types: direct and indirect.</p> |
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⁵¹ Section 29(2).

⁵² Where a person with a disability receives enhanced payment or treatment in employment the EEA prohibits another employee from claiming an entitlement to that enhanced pay or treatment (Section 35(3)).

⁵³ Section 35(2).

⁵⁴ Furthermore the Act in section 16(3) requires employers to provide reasonable accommodation ('appropriate measures') to enable a person with a disability to fully participate in employment or vocational training, unless those measures would impose a disproportionate burden on the employer.

⁵⁵ Section 35(1).

- 59. Direct discrimination** concerns less favourable treatment of an individual on a prohibited ground. For example, direct discrimination in pay⁵⁶ occurs where an individual establishes that s/he is being paid less for performing like work with a comparator in respect of which there is a difference on one or more of the prohibited grounds. Whether there is an intention to discriminate or not is irrelevant.
60. Direct pay discrimination, such as different pay scales for men and women, is less likely to occur now than in the past. Discriminatory pay differentials are more likely to occur as a result of an indirectly discriminatory pay practice.
- Indirect discrimination**
61. **Indirect discrimination**⁵⁷ occurs where apparently neutral treatment has an adverse impact on a particular group. Such treatment is unlawful unless it can be objectively justified. The discrimination may be hidden by systems or criteria that appear to treat people the same but, in fact, disadvantage a particular group⁵⁸. Most indirect discrimination claims to date have been taken by women on the gender ground and some of the most important decisions⁵⁹ concern less favourable treatment of part-time employees (a predominantly female group).
62. A claim of indirect pay discrimination in the United Kingdom was⁶⁰ taken by (a predominantly female group of) speech therapists comparing their work to clinical psychologists and pharmacists, the latter groups being predominantly male and paid more.

⁵⁶ Section 19(1) and section 29(1).

⁵⁷ Section 19(4) contains the provisions dealing with indirect gender discrimination in pay; section 29(4) replicates these provisions, dealing with indirect discrimination on the non-gender grounds.

⁵⁸ In *Kenny & Ors v Minister for Justice, Equality and Law Reform, Minister for Finance, Commissioner of An Garda Síochána*, Case 427/11, CJEU, an equal pay case brought by women employed in civilian posts in An Garda Síochána, the Court of Justice stated:

‘So ... it must be noted that if the pay of one group of workers is significantly lower than that of another group and if the former are almost exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination, at least where the two groups in question perform duties of equal value and the statistics describing that situation are valid ...’

⁵⁹ *Nimz v Freie und Hansestadt Hamburg* [1991] ECR 1-297, *Gerster v Freistaat Bayern* [1997] IRLR 699. Many of the gender discrimination claims taken on behalf of part-time employees pre-dated the legislation protecting part-time employees per se.

⁶⁰ *Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993] IRLR 591, ECJ.

In *Krüger*⁶¹ the CJEU found that the exclusion of employees who worked less than 15 hours per week from a collective agreement, resulting in the non-payment of a Christmas bonus to them, constituted indirect gender discrimination as the exclusion impacted on a considerably higher percentage of women than of men.

In *Hill & Stapleton*⁶², taken on behalf of job-sharers in the Irish civil service, the CJEU found that the way in which incremental credit was determined disadvantaged job-sharers who were predominantly women and constituted indirect pay discrimination on the gender ground unless justified.

Defences to claims

- | | |
|---|---|
| <p>Not like work, etc.</p> <p>Non-discriminatory ground</p> <p>Length of service and seniority</p> | <p>63. A claim of direct pay discrimination may be defended by an employer showing, for example, that the work is not like work, that the comparator is not appropriate, or that there is a reason for the pay differential which is not discriminatory.</p> <p>64. The EEA⁶³ provide that nothing prevents an employer from paying different rates of remuneration to different employees on grounds other than the prohibited grounds. For example, a male employee may be receiving higher remuneration for the same work as a woman because he has been ‘red-circled’⁶⁴ for reasons of ill-health.</p> <p>65. Length of service is not a blanket defence or justification for pay inequality. The ECJ⁶⁵ concluded that where length of service leads to disparities in pay between men and women, the criterion need not be justified by an employer since ‘as a general rule’ the criterion of length of service is appropriate to reward experience which enables better performance. The ECJ also held, however, that justification was required where an employee provided</p> |
|---|---|

⁶¹ *Andrea Krüger v Kreiskrankenhaus Ebersberg*, Case C-281/97.

⁶² *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance*, Case C-243/95.

