

Banter and Bias Discrimination Law

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10th October 2020

Introduction



Banter and Bias



**Formal and
informal processes**

Employment Equality



Discrimination definition

Includes condition which:

- Exists
- Existed but no longer exists
- May exist in the future or
- Is imputed to the person concerned

Or

- Where a person is treated less favourably than another person because of association with another person

Unconscious Bias

Social stereotypes

Ryanair (2001): “Young and Dynamic” - IR£8000 award

Ryanair (2016): “No Dubs, a thick skin and an ability to operate without sleep”

“Lady electrician”
Rodmell -v- Trinity College

Questions based on gender: *Gleeson -v- The Rotunda Hospital and the Mater Misericordiae Hospital*

Disability: *Nano Nagle School v Daly (Supreme Court 2020)*

Active measures to counter bias

- Job description
- Agree skills and attributes required
- Qualifications – required and desirable
- Conditions of employment
- Evaluation system
- *Mr M -v- Language School*



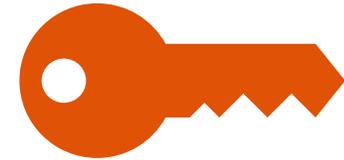
Harassment is Discrimination

- Includes harassment and sexual harassment
- Unwanted conduct
- Protection against penalisation: Section 14(3) “A person’s rejection of, or submission to, harassment or sexual harassment may not be used by an employer as a basis for a decision affecting that person”.

Unwanted Conduct

Section 14A(7)

“Any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person”.

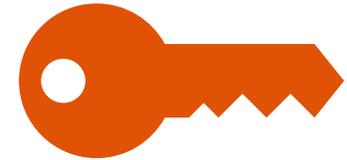


- What is unwelcome to one may not be unwelcome to others
- Potential for unintended consequences

Not Just Co-Workers and Clients

Section 14(4)

“The reference in subsection (1)(a)(iii) to a client, customer or other business contact of the victim’s employer includes a reference to any other person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment”.



- Also includes those seeking employment

Vicarious Liability

O'Keefe -v- Hickey

Hickey -v – McGowan

Close Connection

O'Keefe –v- Hickey: per Fennelly J (approved by Court in Hickey & McGowan)



Vicarious liability could extend to acts which were closely connected with the employment



No question of automatic liability being imposed



All would depend on a careful analysis of the facts of the case

Employer's Liability

S15 of the 1998 Act: “anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act, be treated for the purpose of this Act as done also by that person’s employer, whether or not it was done with the employer’s knowledge or approval”.

Hickey – v - McGowan

- Some circumstances where such behaviour, including criminal behaviour may be regarded as so closely connected with the workplace that vicarious liability will apply

Social Events – close connection with employment

William McCamley (complainant) v Dublin Bus (respondent)

- Assault in **2008** at a social function, motivated by an imputation to him of a certain religious affiliation
- **2012** - received abusive comments on Facebook referring to him in disparaging and offensive terms which related to a religion and nationality imputed to him
- After complaint lodged in the Equality Tribunal, graffiti of a personalised and highly offensive nature about the complainant was visible in the staff bathrooms

Social Events – “in the course of employment”

Discrimination on the Traveller status ground – due to harassment at the office party

Equality Officer: *“I am satisfied that this Christmas party was related to work inasmuch as the complainant would not have been present at the party if he had not been employed by the respondent organisation”*

Francis Maguire (claimant) v North Eastern Health Board (respondent)

Work Environment

Waterford City and County Council -v- a Worker

- *“Offensive environment for the person”*
- Comments complained of need not necessarily be addressed to or directed at the victim



Code of Practice

- The Employment Equality Act 1998
(Code of Practice) (Harassment) Order
2012 (SI. No 208 of 2012)
- *Catlan Trading Limited t/a Marco*
(respondent) -v- *Kellie Ann McGuinness*
(Labour Court)



Reasonably practicable steps

- Section 15 (3): employer to show that it took such steps as were reasonably practicable to prevent the employee from doing that act or from doing in the course of his employment acts of that description
- Policies and Procedures
- *Catlan Trading Ltd t/a Marco Moreo v Kellie Ann McGuinness*
- *A Hotel and a Worker* “*The obligation is preventative in nature and it is not sufficient for an employer to show that measures were taken to prevent a reoccurrence of harassment after it had taken place*”
- *Store (respondent) v A Worker (complainant/appellant)*

Resolution



2012 Code of Practice



Mediation



Informal Resolution



Investigation

Policies and Procedures

Barbara Atkinson v Hugh Carty and another

“The failure of the Defendants to have in place adequate procedures renders them liable and by reason of their failure to fulfil their statutory obligations they are responsible and cannot plead immunity from same simply because the Plaintiff failed to make a complaint”

Education and Training

EAT: “Whether behaviour amounts to sexual harassment in a particular instance is determined from the point of view of the victim and what she/he regards as acceptable behaviour. Behaviour regarded as acceptable and innocent by the perpetrator, his colleagues and others may nonetheless be unacceptable to the victim and so could constitute sexual harassment”.

James Allen (claimant) v Dunnes Stores Ltd (respondent)



**Programme of education
and training recommended**

Conclusion



Develop effective policies



Assess nature of work environment



Train managers to use policies



Ensure existence of policies is well known



Effective processes for harassment policies



Be aware of principles of fair procedures

Thank you



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