SUMMARY

2010/78: Rules prohibiting direct sex discrimination may be applied to a claim based on indirect sex discrimination (failure to provide part-time work) (IR)

<p>An employee alleged that her employer had indirectly discriminated against her on the grounds of gender and family status when it failed to provide her with part-time work in 2005. At the hearing, the Equality Officer decided to address the issue of direct discrimination, even though the employee had not made any allegations in this regard. The Equality Officer concluded that the employee had established a prima facie case of direct discrimination on the grounds of gender only and awarded her € 45,000 in compensation.</p>

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Facts

Ms Higgins (the complainant) commenced employment with the respondent financial

services company as a Programmer/Analyst within the employer's IT department in 1986. Following the birth of her fifth child in 2004, the complainant experienced significant health difficulties and requested that she be allowed to work permanently on a part-time basis. She was informed, however, that no applications were being accepted at that time as there was an Alternative Working Pattern Policy which only granted part-time work on a temporary basis for a period of one year.

Whilst on parental leave, the complainant then made an application in December 2004 under the Alternative Working Pattern Policy. Among the criteria to be assessed were the operational requirements of the area concerned, the numbers of staff already availing of alternative working arrangements in the unit/team or area, the job performance of the applicant and the length of service of the applicant.

In January 2005, whilst other members of the IT staff including a male colleague were granted part-time work for a year, the complainant's application was refused. The employer claimed that this had been based on the large volume of applications received as against the continuing business needs of the bank and that not all applications could be granted. The employer informed the complainant that further applications would be sought the following year.

The complainant subsequently contacted the HR department in January 2005 stating that she wished to appeal this decision[1]. She returned to work from parental leave at the employer's request, to 'resolve' matters. However, she had extreme difficulty in achieving a balance between her work and family life, stating that she found such responsibilities extremely stressful and debilitating. It was at this stage that she made a further (second) request that she be allowed to permanently work on a part-time basis and also offered to return to complete her work in the evenings, if necessary. Her request for part-time work was denied and her additional request to work after-hours was refused on security, supervision and health and safety grounds. The complainant was subsequently diagnosed with an illness and certified unfit for work.

In November 2005, while the complainant was on sick leave, she submitted a third application for permanent part-time working. She had decided not to make any further applications under the Alternative Working Pattern Policy since she felt that the temporary provision would undermine rather than support the stability of her family and that a permanent part-time arrangement would be most suited to her needs. This application was refused without reason. She failed to appeal through the internal grievance procedure as she felt it would be futile.

The complainant was granted a further period of parental leave in June 2006, following requests from the employer to return to work on a full-time basis. She subsequently took a career break[2] during which time she applied to the Equality Tribunal, claiming that her employer's conduct constituted indirect sex discrimination[3].

Judgment

The Equality Officer who handled the case on behalf of the Equality Tribunal began by noting that, with regard to part-time working, the Equality Tribunal had previously stated that "*there is no statutory entitlement for an employee on full-time hours to be accommodated with part-time work, or vice versa.*"[4] The Equality Officer also placed emphasis on the dicta of the Labour Court in Bank of Ireland v Morgan[5] where it was stated: "*...it would be manifestly unreasonable to hold that an employer must provide a woman with a facility to job-share in every case in which such a facility is requested and such a result could not have been intended. It is self evident that such facilities can only be made available within the exigencies of the business.*"

However, the Equality Officer also examined Paragraph 8 of the Code of Practice on Access to Part-Time Working[6] which states: "*Best practice indicates that employers should treat such requests seriously and where possible discuss with their employees if and how such requests can be accommodated.*" The Code lists a number of relevant factors in arriving at this conclusion, including: "t*he personal and family needs of the applicant; the number of employees already availing of part-time work; the urgency of the request and the effect, if any, on the staffing needs of the organisation.*" Although the Code is not legally binding, it is generally relied upon both by the Equality Tribunal and by the courts.

Notwithstanding the fact that the complainant made only a claim of indirect gender discrimination,[7] the Equality Officer ruled that she had jurisdiction to examine the issue of direct discrimination on gender grounds.[8] This was on the basis of previous case law[9] in which the High Court, on a judicial review, ruled that the Labour Court decision to uphold the Equality Officer's stance that she had no jurisdiction to consider an allegation of indirect discrimination, as the claim was only for direct discrimination, was null and void.

In relation to the applications for permanent part-time work, the Equality Officer concluded that the complainant had not demonstrated that she had been directly discriminated against on gender or family status grounds. However, in relation to the application for temporary work in December 2004/January 2005, the Equality Officer found that the complainant had established a *prima facie* case of direct gender discrimination, reasoning as follows.

The criteria to be assessed under the Alternate Working Pattern Policy included job performance and operative requirements. The employer argued that its decision to grant temporary part-time work to a male colleague and not to the complainant was in line with the Policy, given that (i) the male colleague had a better performance record and (ii) the male colleague's suggested work pattern (4 days per week) was better suited to the company's needs than that suggested by the complainant (5 half days per week).