⁶³ Section 19(4)(c) and section 29(5).

⁶⁴ Where pay is ‘red-circled’ it means pay is protected at a level above the appropriate rate for the work performed, so for example a person who because of illness may no longer be able to perform all the duties attaching to his/her position nevertheless continues to receive the rate of pay assigned to the job. This protected rate of pay is personal to the job-holder.

⁶⁵ *Cadman v Health and Safety Executive* [2007] ELR 139, paragraph 40 of judgment.

‘evidence capable of raising serious doubts’ that this was in fact the case.⁶⁶

Length of service and age discrimination

66. Section 34(7) EEA states that it is not discrimination on the age ground to provide different rates of remuneration if the difference is based on relative seniority or length of service. However, section 34(7) must be seen in the context of EU law⁶⁷ which provides that Member States may provide for differences of treatment on grounds of age provided such differences are objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Employers should therefore ensure that relying on seniority or length of service is justified⁶⁸.

Market forces

67. ‘Market forces’ can be a defence to alleged pay discrimination but such a defence would have to be proven by reference to quantifiable evidence. Furthermore, even if such evidence is available it would be necessary to establish whether any pay differential is attributable wholly or in part to the particular market forces. If the defence is only a partial defence, then it would be applied to the pay differential pro rata⁶⁹.

Indirect discrimination and objective justification

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

69. A claim of indirect discrimination may be defended by showing that there is objective justification for the negative impact on a particular group. A negative impact may be objectively justified by identifying a legitimate

⁶⁶ In *Wilson v HSE* the Court of Appeal in the United Kingdom addressed the issue of higher pay on grounds of longer service, with particular reference to *Cadman*. The court found that the complainant should show some basis for inferring that the length of service criterion is disproportionate. The court described this test as a ‘low’ test stating that the employee has only to show that there is evidence from which it can properly be found at trial that the general rule in *Cadman* does not apply and also stated that this was ‘merely a sensible evidentiary requirement to ensure that the complaint had some prospect of success’.

⁶⁷ Article 6(1) of Council Directive 2000/78/EC.

⁶⁸ The National Minimum Wage Act 2000 provides for sub-minima wages, sometimes on age grounds, which will not amount to discrimination.

⁶⁹ As the Court of Justice stated in *Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993] IRLR 591::

‘If... the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality... it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide **objective justification** for part or all of the difference.’

aim and showing that the means of achieving that aim are appropriate and necessary.

70. General assertions unsupported by objective criteria or simply seeking the avoidance of increased costs will not satisfy the rigorous standard for objective justification⁷⁰. Vague arguments, for example, that an (indirectly discriminatory) practice is justified by the need to reward staff commitment or inspire motivation are unlikely to succeed.

Elimination of pay inequality

Pay review

71. This section of the code provides guidance to help employers identify pay inequality and eliminate it. A ‘pay review’ or a ‘pay audit’ are terms commonly used to describe the investigation by an organisation of its pay practices, frequently resulting in reform of those practices; in this code the term ‘pay review’ will be used⁷¹. The law does not require employers to carry out such pay reviews, the minimum legal requirement is the elimination of unlawful pay inequality. However, a pay review - incorporating, as part of the process, a rational and objective job evaluation model - is the most effective way of achieving pay equality. An overall strategy to redress unfairness and ensure pay transparency will encourage real pay equity in an organisation. Clearly, this will have to be conducted in accordance with an employer’s obligations under data protection legislation. Further, the way in which an employer may choose to conduct a pay review will need to be adapted to its size and resources.

⁷⁰ In *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance*, Case C-243/95 the Court of Justice stated:

‘38 ...[N]either the justification provided by the Revenue Commissioners and the Department of Finance to the effect that there is an established practice within the Civil Service of ‘crediting’ only actual service, nor that stating that this practice establishes a reward system which maintains staff motivation, commitment and morale, is relevant. The first justification is no more than a general assertion unsupported by objective criteria. With regard to the second, the system of remuneration for employees working on a full-time basis cannot be influenced by the job-sharing scheme.

...

40 So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs.’

⁷¹ The term ‘pay review’ used here should not be confused with the term as used to describe an individual pay review, e.g. carried out by an employer on an annual basis to determine increments etc.

