



ICTU Briefing Paper-

Workplace Equality:

Workplace Culture and the Law

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Introduction

In 2004 the Central Statistical Office carried out a comprehensive national household survey on discrimination for the first time (CSO 2004). It found that 12% of people over 18 felt discriminated against in the past two years. This proportion rose to 31 % amongst minority ethnic groups, 28 % of the unemployed and 19% of those with a disability. In 2007 the International Labour Office issued a comprehensive report on equality at work and found that ‘discrimination is an insidious and shifting phenomenon that can be **difficult to quantify**’ (ILO 2007: x) and called for more research and better data on the subject. Workplace equality is a long way off we can safely say and the **trade unions have an important role** in rectifying that situation given their long standing commitment to equality. This briefing paper aims to provide an overview of workplace inequality and make some recommendations for **a more proactive equality strategy**. The contents include: a review of workplace culture, especially the informal element often missing in official accounts (**section 1**), and of inequality in the Irish workplace (**section 2**); a review of current responses to inequality in the workplace (**section 3**) and of responses to harassment and sexual harassment (**section 4**). **Section 5** develops arguments for a **Zero Tolerance** approach and, finally, we end with a **summary and recommendations**.

1. Dimensions of workplace culture

Organisational structures, cultures and practices have a major impact – for good or for bad – on the equality agenda. Organisations are a major focus for power in contemporary societies. Power is, however, contested and there are conflicts of interest inherent in the organisation of the workplace. The shared norms, values and assumptions within a workplace

play a major role in facilitating or inhibiting the development of a strong equality agenda, in principle and in practice. In considering the role of workplace culture, it is extremely important at the outset to understand that organisations have a *formal and informal set of power relations*. It is often found that informal networks and cultures are a means to avoid, subvert or counter formal organisational commitments to equality.

Workplace cultures *produce meaning* and *set the context* for an individual's experience within an organisation. These cultures more often than not reflect class, gender, race, sexual identity and other inequalities within the wider society. These cultures are reinforced by informal social networks operating 'under the radar screen' of the formal workplace culture, or ethos. Certain individuals within a workplace may have or be seen to have 'charisma' that may influence others unduly. People may 'bend the rules' to suit their own needs or preferences. Knowledge and experience of the organisation and the particular workplace culture provides individuals with considerable power to counter formal channels of authority, be they those of management or, for that matter, of workplace staff organisations or trade unions.

Organisational cultures tend to consolidate *gender-related values* and existing *patterns of racism* amongst employees. Gender-related biases may become entrenched in the day-to-day running of the organisation. It is the daily biases that create the fertile ground for cases of open discrimination and the sexual harassment that often pervades an organisational culture. In a similar way institutional racism or what is called 'compulsory heterosexism' creates the basis for persistent and self-reinforcing inequalities in an organisation. The point is that it is the routinised inequalities of gender, particularly in informal work relations, that provide the basis for sexual harassment. When women are subject to unwanted sexual advances by men in positions of power, they are being oppressed as an extreme manifestation of day-to-day gender inequalities in workplace culture. Women, particularly younger women, suffer from bullying and harassment more than men: three times as many women as men suffer from unwanted sexual attention for example (European Working Conditions Survey 2007)

Organisations are rarely just about the rational pursuit of business objectives or strategic aims. That is why we often find 'caring' organisations involved in oppressive workplace practices. *Workplace cultures* may evolve that contradict and undermine formal commitments to equality. Organisations with strong commitments to equality may thus be found guilty of significant acts of discrimination, through acts of omission as well as of commission. Individuals often display personal prejudices and negative attitudes towards specific groups. This clearly affects inter-group dynamics within an organisational culture. The norms and the values that create an organisational culture often lead to stereotyping of

particular social groups. Finally, organisations do not work in a social and political vacuum and inevitably reflect social prejudices and political biases of society at large.

Workplace cultures set up what might be called a '*symbolic universe*', which sets the parameters of the values and practices within an organisation. It is clear from what we have explained above that prejudices, stereotyping and discriminatory processes will emerge in this situation. While a workplace culture does not necessarily lead to open discrimination, it *sets the parameters that make discrimination more likely*. Organisational culture and socialisation into it, is thus a powerful element in creating a positive or a negative climate for inequality. What this means, is that organisations need to do more than create a culture of compliance vis-à-vis equality. They need to *engage vigorously with informal workplace cultures*, to create values and common understandings that are more comfortable with equality than with exclusions and discrimination. And clearly trade unions and other workplace organisations have a key role to play here.