As for the first argument, it was noted that the male applicant and the complainant were awarded the same level of performance in 2003. The employer failed to submit the appraisal for 2002. In respect of 2004, the male employee's appraisal was submitted but the complainant's was not. Indeed, it was determined by the Equality Officer that, at the time the decision was made in December 2004/January 2005, no appraisal for the complainant even existed, as she had been on maternity leave and parental leave for a considerable portion of that year.

The second criteria to be applied where there was a tie in the performance scores of applicants, was the pattern of attendance applied for. The complainant requested to work a part-day every day. The male applicant requested to work a four-day week. This criteria was not listed in the original invitation for applications. In fact, both patterns were listed as equally valid in the Policy. The Equality Officer determined that a deciding selection criteria had been applied by the employer after it was in possession of the relevant applications. The Equality Officer held that there was no evidence presented by the employer as to why the comparator's suggested work pattern should be selected over the complainant's in relation to business needs. This was manifestly unfair and "*created a situation decidedly lacking in transparency and fairness.*" The Equality Officer also concluded: "'*Where…there is unfairness in a selection process which disadvantages a woman candidate and operates to the advantage of a man, an inference of discrimination on the gender ground will properly follow*".

In summary, the Equality Officer held that, given the unfair and non-transparent decision making process which operated to the advantage of a man, the complainant had established a prima facie case of direct discrimination on the gender ground in relation to the selection process used to assess and grant alternate working patterns for 2005. Under the Employment Equality Act 1998, where a complainant establishes facts which may indicate discrimination, it is for the respondent to prove to the contrary.[10] The employer failed to provide such evidence and was ordered to pay the complainant € 45,000 in compensation.

Commentary

First and foremost it should be outlined that this case has been appealed by the employer. It is understandable why this is so for a number of reasons. First, the policy for part-time work, albeit on temporary offer, was available to all employees. The employer was in a position where it had been unable to accommodate the large number of requests for part-time work. Therefore, in order to facilitate as many people as possible, this one-year scheme was brought in. The policy had been put in place on foot of employee surveys and had been agreed with the trade union representing the employees. Secondly, the complainant only applied under the policy once. Thereafter, any requests by her were outside of the policy. Thirdly, the complainant did not go through the employer's formal grievance procedure. As all lines were not exhausted, the employer was not given an opportunity by the complainant to resolve the issue at local level.

Finally, the Equality Officer's decision that there was direct discrimination on gender grounds does not necessarily follow. The Equality Officer outlined that "*the decision making process in selecting candidates for the award of an alternative working pattern was unfair and lacking in transparency. The process operated to the advantage of a man in that the man was granted an alternative attendance pattern.*" Whilst the feedback and discussions with the complainant may well have been unfair and lacking in transparency, it has to be noted that other women were granted alternative working patterns where the complainant was not. The real concern for employment lawyers is the assertion that an Equality Officer is entitled to change the nature of a complaint, as such deviation made by the Equality Officer may be seen as a bias towards a positive outcome for the complainant.

This case can be compared to *De Belin – v – Eversheds Legal Services Ltd*[11] which was recently before the English Employment Tribunal. Mr De Belin claimed that he had been unfairly selected for redundancy and brought a case for unfair dismissal and sex discrimination. Eversheds was held to have discriminated against him on grounds of gender when he was made redundant rather than a female colleague whose score had been inflated to reflect the fact that she was on maternity leave. The Tribunal outlined that, since this issue was going to be decisive in deciding who would be made redundant, the employer should have ignored this particular aspect of the marking criteria or used an alternative reference period. Eversheds contended that they had taken a fair approach, in that had they acted any other way, they would have been discriminating against Mr De Belin's female colleague on the grounds of her pregnancy. The Tribunal awarded Mr De Belin £123,300. This decision is also under appeal.

When comparing the two cases, it seems to be a case of damned if you do and damned if you don't. There is a fine line within which employers can operate. Employers must juggle the

business needs with the needs of its employees and, where business needs come first, it would appear that Tribunals are willing to view that discrimination, whether indirect or direct, is part of the employer's decision making process. We will be keeping an eye on both cases and will revisit the appeals when they are published.[12]

Comments from other jurisdictions

Germany (Paul Schreiner and Christian Busch): The German Part-Time and Limited-Term Employment Act (TzBfG) gives employees the right to reduce or to increase their contractual working hours. In contrast to The Netherlands (see below), an employee who wishes to exercise this right merely needs to have been employed for a period of at least six months, following which he must inform his employer of his preferred working schedule.

As in The Netherlands, the employer must discuss the employee's wishes and the employer needs to have very convincing reasons to decline the request, namely important operational reasons. Such reasons would be acceptable if the reduction considerably hampers the organisation, operational procedures or safety, or if they would cause disproportional expense. In a case such as that reported above, an employer wishing to decline a request for working time reduction must prove the existence of operational reasons, and an employee whose application has been declined may bring an action against the employer for a reduction in working hours.