- Participation and consensus**
72. Joint management and employee participation⁷² at all stages of the review is desirable to ensure commitment to the process and positive outcomes. It is not desirable for one person to undertake the job evaluation regardless of how small the organisation is. In some circumstances an external consultant/expert may be useful to assist and direct the review process but that person should work in an integrated way with relevant staff and any internal committees⁷³. Consensus, rather than simple voting, is a more effective way of ensuring trust in the process and acceptance of the outcomes⁷⁴. However there may be circumstances where full consensus is not possible given the particular employee participation structures involved.
73. Clear communication with the workforce at all stages of the pay review is vital and employees who are unhappy about the evaluation of their jobs should have access to an appeal mechanism.
- Review process**
74. When the jobs that are to be examined by the pay review have been identified, the process should generally proceed as follows:
- *Collection of data* including job descriptions or role profiles describing the relevant jobs;
 - *Analysis of job data and observation of the role being evaluated* (job evaluation);
 - *Analysis of pay data*: identification of any apparent differentials in pay for same/similar jobs or jobs of equal value and the reasons for such differentials; and
 - *Implementation* of equal pay (see paragraph 97, below).
75. ***Collection of job data***
- Information on the jobs to be evaluated can be collected by, for example, interview, questionnaire, observation of roles being evaluated, or from existing Human Resources files.
 - Particular care needs to be taken that elements of particular jobs are not overlooked, especially in areas where there may be occupational segregation, for example areas where migrant workers, employees

⁷² This can be ensured for example by setting up a steering committee involving management and union/employee representation to manage the review process; a job evaluation committee with such mixed representation is also desirable. The number and size of such internal committees will depend on the size of the organisation.

⁷³ Please see reference in previous footnote to internal committees.

⁷⁴ Any data collection strategy must have regard to the requirements of data privacy and confidentiality.

with a disability, women or part-time employees predominate.

- Questionnaires should collect information regarding the job requirements, rather than the performance or characteristics of the individual employee; it is the job which is being evaluated and not the performance.
- Employers should adapt the criteria, or add factors/sub-factors⁷⁵ to them, to suit the jobs being examined.
- Questionnaires should elicit information which is objective rather than subjective, information which describes the nature of the work rather than the employee's subjective experience of it.

76. Analysis of job data: evaluation

There are many different types of job evaluation models⁷⁶ and it is a matter for each organisation to choose the method best suited to it or to adapt a particular model as necessary⁷⁷. The evaluation model (or method) used must be neutral in respect of any aspects of jobs generally done by a protected group (for example, by women, by non-Irish employees, by employees with a disability): these aspects of the job must not be undervalued as this would simply perpetuate any pay inequality. This is particularly important in organisations where occupational segregation is a factor. Job evaluation models to date have focused on the elimination of gender inequality in pay, however these models are just as relevant to eliminating non-gender pay inequality. The most important aspects of a job evaluation are set out below:

- *Assessment:* Jobs are assessed on the basis of the information collected and a value is assigned, usually a points value;

⁷⁵ For example, criteria such as financial knowledge will be of great significance for a job in financial management and technical knowledge will be of paramount importance in a job dealing with information technology, but these factors will not feature in a job involving refuse collection or landscaping of public parks. Sub-factors under these headings might include keeping up to date (e.g. by doing relevant courses) with knowledge of company law and corporate taxation issues or with developments in information technology and Internet law.

⁷⁶ See for example *Promoting Equity: Gender Neutral job evaluation for equal pay: a step-by-step guide*, ILO (2008); *Equity at Work: An Approach to Gender-Neutral Job Evaluation*, State Services, New Zealand; *Gender Pay Reviews*, IBEC (2013); *Negotiating for Equality – Gender and Pay Toolkit*, ICTU (2003); *Equal Pay Handbook*, Human Rights Commission of Australia (1998); *Gender Pay Equity*, Fair Work Ombudsman of Australia (2012).

See also, for example, those described in Appendix 5 of IBEC's 'Gender Pay Reviews – A template for examination of gender pay in organisations', IBEC, 2013; Chicha, Marie-Thérèse, 'Promoting Equity: Gender neutral job evaluation for equal pay: A step-by-step guide', ILO, 2008; *Negotiating for Equality – Gender and Pay Toolkit*, ICTU, 2003; *The Equal Pay Handbook*, Human Rights and Equal Opportunity Commission of Australia, 1998 and the guidelines in *A Framework for Building a Culture of Equality and Human Rights in the Workplace*, IHREC.

⁷⁷ Quantitative or factor evaluation would appear to be the model best suited to equality reviews. This involves assessing jobs on a factor-by-factor basis (for example, functional knowledge, training and experience, reporting level and accountability, etc.) and assigning points to each factor.