In terms of embedding equality within a workplace culture, there are clear limits to a focus on the legal aspects and the requirement to avoid discriminatory acts. This approach can often become purely tokenistic if it is contradicted by informal workplace cultures. It is now widely believed that a '*managing diversity*' approach will be more productive, in embedding equality in an organisation. It is premised on the notion that difference and diversity is positive for an organisation. Rather than eradicating negatives (stereotypes, discrimination, etc) we should focus on the benefits in terms of creativity, feeling valued, and empowerment that diversity brings. This is much more positive than merely 'tolerating' difference. It can also involve all the staff in a workspace, thus maximising their engagement, rather than those social groups usually deemed disadvantaged and thus protected from discrimination.

2. Inequality in the Contemporary Workplace

Since the early 1990's, the Irish workplace has undergone a *huge expansion but also diversification*. The adverse social impact of emigration and unemployment was gradually overcome as economic growth prospered due to integration in the global market, but also due to the social stability provided by the partnership between the state, employers and the trade unions. The economic expansion of the Irish workplace took place in the context of globalisation and primarily the drive of U.S. investment into Ireland. While the social partnership and EU legislation led to some regulation of the workplace, the overall ethos of this period was one of unrestricted market forces. During this neo-liberal expansion the Irish

state's capacity shrunk and many social programmes were either curtailed or paid only lip-service to.

In terms of diversification of the Irish workplace, the first significant transformation was caused by the *feminisation of the labour force*. Whereas in 1993, the participation of women in the labour force stood at 35 percent, this had risen to 49 percent in 2003. Ireland's gender balance in the workplace now approximated the EU average in a transformation that represents a real sea-change. The growth in women's jobs has, significantly, been more concentrated in full-time rather than part-time jobs. The patriarchal assumptions that women stay at home, were further shattered by the fact that among couples with children, half of these have both adults working in the paid economy. The changes in the workplace and in working patterns represented by this gender revolution have clear implications for women and men, both at home and at work.

The second slightly later transformation of the workplace was caused by the *growing internationalisation of the workforce*, from the mid-1990's onwards. The state's immigration policy has developed in a piecemeal and ad-hoc manner, driven almost entirely by employers needs. The social rights of legal, immigrant workers and employees have been restricted. Labour market regulations in regards to the minimum wage, working time and conditions, and in terms of employee relations have often been flouted in regards to migrants. Socially, the Irish workplace has been transformed radically by immigration. The overall official figure for migrant workers of 9 percent masks a considerable presence of migrants in specific sectors. Thus, in the hotel and restaurant sector, migrant workers now represent over 20 percent of the total, and there are over 10 percent in specific sectors of agriculture, construction and health.

In terms of workplace culture, there is *no single Irish workplace model* given the diversity of workplace experiences across the economy. The public sector is the largest employer at 24 percent of the working population, and there is a considerable presence of trade unions there. The public sector workplace is characterised by the bureaucratic management model. There have been quite a few discrimination cases emerging from the public sector, most notably recently in regards to the age ground. The national as against foreign owned industrial sector is declining. There is a patchy presence of trade unions in this sector and management methods tend to be personalised and paternalistic at times. Finally, we have the small and medium enterprise sector and agriculture, where the *workplace culture tends to be individualised and management models quite personalised*.

The 'modern' or transnationalised Irish workplace can be characterised by the ICT sector. Irish ICT companies set great store by what they call labour 'flexibility'. In practice, this has meant longer hours and reduced labour rights in this sector. The emphasis on teamwork in the *ICT sector* and the stress on a 'flat' management structure mask the strong managerial control over the workforce. Work practices and organisational culture emphasises

the value of the 'team' but in practice, with trade unions largely absent from the sector, this means the company. Individualised employment relations – with career paths and working conditions negotiated individually – conspires against collective norms around equality issues. The many women working in this sector also find that there is a strong 'macho' culture in the workplace, and very little understanding of the gender division of labour and work-life balance issues. While the 'high tech' sector is seen as the main driver of the economic growth of the 1990's, most Irish workers still work in *more traditional industries*. Public sector employees are more likely to work in conditions where trade unions are organised. There are also indications that a two tier or segregated labour market is emerging with **recruitment agencies** being used to **avoid equality** legislation in regards to access to employment by all sectors of the population without discrimination. While at present numbers in Ireland are low this is an area that will need to be monitored carefully if international experience is anything to go by.