Under the German General Treatment Act (AGG), direct discrimination (paragraph 3(1) AGG) as well as indirect discrimination (paragraph 3(2) AGG) constitute breaches of the law. Therefore the question of the actual character of the discrimination is not essential to entitlement to 'compensation' (i.e. a form of immaterial damages) or 'damages' in accordance with paragraph 15 AGG. It is sufficient that a case of discrimination has been made.

Independently of this, there is some doubt as to whether there would have been direct discrimination in this case, because the employer based its decision on the better job performance of the male employee and on operational requirements, whereas discrimination on the grounds of gender was barely found.

Czech Republic (Nataša Randlova): According to the Czech Labour Code, the employer is obliged in assigning employees to shifts to take into consideration the needs of female and male employees taking care of children. Moreover, if a female or male employee taking care of

a child under 15, a pregnant employee or an employee taking care of a person dependent on his or her assistance, requests reduced working hours or a suitable modification of his or her full-time weekly working hours, the employer is obliged to satisfy the request unless this is prevented by serious operational reasons.

Therefore the employer may not give priority to employees (male or female but not fulfilling the conditions above) against the interests of an employee taking care of a child under 15 (or pregnant) when deciding on a request for reduced working hours.

The Netherlands (Peter Vas Nunes): Dutch law gives employees who have been employed for no less than one year the right to reduce or expand the number of hours they work per week. This right is not unconditional, but the employer needs very convincing arguments to turn down an application for work reduction. For this reason alone, a discrimination claim such as the one reported above would not arise under Dutch law. Another difference with Ireland is that a plaintiff need only allege discrimination on a certain ground, such as gender, but need not specify whether the claim is based on direct or indirect discrimination. In fact, it is not uncommon for a plaintiff to claim direct discrimination, with indirect discrimination in the alternative, in which case it is up to the court to determine which type of discrimination, if any, applies. In the event a plaintiff were nevertheless to allege exclusively direct or exclusively indirect discrimination, I expect a court would reject the claim if it determined that there was discrimination of the type not alleged, but this is not certain.

In the case reported above, it is unclear to me what caused the Equality Officer to believe there was direct gender discrimination. The employer argued that his decision to reject the complainant's application for part-time work was fair on the basis of two criteria, neither of which were directly related to the complainant's gender: job performance and operational requirements. If I had been the complainant, I would have based my claim on indirect discrimination.

United Kingdom (Hester Briant): The commentary cites the UK case of *De Belin – v – Eversheds Services Ltd* (ET case no.1804069/2009, 24.3.10, unreported), which has attracted

significant interest. It is the first case to look at the exemption from UK sex discrimination law for "special treatment" afforded to women in connection with pregnancy or childbirth. The Employment Tribunal ruled that special treatment could not mean "blanket" protection for any beneficial treatment which employers may choose to provide to employees who are pregnant or on maternity leave. On the facts of *De Belin*, this meant that the exemption did not apply to the employer's adjustment of its redundancy selection criteria to accommodate a woman on maternity leave. The Tribunal therefore ruled in favour of the male claimant who had been selected for redundancy as a result.

The Tribunal did not clarify whether "special treatment" could only be with respect to treatment afforded by statute (for example, the right to statutory maternity leave and pay) or whether the exemption might potentially cover additional benefits provided by the employer. The case has been appealed and was due to be heard by the UK Employment Appeal Tribunal in December 2010. The EAT's judgment will hopefully provide further clarification.

Footnotes

1 The judgment does not reveal whether the complainant actually appealed.

2 A career break is a period of unpaid leave. There is no statutory right to such a break, but it was a common benefit in the financial sector in 2006.

3 It is not known what relief she sought or would have sought. It may have been financial compensation.

4 Equality Tribunal: *An Employee – v - A Hotel DEC-E2009-109.*

5 Labour Court Determination No EDA096.

6 Statutory Instrument No 8 of 2006; www.lrc.ie/documents/publications/codes/9parttimeworking.pdf.

7 Section 22(1)(a) of the Employment Equality Act 1998 (as amended) provides: "*Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (…) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer.*"

8 Section 6(2)(a) of the Employment Equality Act 1998 (as amended) provides: "*a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the 'discriminatory grounds' . . . As between any 2 persons, the discriminatory grounds. . . that one is a woman and the other is a man (in this Act referred to as 'the gender ground') . . .*"

9 *Siobhan Long – v - Powers Supermarkets Ltd t/a Quinnsworth* Labour Court Decision DEE901; *Siobhan Long – v - The Labour Court, Mairead Blackhall and Powers Supermarkets Ltd t/a Quinnsworth*, 1990 No 58 Judicial Review, Johnson J, High Court, 25 May 1990.

10 Section 85A of the Employment Equality Act 1998 (as inserted by section 36 of the Equality Act 2004).

11 ET/1804069/09.

12 The appellate court is not expected to rule on the case until mid 2011.

Subject: Gender discrimination, part time work

Parties: Ms Higgins (complainant – employee) – v – Irish Life & Permanent (respondent – employer)

Court: The Equality Tribunal

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