- *Criteria:* Most evaluation models suggest similar criteria: for example, knowledge and skills, physical/mental skills, responsibility for health and safety, supervision, responsibility for planning and development, responsibility for finance. These factors/sub-factors are not exhaustive and should be adapted as appropriate;
- *Stereotypical assumptions* about jobs traditionally performed by particular groups should be avoided;
- *The weighting of evaluation factors* involves determining their relative importance (by for example using percentages and points scores) and assigning relative values to each of them: the same weighting system should be used for all jobs; and
- A *weighting grid*⁷⁸ can be used to indicate the relative importance of each factor and sub-factor: the same weighting grid should be used for all jobs.

77. Analysis of pay data

- *Pay differentials:* The pay data must be collected and analysed and any pay differentials identified in respect of jobs which are the same, similar or of equal value.
- *Comparisons of all elements of pay:* Analysis must include all elements of pay (including discretionary payments) not just basic pay, including benefits such as allowances, performance bonuses, sick leave pay, company car, productivity pay, etc.
- *Indicators of discrimination* in pay could include, for example, certain employees progressing more slowly than others through incremental salary scales or some employees being paid less than others with equivalent entry qualifications and length of service.

78. Even if a pay review has been carried out and changes made to ensure pay equality, disputes may nevertheless arise. The following section of this code outlines how such disputes may be addressed.

⁷⁸ See for example the weighting grid advocated in *Promoting Equity: Gender Neutral job evaluation for equal pay: a step-by-step guide*, ILO (2008), at page 70.

Resolution of pay disputes

Informal/formal 79. If an individual considers that s/he is not being paid equal pay for their like work they should raise the matter informally with management through the internal grievance procedure in the first instance. If not resolved, the pay issue should then be pursued formally. Should the individual not be satisfied with the outcome of this procedure they have the option of lodging a claim with the Workplace Relations Commission (the WRC, or to the Circuit Court in a gender claim) under the EEA.

Victimisation 80. Where an employee is dismissed or subjected to other adverse treatment by her/his employer for any of the following reasons:

- making a complaint of discrimination internally or to the WRC;
- issuing proceedings;
- having represented or supported a complainant;
- the employee's work having been used for comparison with that of another employee;
- being a witness;
- having opposed an act which is unlawful under the EEA; or
- having given notice of an intention to do any of the above,

that treatment constitutes victimisation⁷⁹ under the EEA.

Victimisation complaints may be referred to the WRC⁸⁰. Victimisation is also an offence⁸¹ which may be prosecuted; an employer may be required to re-instate or re-engage the employee⁸² upon conviction, or to pay both a fine and/or compensation⁸³.

Forum for redress

81. The WRC is now the main forum for dealing with employment complaints. Established under the Workplace Relations Act 2015, it has absorbed the functions previously carried out by the Equality Tribunal, the Labour Relations Commission and the Employment Appeals Tribunal. Equal pay claims on both gender and non-gender grounds are investigated at first instance by the WRC and by the Labour Court on appeal. In respect

⁷⁹ Section 74(2).

⁸⁰ Section 77(1) of the 1998 Act.

⁸¹ Section 98(1).

⁸² Section 98(2).

⁸³ Section 98(3)

only of equal pay claims on the gender ground complainants have also the alternative option of referring claims to the Circuit Court⁸⁴. Both the WRC and the Labour Court operate as quasi-judicial bodies when dealing with equality claims.

- 82. Where ‘like work’ is in dispute, the Adjudication Officer may conduct a work inspection to determine the existence of ‘like work’.
- 83. Information and guidance is available on the WRC website; relevant forms and equality decisions since 1996 are also available. A claim for equal pay on any of the nine prohibited grounds may be referred to the Director General of the WRC⁸⁵. The WRC provides a complaint form for this purpose on its website (a sample form is appended at **Appendix 1**). Complaints can be lodged with the WRC online. It is essential that a complainant use the employer’s correct legal title, or it may be impossible to establish liability⁸⁶.
- 84. A party to proceedings⁸⁷ before the WRC (or the Labour Court) may be represented by any individual or body authorised by that party⁸⁸.

Circuit Court

- 85. Only equality claims on the gender ground may be referred to the Circuit Court⁸⁹. The Circuit Court⁹⁰ may determine as a preliminary issue whether, or not, grounds other than gender exist for the pay differential in dispute⁹¹. The Court may request the Director General of the WRC to nominate an adjudication officer to prepare a report on any matter⁹², such as whether, or not, the complainant and the comparator are employed on like work.
- 86. An employee may not seek redress for pay discrimination under the EEA if s/he has instituted proceedings at

⁸⁴ Section 77(3). This alternative forum for gender complaints is necessary to comply with a ruling of the ECJ in *Marshall v Southampton and South-West Hampshire Area Health Authority*, C-272/91, ECJ, which effectively removed the ceiling on compensation in successful discrimination cases; in the Circuit Court there is no upper limit on compensation (as there is in the WRC and in the Labour Court).