As in other countries, there is a significant presence of bullying and harassment in the Irish workplace. At an EU level 5% of workers currently report some form of violence, bullying or harassment in the workplace in the last year (Fourth European Working Conditions Survey). The Report of the Expert Advisory Group on Workplace Bullying in 2004, found that there was an overall reported level of bullying in the Irish workplace of 7 percent, with women nearly twice as likely to be bullied as men. Risk levels were found to be 56% higher in the public than in the private sector, and the risk of being bullied is also significantly higher amongst those whose jobs have recently seen the introduction of new technology. We can assume a significant level of under-reporting in regards to bullying and other oppressive workplace practices. We should also be cognisant of the deleterious effect of what might be called a 'laddish' culture, often associated with more informal workplace cultures, with regards to women in particular but also more generally.

There is also in the Irish workplace the presence of *official equality procedures*. How far these are embedded in the workplace culture is open to question. Whether it is in relation to women workers or migrant workers we find a formal commitment to the EU and national equality agendas but, in practice, a situation where the economic agenda drives policy development and implementation. An equality driven agenda would focus more consistently on equality of opportunity and equality of outcome across all nine grounds within an increasingly diverse workplace. The presence of trade unions in the workplace is found to be a positive asset in this regard, and produces a more balanced workplace culture compared to companies dominated and the so-called informal workplace cultures where oppressive practices are common.

3. Responses to Inequality in the Workplace

The favourable trend in female employment has led to a narrowing of the **gender gaps in employment and unemployment**. Nevertheless, major imbalances persist while the high pay gap shows no significant signs of narrowing. (EC, 2006). The main areas of growth for female employment continued to be concentrated in activities and occupations already predominantly feminine. This has reinforced segregation in the labour market. Indeed, both sectoral and occupational segregation continue to rise in the EU, respectively to 25.4% and 18.1%. More than four in ten employed women work in public administration, education, health or social activities, compared to less than two in ten men. In the private sector, however, business services remain an important source of job creation both for women and men, with an increase of employed persons in excess of 5% between 2000 and 2004. A further source of concern is the persistence of the **gender gap in part-time work**, which is done by 32.6% of women in employment against only 7.4% of men. Although recourse to part-time work may reflect personal preferences and may help people to (re-)enter and stay in the labour market, the high gender gap is also evidence of differences of time use patterns between women and men and of the role of carer predominantly assumed by women and the greater difficulties they face in trying to reconcile work and private life. Participation in employment and the amount of time worked by women is closely linked to the number and age of children; this is less the case for men. For women aged between 20 and 49, having a child pushes the employment rate down by as much as 14.3 points, while it drives up men's employment rate by 5.6 points. Similarly, the recourse to part-time work by women increases with the number of children, which is not the case for men.

Although much has been done to incorporate people of different ethnicities into society at large, **discrimination in employment based on ethnicity** still persists. The increased presence of migrant workers has engendered feelings ranging from concern over jobs to outright hostility. Foreign-born workers represent a significant and rising proportion of the workforce in many countries. With 10% of the workforce in Western Europe currently made up of migrants seeking better job opportunities abroad, a number likely to increase over the coming years, the plight of migrants will be a growing concern. There are many ways in which migrant workers' free choice of employment and access to the labour market are restricted. The system of work permits allows governments to limit access of foreigners to certain job categories as is the case in Cyprus, Belgium and the Czech Republic among

others. Migrants may also be confined to a specific region of the country as in Bulgaria and Switzerland.

Discrimination based on religion is another issue that is affecting many countries. In the EU, the issue of the "Islamic veil" or hijab has highlighted the different perceptions prevailing among European countries regarding secularism and religious freedom and has revealed some inconsistencies.

Discrimination based on age, at both ends of the spectrum, is becoming an urgent workplace issue. In 2005, young people accounted for 44% of the world's total unemployed, although their share of the total working-age population aged 15 and above was only 25%.

Discrimination based on disability is already a serious issue in employment. An important source of exclusion or disadvantage of people with disabilities is the fact that they are still often perceived as unproductive, unable to perform a job or too costly to employ. The likelihood for a person with a disability of finding a job seems to decrease as the level of disability increases. In Europe, a person with a disability aged between 16 and 64 has a 66% chance of finding a job; this rate falls to 47% for a moderately disabled person and 25% for a person with a severe disability.

Over the last decade, the pervasiveness and **the cost of sexual harassment**, a manifestation of sex-based discrimination, has become a growing concern at the national and international level. In the European Union, 40-50% of women have reported some form of sexual harassment at the workplace. In many ways sexual harassment can be taken as an indicator of the general levels of harassment in a given workplace. Where this form of discrimination/harassment is allowed to exist then we can also expect other forms to flourish in the absence of a zero tolerance approach.

