

SUMMARY

2019/16 Pay discrimination based on gender in third level college (IE)

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Facts

The complainant began employment with the respondent in 2006 as an assistant lecturer. In 2008 she was appointed to the position of lecturer where her remuneration was €63,203. Her elected comparator, Mr. DG, was placed in the same role in 2009 with a salary of €85,118. The complainant's salary at the time of the hearing was €79,491, while the comparator's salary was at the top of the pay scale at €86,400. The complainant asserted that the pay differential amounted to a difference of €141,666 in pay between them since 2009.

The complainant argued that both of them were equally experienced. The complainant submitted that on qualifying with a PhD she was significantly more qualified than her comparator, yet in 2014 she was earning circa €14,000 less than him.

In March 2018 the complainant began the internal grievance procedure. The College did not accept her grievance and thus the case was brought to the WRC, the fourth stage of the College's grievance procedure.

The College argued that both males and females were positioned at different points of the pay scale for the lecturer role. They argued that several factors influence where someone is

positioned within the band, such as length of service. Mr. DG had longer service with the College, having lectured there for 14 years prior to his appointment as a full-time lecturer. The respondent also put forward the argument that prior to 2009 Mr. DG's hours of work exceeded the norm of 35 hours, his lecturing hours were in excess of the norm of 12 hours lecturing per week and his earnings on his part-time contract arrangement exceeded the top point of the relevant scale. The College stated that his role change in 2009 was to bring his contractual arrangements into line with his actual working arrangements. The College further noted that in 2009, there were three other members of faculty at the top point of the relevant pay scale, all of whom were females with significantly longer service with the respondent than the complainant.

The respondent put forward comparators within the School of Business who they submitted were more appropriate comparators to the complainant. One of the comparators, a male lecturer, received a similar salary to the complainant. He was, at the time, paid €3,638 more per year than the complainant, but began his employment with the respondent in 2003 and therefore had longer service than the complainant. In addition, he joined the respondent having already completed his PhD. Another comparator put forward by the College, who had similar qualifications to the complainant, was hired on over €25,000 less per annum than the complainant, due to the lack of prior lecturing experience.

Decision of the Adjudication Officer

The WRC had regard to the Employment Equality Acts, which prohibit discrimination for like work based on gender. It was accepted by all parties that the complainant and Mr. DG were doing like work.

In considering the pay difference, the WRC referred to the case of *Cadman – v – HSE* (C-17/05) [2006] ECR I-09583 where the Court of Justice of the European Union rejected an employee's claim for equal pay, accepting that differentiation of pay based on length of service is appropriate "to attain the legitimate objective of rewarding experience acquired which enables an employee to do their job better."

The WRC referred to the case of *Wilton – v – Steel Company of Ireland* ([1999] ELR 1). In this case the High Court found that there was no discrimination where the comparator was paid more money due to his greater length of service, and that this was an accepted ground for pay differentiation under the Anti-Discrimination (Pay) Act 1974.

The Adjudication Officer was satisfied that Mr. DG had 14 additional years lecturing experience with the respondent than the complainant and so the differential in pay was attributed to objective reasons which were unrelated to gender. The Adjudication Officer

further held that the complainant was statute barred in relation to her claim that she was discriminated against upon appointment in 2009.

Accordingly, the Adjudication Officer found that the complainant had failed to establish a *prima facie* case of either direct or indirect discrimination in the circumstances and on this basis her claim failed.

Commentary

Both the ECJ and the Irish High Court have endorsed looking to length of service as an objectively justifiable reason to pay men and women differently for like work. However, it is interesting to note that some commentators have criticised the ECJ for its decision in *Cadman – v – HSE* as blindly accepting that length of service equates to experience. Previous cases, such as *Gerster – v – Freistaat Bayern* (C-1/95), did not allow for generalisations such as this and often employers are required to provide specific evidence showing that the particular measure chosen was suitable for achieving a legitimate aim.

Whilst the WRC followed the jurisprudence of the ECJ and the Irish High Court in this case, the WRC also closely considered the treatment of all men and women doing like work within the School of Business and not just the comparator put forward by the complainant.

Gender pay and gender pay gap reporting has been a particularly hot topic for the last year. In April 2019 the Irish Government published the Gender Pay Gap Information Bill 2019 (the ‘Bill’). The Bill amends the Employment Equality Act 1998 and requires certain employers to report on the differences between male and female pay. In addition, the Bill requires employers to publish a statement explaining the reasons for any differences and also to provide details of the measures it has taken or proposes to take to reduce or eliminate the differences.

It must be said that there are relatively few gender pay cases before the WRC. However, given the heightened awareness of differences in treatment between genders in recent times together with the requirements of the Bill (which is expected to be enacted in late 2019), employers would be well advised to take measures to ensure any pay differences can be legitimately justified, as discrimination claims and/or industrial relations issues may increase.

Comment from other jurisdiction

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH): According to Article 3(3) of the German constitution (*Grundgesetz*) discrimination on the grounds of sex is prohibited. Additionally, the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) –

that transposed Directive 2000/78/EC into German law – and the Pay Transparency Act state that all disadvantages on the grounds of sex are not allowed, including working conditions and salary. A gender discrimination in that sense requires that an employer pays less to a person because of his/her sex without any objective reasons. Their sex must be the only reason why the person is paid less to result in further claims from the employee.

The complainant argued that she, as a female, was discriminated against because she was paid a lower salary than another male employee. This fact alone could not back the claim in Ireland. A claimant with the same line of argumentation would also have failed in Germany.

In order to identify whether there is a gender discrimination, German courts define a comparison group of employees with equivalent occupation. Within this group it is to be examined if there are any justified reasons for an unequal treatment. These reasons may be due to full- or part-time employment, vocational training or because of differences in levels of seniority and/or experience.

In a recent decision the Higher Employment Court of Berlin-Brandenburg had to decide if a female news reporter working for the public service television broadcaster ZDF was discriminated against because of her sex. Similar to the case in Ireland the woman stated that her salary was lower than her male colleagues' salary. The claim was dismissed for several reasons. As in the case in Ireland, the court stated that she could not prove that she was in an equivalent position to her colleagues. Second, the court held that employees and freelancers may be in different positions in general.

Subject: Gender Discrimination

Parties: A Complainant – v – A Third Level College

Court: Workplace Relations Commission

Date: 20 March 2019

Case number: ADJ-00014991

Internet publication: <https://www.workplacelrelations.ie/en/cases/2019/march/adj-00014991.html>

Verdict at: 2019-03-20

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