⁸⁵ Section 77(1).

⁸⁶ In order to establish the correct legal title of the employer a complainant should, for example, examine all documentation from the employer, especially the written contract of employment (if there is one) and pay slips; a complainant should also contact the Companies Registration Office for information where appropriate.

⁸⁷ A claim may be dismissed if the Director General decides that it has been made in bad faith, is frivolous, vexatious, misconceived or trivial (a complainant may appeal a decision to dismiss to the Labour Court within 42 days) - Section 77A(1). Claims may be struck out for non-pursuit after one year from the date of referral - Section 102(1).

⁸⁸ Section 77(11).

⁸⁹ As stated earlier, this is to comply with the ruling of the CJEU in *Marshall v Southampton and South-West Hampshire Area Health Authority*, C-272/91, ECJ.

⁹⁰ The Circuit Court generally awards costs against the losing party which means that that party would be obliged to pay the costs of the other side in addition to their own. No costs are awarded by the WRC or Labour Court.

⁹¹ Section 80(3).

⁹² Section 80(4).

common law in respect of the same complaint⁹³. A person who has referred a claim for equal pay to the WRC is not entitled to damages at common law in respect of that equal pay claim if it has been settled in mediation or an investigation has begun⁹⁴.

Time limit 87. No time limit for equal pay claims is provided in the EEA and so the six-year limitation period provided under the Statute of Limitations 1957 in respect of breach of contract is the appropriate time limit. A claim for equal pay must be made within six years of the disparity in pay.

Mediation 88. The Director General of the WRC may refer equal pay claims for mediation⁹⁵ where it appears to him/her that the complaint is one capable of being resolved. Such referrals are assigned to a mediation officer who engages with the parties in an effort to resolve matters. The mediation officer records in writing the terms of resolution and provides this to the Director General of the WRC⁹⁶. The terms of the resolution are confidential and binding on the parties⁹⁷, thus any contravention is actionable.

Investigation by the WRC 89. A complaint which is not considered appropriate for mediation is investigated by an adjudication officer⁹⁸ of the WRC⁹⁹. The complaint may be determined on the basis of written submissions unless one, or more, of the parties objects¹⁰⁰. If directed by the WRC, certain questions may be determined as preliminary issues, such as whether, or not, a ground other than the prohibited ground exists for the pay differential in dispute¹⁰¹. A workplace inspection may be necessary in order to evaluate the work at issue. Investigations are held in private¹⁰². At the conclusion of an investigation, the WRC issues a decision in writing¹⁰³.

Powers of investigation 90. Both the WRC and the Labour Court have extensive powers on foot of a search warrant¹⁰⁴ to enter and search premises, to require the production of records, documents, etc., which are considered material information relevant to an investigation, or to inspect any work in progress on the

⁹³ Section 101(1).

⁹⁴ Section 101(2). A detailed analysis of section 101 is contained in the Court of Appeal's decision in *Culkin v Sligo County Council* [2017] IECA 104.

⁹⁵ Section 78 of the 1998 Act; the relevant procedure is set out in section 39 of the Workplace Relations Act, 2015.

⁹⁶ Section 39(3)-(4) of the Workplace Relations Act, 2015.

⁹⁷ Section 39(6)-(8) of the Workplace Relations Act, 2015.

⁹⁸ The Director General of the WRC may delegate to an adjudication officer any functions conferred on him/her under the EEA (section 75(4B)).

⁹⁹ The authority for investigation is contained in section 79(1)(a).

¹⁰⁰ Section 79(2A).

¹⁰¹ Section 79(3) and (3A).

¹⁰² Section 79(2).

¹⁰³ Section 79(6).

¹⁰⁴ Section 94.

premises. Both the WRC and the Labour Court may require¹⁰⁵ a person to produce information relevant to an investigation or to attend before the WRC or the Labour Court and give evidence before them¹⁰⁶. A disclosure of information to the WRC or Labour Court in the course of an investigation (or during a mediation) does not give rise to any liability¹⁰⁷.