4. Responses to Harassment and Sexual Harassment in the Workplace

A large proportion of Europeans are of the opinion that **discrimination is widespread** in their country. Discrimination based on ethnic origin is felt to be the most widespread (almost 2 Europeans out of 3, 64%; however, results vary widely between countries). Around one in two European considers discrimination based on disability and

sexual orientation to be widespread. Discrimination on the basis of age (46%), religion or beliefs (44%) and gender (40%) are also felt to occur, albeit at to slightly lesser extent.

Moreover, a significant share of European citizens has the feeling that **discrimination based on ethnic origin** has increased in the last 5 years. 6 out of 10 respondents believe that discrimination on the basis of gender and disability is now less widespread than 5 years ago.

A large majority of the European Union population is of the view that **more women are needed in management positions** (77%) and as MPs (72%). A large majority also think that disabled people (74%) and people over 50 (72%) are underrepresented in the workplace, and they would agree to see this situation improve.

A broad majority of European citizens believe that being disabled (79%), being a Roma (77%), being over 50 (69%) or having a different ethnic origin (62%) is a disadvantage in their society. At the same time, in all but four Member States, a majority of citizens find that people of a different ethnic origin than the rest of the population enrich the national culture.

When it comes to getting a job, **disability and age** are the two factors which European Union citizens believe put people most at a disadvantage. Close to 8 out of 10 respondents feel that with equivalent qualifications, a person aged 50 or over stands less chance when it comes to employment or promotion compared with a person aged under 50, and similarly disabled person compared with an able-bodied person. Whilst still cited by a majority, skin colour (59%) and ethnic origin (58%) are stated to a lesser extent as causes of disadvantage.

There is very broad support among European Union citizens for adopting measures that provide equal opportunities for everyone in the field of employment, ranging from 87% of Europeans in favour of specific measures for disabled people and older people to 66% when it comes to adopting specific measures depending on people's sexual orientation.-

On average, 51 % of Europeans think that not enough effort is made in their country to fight discrimination. Public opinion about efforts made to combat discrimination varies significantly between the Member States. Educational institutions and parents are most often seen as having to play an important role in combating discrimination, indicating that Europeans consider young people to be a principal target group in the fight against discrimination. Around a third of European Union citizens find that the media and their national government have an important role to play. A large majority of European Union citizens are willing to provide personal information relating to ethnic origin (75%), religion or beliefs (74%), health situation (71%) and sexual orientation (65%) on an anonymous basis as part of a census in order to combat discrimination.

Finally, the survey highlights that awareness of the existence of anti-discrimination laws remains quite low in the European Union. Disability is the only type of discrimination which more than half of the European public knows is prohibited by law when hiring employees. The public is least aware of legislation prohibiting discrimination on the basis of age (31%) and sexual orientation (30%). Only one third of European Union citizens (32%) know their rights should they become a victim of discrimination or harassment.

5. From Diversity to Zero Tolerance

The promotion of diversity in the workplace is a widely shared goal within the Irish workplace organisation. It is clear that all parties can benefit from diversity and that it brings many social and cultural benefits. Diversity may be defined simply as the presence of differences among members of a social unit (Jackson et al., 1995 in D’Netto and Sohal, 1999). However, diversity is a not a simple concept that can be defined objectively, but rather it is context-dependent and selective (Moore, 1999). The impact of diversity on the organisation and its employees has been extensively researched in the business studies literature (Richard, 2000; Bacharach et al., 2005). Table 6 presents a summary of the benefits and costs mentioned in the literature:

BENEFITS	COSTS
<p>Long term</p> <ul style="list-style-type: none"> ➤ Access to a talented workforce ➤ Improved image – easier to recruit ➤ Innovation and creativity ➤ Good reputation with government and other stakeholders ➤ Marketing image ➤ Easier to adapt to change <p>Short and medium term</p> <ul style="list-style-type: none"> ➤ Cost reductions: litigation and legal costs, reduced labour turnover, and lower absenteeism ➤ Access to labour ➤ Access to new markets ➤ Performance in existing markets 	<p>Costs of legal compliance</p> <ul style="list-style-type: none"> ➤ Creation and maintenance of new HR record-keeping systems ➤ Training of HR staff and employees involved in recruitment and employee development ➤ Establishment and communication of new HR policies <p>Cash costs on</p> <ul style="list-style-type: none"> ➤ Specialist staff, education & training, facilities and support, working conditions and benefits, communication, employment policies, monitoring and reporting process <p>Opportunity costs</p> <ul style="list-style-type: none"> ➤ Diversion of top management and functional management time, productivity shortfalls <p>Business risks</p>