Right to information

91. A complainant has a right to seek ‘material information’,¹⁰⁸ from an employer¹⁰⁹, for example about the remuneration of comparable employees, in order to decide whether or not to pursue a claim or to assist with the effective presentation of a claim¹¹⁰. Questionnaire and Reply forms are prescribed in order to request this information¹¹¹ (sample forms are attached at **Appendix 2**). A complainant has separate statutory rights to access the personal information held by his or her employer, as provided for under the Freedom of Information Act 2014 and the Data Protection Acts 1988 to 2018.

Redress

92. The WRC may provide for up to three years’ arrears of remuneration¹¹², an order for equal remuneration from the date of referral, and/or an order for a specified course of action¹¹³.

93. The Circuit Court may provide for up to six years arrears of remuneration,¹¹⁴ an order for equal remuneration from the date of referral, and/or an order for a specified course of action¹¹⁵. There is no monetary limit on the jurisdiction of the Circuit Court to award compensation¹¹⁶ or remuneration in gender discrimination claims¹¹⁷. The

¹⁰⁵ Section 95(1).

¹⁰⁶ Failure to comply with any requirement of the Director General or Labour Court may result in an application to the Circuit Court and consequent order requiring compliance (Section 96(1) and (2)). Obstruction of an investigation or failure to comply with a requirement of the WRC or the Labour Court is an offence (Section 99(1)) under the EEA for which a person may be liable to a fine or imprisonment or both if convicted (Section 100).

¹⁰⁷ Section 97(1).

¹⁰⁸ Section 76.

¹⁰⁹ An employer is not obliged to provide the information requested but if s/he does not do so, or does in a false or misleading way, the Circuit Court or the Director General may draw such inferences as seem appropriate (Section 81).

¹¹⁰ Certain information is excluded from this entitlement such as confidential information or references (section 76(2)-(6)).

¹¹¹ The forms are set out at schedules 1 and 2 of S.I. No.321/1999 - Employment Equality Act, 1998 (section 76 - Right to Information) Regulations, 1999.

¹¹² For the period of employment beginning not more than three years prior to the referral – section 82(1)(a).

¹¹³ Section 82(1).

¹¹⁴ For the period of employment beginning not more than six years prior to referral – section 82(3)(a).

¹¹⁵ Section 82(3).

¹¹⁶ Compensation payable to a complainant must be paid in priority to all other debts in the case of a company being wound up or the distribution of the property of a bankrupt or arranging debtor (section 103).

¹¹⁷ Section 82(3)(d).

Court or the WRC may order interest on compensation in gender cases.¹¹⁸

- | | |
|-------------------------------------|---|
| <i>Right of appeal</i> | 94. A party to a case in which the WRC issues a decision may appeal ¹¹⁹ to the Labour Court ¹²⁰ within 42 days of that decision by notice in writing ¹²¹ . The Labour Court will issue a determination in due course and has the same options regarding redress as the WRC ¹²² . A determination of the Labour Court may be appealed by either of the parties to the High Court on a point of law ¹²³ . |
| <i>Enforcement</i> | 95. Decisions of the WRC not carried out within 56 days may be enforced by the District Court ¹²⁴ . Decisions of the Labour Court not carried out within 42 days may also be enforced in the District Court ¹²⁵ . An application for enforcement may be made ¹²⁶ to a judge of the District Court by a complainant, by IHREC, or by a trade union or body of which the employee is a member. |
| <i>Collective agreements</i> | 96. A ‘collective agreement’ is an agreement ¹²⁷ between an employer and a representative body. Any provision in a collective agreement which contains different rates of remuneration on any of the discriminatory grounds, or which conflicts with an equal remuneration term in a contract of employment, is null and void ¹²⁸ . A collective agreement may be referred to the WRC ¹²⁹ , which may refer the dispute for mediation or alternatively may investigate and issue a decision ¹³⁰ . |

Implementation of equal pay following a pay review or a successful claim

97. While discriminatory pay inequalities should be redressed promptly following a pay review or a successful claim, good practice strategies are important in pre-empting pay

¹¹⁸ Section 82(5).

¹¹⁹ An appeal may be dismissed by the Labour Court for non-pursuit after one year from the date of appeal (Section 102(2)).

¹²⁰ In dealing with appeals, the Labour Court may refer all or any matters to the Director General of the WRC for investigation or re-investigation and shall take account of any report from the Director General in reaching its determination (section 84).

¹²¹ Section 83 of the 1998 Act and section 44 of the Workplace Relations Act, 2015.

¹²² Section 44(1)(b) of the Workplace Relations Act, 2015, as modified by section 83 of the 1998 Act (as substituted by section 17(1)(a) of the National Minimum Wage (Low Pay Commission) Act 2015).

¹²³ Section 90(1).

¹²⁴ Section 91(1) of 1998 Act and section 43 of the Workplace Relations Act, 2015.

¹²⁵ Section 91(2) of the 1998 Act and section 45 of the Workplace Relations Act, 2015.

¹²⁶ Section 43(1) of the Workplace Relations Act, 2015 as modified by section 91(1) of the 1998 Act.

¹²⁷ Section 2(1).

¹²⁸ Section 9(1).

¹²⁹ Such a referral is made to the Director General of the WRC.

¹³⁰ Section 86. The references to section 78(7) in subsections (4) and (6) are problematic because section 78(7) has been deleted. Presumably the legislation will be amended in due course.

inequalities arising in the future and in ensuring successful long-term implementation of equal pay, for example:

- A *monitoring system*, with the participation of union/employee representation, should be put in place ensuring regular pay reviews;
- An *accessible grievance procedure* (informal and formal) should be available to employees who have pay concerns or complaints;
- *Transparency* should be ensured regarding how each element of pay is determined; unnecessary secrecy about, for example, performance, merit or bonus payments can enable unfair/discriminatory bias to impact on pay levels;
- *Benchmarking* (internal or external) should be free of any inherent bias in the system used;
- *Recruitment and promotion* practices have implications for pay and should be examined and revised as necessary to ensure that bias or stereotypical assumptions do not influence decisions; and
- An *equality audit*, that is to say an exercise that examines all aspects of equality in an organisation, will help to ensure a successful pay review where both are part of an integrated strategy promoting a culture of equality and respect.

Building a culture of respect

98. There are significant benefits for organisations that are proactive in building a culture of equality in the workplace. A culture that respects employees and their rights is likely to be more productive and more successful. As the Fair Work Ombudsman of Australia guide summarised, ‘Fairness, respect and equality are essential components of building harmonious, cooperative and productive workplaces’.

Sources of further information/guidance

There is extensive guidance available regarding equal pay initiatives and equality initiatives generally in the workplace. A list of sources is attached.

- A Framework for Building a Culture of Equality and Human Rights in the Workplace, Irish Human Rights and Equality Commission, available at: <https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-for-employers/building-a-culture-of-human-rights-and-equality-in-the-workplace/>
- Equality in the Workplace: Ireland, Europe and Beyond, Irish Congress of Trade Unions, available at: https://www.ictu.ie/download/pdf/equality_in_the_workplace.pdf
- Equality in the Workplace: An Employer's Guide, Irish Small and Medium Enterprises Association (2011) available at: <https://www.isme.ie/assets/Equality-in-the-Workplace-Guide.pdf>
- Gender Pay Reviews – A template for examination of gender pay in organisations, IBEC (2013) available at: [https://www.ibec.ie/IBEC/ES.nsf/vPages/Employment_law~During_employment~free-gender-pay-audit-tool-23-09-2013/\\$file/Gender+Pay+Review+Template.pdf](https://www.ibec.ie/IBEC/ES.nsf/vPages/Employment_law~During_employment~free-gender-pay-audit-tool-23-09-2013/$file/Gender+Pay+Review+Template.pdf)
- A Guide to the Gender-inclusive Job Evaluation Standard, Ministry of Business, Innovation & Employment, New Zealand (2008) available at: <https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/guide-to-gender-inclusive-job-evaluation-standard.pdf>
- Gender Pay Equity, Fair Work Ombudsman, Australia (2012) available at: <http://www.fairwork.gov.au/How-we-will-help/templates-and-guides/Best-practice-guides/gender-pay-equity>
- Promoting Equity: Gender Neutral job evaluation for equal pay: a step-by-step guide, International Labour Organization (2008), available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publications/wcms_122372.pdf
- Workplace Relations Commission – <https://www.workplacerelations.ie/en/>
- Law Reform Commission consolidated employment legislation database <http://revisedacts.lawreform.ie/revacts/intro>
- EU case law and legislation database - <https://eur-lex.europa.eu/homepage.html>
- UK Advisory Conciliation and Arbitration Service <http://www.acas.org.uk>
- EQUINET European Network of Equality Bodies 2016 Guide on How to Build an Equal Pay case - http://www.equineteurope.org/IMG/pdf/handbook_on_equal_pay_-_electronic_version-2.pdf

Appendix 1
Workplace Relations Complaint Form

Please see www.workplacerelations.ie/en/e-complaint_form/

Appendix 2

Employment Equality Act, 1998 — Section 76

Questionnaire of the Complainant

Name and address of person to be questioned (the Respondent): To.....
of.....
.....