Costs and benefits of diversity (European Commission, 2003)

However, the presence of diversity in the workplace is by no means a guarantee for success: ‘to reap these benefits, diversity must be managed effectively’ (D’Netto and Sohal, 1999: 538). Diversity management (DM) was developed in the late 1980s in North America and it gained popularity during the 1990s ‘as a new management approach in the UK’ (CIPD, 2006). This new concept has to some extent replaced the debate on equal opportunities (EO) (Maxwell et al., 2000). Kandola and Fullerton (1994) define diversity as consisting of ‘visible and non-visible differences’ and, thus, the management of diversity ‘is founded on the premise that harnessing these differences will create a productive environment in which everybody feels valued, where their talents are being fully utilised and in which organisational goals are met’ (Kandola and Fullerton, 1994: 8).

However, as the European Commission (2003) report indicates, ‘for diversity strategies to succeed, they need to overcome an overriding obstacle that is common to most businesses – opposition in the workplace’ (: 6). The survey on which the report was founded shows that from the sample of companies participating in the European Business Test Panel (EBTP), 17 percent mentioned that the main challenge in promoting diversity are the discriminatory attitudes and behaviours (European Commission, 2003). The conclusions of the report indicate that, companies should approach the management of diversity in the workplace as a ‘culture change process’. This process includes:

- defining a clear case for action,
- building leadership commitment,
- establishing an infrastructure to support implementation, and
- communicating diversity and inclusion principles to staff, customers and other stakeholders (European Commission, 2003: 6).

Key for success is to make diversity more than a HR-related concern. Employees need to be trained in dealing with diversity, but goals also need to be set and performance of the diversity policies and training need to be appraised. Some companies make use of a wide range of tools that helps in increasing the awareness of diversity and ensure full legal compliance: performance planning frameworks, diversity checklists and toolkits to support them in policy implementation.

A key point made in the report is that **‘support from unions, works councils and other staff groups or networks, is another prerequisite for successful implementation of diversity policies’** (European Commission, 2003: 6). The workers’ representatives need to be considered key stakeholders in the design and implementation of diversity policies in the workplace.

Hostile work environments

While trade unions and workers can benefit from active diversity policies we need to consider whether they should go one step further and counter hostile work environments through a concerted zero tolerance to all forms of discrimination and harassment.

In legal terms the phrase “**work environment**” describes the collective environmental experience of employees. A “**hostile work environment**” describes a work environment where conduct of a sexual nature is so severe and pervasive that it pollutes employees’ work environment. This conduct can include sexually orientated jokes, sexually explicit e-mails, posters, cartoons, graffiti, and unwanted verbal and physical contact. This conduct must be as severe and pervasive as to, as the name implies, create an intimidating and offensive work environment.

Definition of sexual harassment

Although the Employment Equality Acts 1998-2004 does not use the phrase hostile work environment when defining sexual harassment, the statutory definition encompasses this form of sexual harassment. Sexual harassment includes: - *[a]ny form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment*¹

The Employment Equality Acts 1998-2004 Act provides a non-exhaustive list of conduct, which constitute sexual harassment: *[a]cts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material*²

The 1998-2004 Acts’ definition of hostile work environment is broad and liberal in two ways. First, intention is not a pre-requisite for a hostile work environment. It is sufficient to establish that the effect of the conduct in question created a hostile working environment for the employee. Second, the definition does not restrict the environment to a hostile environment. The definition includes an intimidating, degrading, humiliating or offensive environment. It is necessary to examine whether this liberal definition is complemented by the 1998-2004 Acts’ complaint mechanism for employees who feels that they have suffered or are suffering a hostile working environment.

¹ Employment Equality Acts 1998-2004, s. 14A(7)(a)(ii)

² Employment Equality Acts 1998-2004, s. 14A(7)(b)

Complaint mechanisms

The 1998-2004 Acts confers a right to complain on *every individual* employee. The 1998-2004 Acts provides no collective right to complain on a group of employees. Thus, a number of employees who experience a hostile working environment must make separate and individual complaints rather than initiate a class action.

Furthermore, the statutory definition of sexual harassment does not lend itself to a class action in two ways. First, the definition refers to the singular “*person’s* dignity” rather than the plural. Second, the definition refers to “an intimidating, hostile, degrading, humiliating or offensive environment”. It is not clear whether this environment is determined on an objective or subjective basis. It is possible that one employee may feel subjectively that he or she is experiencing a humiliating environment while another employee may not.

Trade Union assistance in lodging a complaint

The 1998-2004 Acts permits a complainant to authorise a body to act as that complainant’s representative, such as a trade union.³ However, these bodies have no right to initiate an action on behalf of a complainant or complainant.

This approach of the 1998-2004 Acts may not comply with European Union law as Article 9 of the General Framework Directive 2000/78/EC provides that national implementing legislation should ensure that associations, organisations or other legal entities that have a legitimate interest should be in a position to enforce the equal treatment principle on behalf of complainants. Such a provision would allow a trade union to initiate and pursue a complaint of hostile work environment on behalf of employees affected by that environment.

Currently, the 1998-2004 provides that only the Equality Authority has the legal standing to bring an action where ‘discrimination or victimisation is being generally practised against persons’.⁴

Compensation for sexual harassment

The 1998-2004 Acts allows the Equality Tribunal to award financial compensation for discrimination including sexual harassment.⁵ The 1998-2004 provides that the maximum level of compensation is 104 weeks pay of the employee in question.

³ Employment Equality Acts 1998-2004, s. 77(11).

⁴ Employment Equality Acts 1998-2004, s. 85.

The issue is whether this limitation is compatible with European Union law. The General Framework Directive 2000/78/EC does not dictate the type of sanctions to States. Instead, Article 17 of the General Framework Directive requires that sanctions in State implementing laws must be “effective, proportionate and dissuasive”.

In *Marshall v. Southampton and South-West Hampshire Area Health Authority Case C-271/91* [1993] the European Court of Justice considered the nature of the compensation in the United Kingdom’s implementing law for the employment equality Directive 76/207. This United Kingdom law set a maximum limit of compensation for a person who had suffered a discriminatory dismissal. The European Court of Justice decided that a maximum limit of compensation was not “*necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of a discriminatory dismissal*”.

The European Court of Justice’s approach is that the national law must ensure that the level of compensation provides full reparation for the discrimination suffered.

Therefore, the 1998-2004 Acts maximum 104 weeks of pay for discrimination including sexual harassment is contrary to the General Framework Directive because this sanction is not “effective, proportionate and dissuasive”. This was demonstrated in the sexual harassment case of *Ms. A v. A Contract Cleaning Company Dec-E2004-068* where the employee’s trousers and underwear were pulled down and she was slapped a number of times on her bare bottom. There, the Equality Officer awarded the 104 weeks pay in light of the fact that the employee was treated in the most appalling manner. The Equality Officer noted that he was constrained by the 1998-2004 Acts in the level of compensation which he could order and had that constraint not been place upon him he would have ordered a significantly higher award given the severity of the treatment to which the employee had been subjected. It is clear that the level of compensation in this case failed to provide full reparation for the discrimination suffered.

This financial limit on damages should be removed. Furthermore, the 104 weeks pay compensation limit is not universal to every claim under the 1998-2004 Acts. There are two claims where this financial limit does not apply. First, it does not apply to compensation for victimisation. This reflects how seriously the legislature takes the issue of victimisation and is also reflected in the Equality Tribunal’s awards for victimisation. The legislature should take sexual harassment as seriously as victimisation and remove the financial limits. Second, gender discrimination claims can be brought directly to the Circuit Court and this Court has an unlimited financial jurisdiction when dealing with such claims. The Circuit Court’s unlimited financial jurisdiction is a disincentive to employees using the Equality Tribunal. It

⁵ Employment Equality Acts 1998-2004, s. 82(1)(a).

would surely be better that the Equality Tribunal would have the same unlimited jurisdiction as the Circuit Court when dealing with sexual harassment complaints.

Thus, the legislature can and should amend the 1998-2004 Acts removing the maximum level of compensation of 104 weeks pay in relation to sexual harassment.