Name and address of 1. I.....
Complainant:
of.....
.....
.....

Delete the circumstances which do not apply to your complaint.

consider that you may have:

- (a) ~~discriminated against me;~~
- (b) ~~dismissed or otherwise penalised me in circumstances amounting to victimisation;~~
- (c) failed to provide equal remuneration to me as required by an equal remuneration term;
- (d) ~~failed to provide equal treatment to me as required by an equality clause under my contract of employment;~~

contrary to the provisions of the Employment Equality Act, 1998.

Indicate the discriminatory ground(s) which you consider to apply to your complaint. (Tick where appropriate).

2. Gender () Marital Status () Family Status () Sexual Orientation () Religion () Age () Disability () Race () Traveller Community Ground ()

Outline the circumstances of your complaint including:

3.

- (a) in the case of treatment, dates, times and a factual description of the treatment received and of the circumstances

leading up to the treatment, or

(b) in the case of remuneration, the name(s), job title(s), etc. of person(s) with whom you consider you perform like work (i.e. the same work similar work or work of equal value).

Complete if you wish to give reasons otherwise delete the word “because”.

This is the first of your questions to the Respondent.

This is the second of your questions to the Respondent.

Enter here any other questions you wish to ask including any request for other non-confidential material information in respect of other persons who are in a comparable position to you or information which it is reasonable for you to require in the context of your case.

4. I believe that the treatment/circumstances outlined at paragraph 3 of this Questionnaire may have been unlawful because . . .

5. Do you agree that the circumstances outlined at paragraph 3 of this Questionnaire are accurate? If not, in what respect do you disagree or what is your version of the situation?

6. Do you accept that your treatment of me, or the rate of remuneration afforded to me, was unlawful, contrary to the provisions of the [Employment Equality Act, 1998](#)? If not:

(a) Why not?

(b) For what reason did I receive the treatment/remuneration which is the subject of my complaint?

7.

Address to which reply 8.
 should be sent if not
 the same as that at
 paragraph 1 of this
 Questionnaire.

Signature of Complainant

.....

Date

.....

Employment Equality Act, 1998 — Section 76

Reply by the Respondent

Name and address of Complainant: To.....
 of.....

.....

Name and address of Respondent: 1. I.....
 of.....

hereby acknowledge receipt of the Questionnaire signed by you and dated

Delete sentence at (a) or (b) as appropriate and, if (a) is deleted, complete (b).

2. (a) I agree that the statement/circumstances outlined in paragraph 3 of the Questionnaire is/are accurate.
 (b) I disagree with the statement/circumstances outlined in paragraph 3 of the Questionnaire in that

Delete sentence at (a) or (b) as appropriate and, if (a) is deleted, complete one or more of the sentences at (b)(i) or (b)(ii).

3. (a) I accept that my treatment of you, or the rate of remuneration afforded to you, was unlawful, contrary to the provisions of the [Employment Equality Act, 1998](#) .

(b) I dispute that my treatment of you, or the rate of remuneration afforded to you, was unlawful, contrary to the provisions of the [Employment Equality Act, 1998](#) :
 (i) My reasons for disputing are
 (ii) The reasons why you received the treatment accorded to you or the rate of remuneration afforded to you are as follows

Replies to the 4.
questions in
paragraph 7 of
the
Questionnaire
should be
entered here.

Delete this entire sentence if you have answered all of the questions in the Questionnaire.

5. I have deleted (in whole or in part) the paragraph(s) numbered above, because I am unable/unwilling (delete as appropriate) to reply to those questions for the following reasons—

Signature of Respondent

.....

Date

Notes

If there is not sufficient space to enter a reply, please use additional page(s) and sign and date each of them.

If a Respondent fails to provide the information sought by the Complainant, or the information provided is false or misleading or is otherwise not such as the Complainant might reasonably require in accordance with the appropriate provisions of the [Employment Equality Act, 1998](#), the Director of Equality Investigations, the Labour Court or the Circuit Court may draw such inferences as seem appropriate in the circumstances.



GIVEN under my Official Seal,
7 March, 2022.

RODERIC O'GORMAN,
Minister for Children, Equality, Disability, Integration and
Youth.

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
Le ceannach díreach ó
FOILSEACHÁIN RIALTAIS,
BÓTHAR BHAILE UÍ BHEOLÁIN,
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