Code of Practice on Sexual Harassment and Harassment at Work

An employer is legally obliged to provide a workplace free of sexual harassment. An employer can satisfy this by monitoring the workplace and implementing an effective code of practice on sexual harassment. The Labour Court have taken such codes of practice into account when deciding whether the employer had taken reasonable steps to prevent the sexual harassment under the Employment Equality Act 1977.⁶

The legislature recognised the importance of code of practices by providing in the Employment Equality Acts 1998-2004 that the Equality Authority may draft codes of practice following consultation with relevant bodies⁷. The Minister for Justice, Equality and Law Reform can give such a code of practice legal force by way of a Ministerial order and the code is admissible in evidence in legal proceedings.⁸ The Equality Authority's Code of Practice on Sexual Harassment and Harassment at Work was given legal force in 2002.⁹

The 1998-2004 Acts does not impose a legal duty on employers to adopt and implement this or any other code of practice on sexual harassment. However, the Equality Tribunal has indirectly imposed such a duty. Evidence for this conclusion is found in the Tribunal's approach to employers who seek to rely on the defence of having taken reasonably practicable steps to prevent the sexual harassment.¹⁰ The Equality Tribunal denies an employer this defence where the employer has failed to adopt a code of practice or actively implement a code of practice.¹¹

In *Ms Z v. A Hotel (Dec-E2007-014)* the Equality Officer found that at the time of the sexual harassment incident the employer had no policy, written or verbal, in operation. The Equality Office found that during new employees' familiarisation discussions with the Restaurant Supervisor no reference to how one might report such incidents was mentioned.

⁶ See *The Health Board v B.C. and the Labour Court* [1994] E.L.R. 27; *A Female Employee v. A Company* (EE 45/1999).

⁷ Employment Equality Acts 1998-2004, s. 56.

⁸ Employment Equality Acts 1998-2004, s. 56(4).

⁹ Employment Equality Acts 1998-2004 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002).

¹⁰ Employment Equality Acts 1998-2004, s.14A(2).

¹¹ *A Complainant v A Financial Institution (Dec-E2003/053)*; *Ms. A v. A Contract Cleaning Company (Dec-E2004-068)*; *Ms A v. A Gym (Dec-E2004-011)*; *A Female Employee v. A Candle Production Company (Dec-E2006-035)*.

The complainant stated that after the incident she did not know what to do or who to go to. The Equality Officer found that this was entirely understandable in the circumstances. The Equality Officer decided that the employer's "absolute failure" to have any procedures in place to handle complaints of harassment/ sexual harassment meant that the employer could not rely on the statutory defence.

The Equality Tribunal has the power to an order that employer who had found to discriminate against an employee to take a specified course of action. The Equality Tribunal has used this power in sexual harassment cases to require employers to adopt a code of practice¹², review an existing code of practice¹³, familiarise staff with the code¹⁴ and provisions of the Employment Equality Acts 1998-2004,¹⁵ ensure that staff with management duties are trained in how to operate the code of practice¹⁶ and display the code in a prominent place(s).¹⁷ For example, in *Ms Z v. A Hotel (Dec-E2007-014)* the Equality Officer awarded the complainant compensation and directed the employer to:

- Develop a code of Practice on Harassment on all of the nine discriminatory grounds covered by the Employment Equality Acts, 1998-2004, which is modelled on the Employment Equality Acts, 1998-2004's Code of Practice and that this Code must be in place within 3 months from the date of this decision;
- Provide a copy of this Code was to all existing and new staff (on arrival) and ensure that the staff were fully acquainted with its contents. In addition, copies of the Code, or a brief synopsis of it, had to be displayed in prominent positions in areas of the hotel frequented by staff; and
- Provide appropriate training in this policy to any staff member who had staff management functions and that this training was kept under review in light of developments/best practice in the area.

The Equality Tribunal has even gone so far in cases where the employer *successfully* defended the sexual harassment claim to make non-binding recommendations in relation to

¹² *A Female Claimant v. A Company (EE 17/2000)*; *A Complainant v. A Company (Dec-E2002-014)*; *Ms A v. A Gym (Dec-E2004-011)* ; *Ms B.H. v. A Named Company t/a a cab company (Dec-E2006-026)*; *A Female Employee v. A Candle Production Company (Dec-E2006-035)*

¹³ *A Complainant v A Financial Institution (Dec-E2003/053)*; *Ms. A v. A Contract Cleaning Company (Dec-E2004-068)*.

¹⁴ *A Complainant v. A Company (Dec-E2002-014)*; *A Female Employee v. A Candle Production Company (Dec-E2006-035)*.

¹⁵ *Ms. CL v. CRM (Dec-E2004-027)*.

¹⁶ *A Complainant v. A Health Board (Dec-E2003/055)*; *Ms. A v. A Contract Cleaning Company (Dec-E2004-068)*; *Female Employee v. A Candle Production Company (Dec-E2006-035)*.

¹⁷ *A Female Employee v. A Candle Production Company (Dec-E2006-035)*.

the employer's existing code of practice¹⁸ or recommending the implementation of such a code of practice.¹⁹ For example, in *Mms A v. A Health Board* Dec-E2005/016 an equality officer recommended that an employer consider very seriously its practice and procedures in dealing with harassment and sexual harassment. The Equality Officer found that it was clear that training in relation to the policy had been less than adequate. The fact that local management declined to deal with the complainant's complaint of sexual harassment in accordance with the policy had demonstrate a significant failure of procedure. The Equality Officer stated that any member of staff, making a complaint in accordance with the employer's stated policy, was owed a duty of care that the policy will be adhered to. Senior management at headquarters was on notice of the failure to follow procedure, since the sexual harassment complaint was referred to headquarters on no less than three occasions, and should have taken steps to ensure the matter was dealt with appropriately. The Equality Officer pointed out that, had the complaint of sexual harassment been upheld, it is unlikely that the employer would have been able to avail of the statutory defence. The Equality Officer strongly recommended that the employer re-consider dissemination of and training in relation to its policy on harassment and sexual harassment, with a particular emphasis on the duties and obligations of both management and staff in this regard.

It is suggested that an amendment should be made to the 1998-2004 Acts requiring employers to:

Have a code of practice;

- Publicise, monitor and revise this code in accordance with best practice; and
- Educate and train their staff about the operation of this code of practice.

Such an amendment would not be extremely onerous on employers since the Equality Tribunal is already imposing such a duty with its approach discussed above. It would be possible to provide that an employer's level of damages would be higher where that employer failed to comply with this amendment.

¹⁸ *An Employee v. An Employer* (Dec-E-2002-042); *Ms. O' N v. An Insurance Company* (Dec -E2004-052); *Ms. B v. An Employee, and A Prison Governor, The Minister for Justice, Equality and Law Reform and the Attorney General* (Dec-E2004-002).

¹⁹ *A Claimant v. A Company* (EE 01/1999)

Summary and Recommendations

Summary

Section One: Dimensions of Workplace Culture

Organisational structures, cultures and practices have a major impact – for good or for bad – on the equality agenda. Organisations are a major focus for power in contemporary societies. Power is, however, contested and there are conflicts of interest inherent in the organisation of the workplace. The shared norms, values and assumptions within a workplace play a major role in facilitating or inhibiting the development of a strong equality agenda, in principle and in practice. In considering the role of workplace culture, it is extremely important at the outset to understand that organisations have a *formal and informal set of power relations*. It is often found that informal networks and cultures are a means to avoid, subvert or counter formal organisational commitments to equality.

Section Two: Inequality in the Contemporary Workplace

Since the early 1990's, the Irish workplace has undergone a *huge expansion but also diversification*. The first significant transformation was caused by the *feminisation of the labour force*. The second slightly later transformation of the workplace was caused by the *growing internationalisation of the workforce*, from the mid-1990's onwards. In terms of workplace culture, there is *no single Irish workplace model* given the diversity of workplace experiences across the economy. As in other countries, there is a significant presence of bullying and harassment in the Irish workplace. The Report of the Expert Advisory Group on Workplace Bullying in 2004, found that there was an overall reported level of bullying in the Irish workplace of 7 percent, with women nearly twice as likely to be bullied as men. Risk levels were found to be 56% higher in the public than in the private sector,

There is also in the Irish workplace the presence of *official equality procedures*. How far these are embedded in the workplace culture is open to question. Whether it is in relation to women workers or migrant workers we find a formal commitment to the EU and national equality agendas but, in practice, a situation where the economic agenda drives policy development and implementation.

Section Three: Responses to Inequality in the Workplace

A large proportion of Europeans are of the opinion that **discrimination is widespread** in their country. There is very broad support among European Union citizens for adopting measures that provide equal opportunities for everyone in the field of employment, ranging from 87% of Europeans in favour of specific measures for disabled people and older people to 66% when it comes to adopting specific measures depending on people's sexual orientation.-

The literature shows that workplaces actively involved in the management of their diverse workforce and implementing a wide range of diversity policies are confident in the benefits of diversity to their business. However, many employers and employees in Europe still lack information and awareness of diversity issues and practices, thus giving them a disincentive to pursue in the future diversity and equal opportunities policies.

Section Four: Responses to Harassment and Sexual Harassment in the Workplace

Over the last decade, the pervasiveness and **the cost of sexual harassment**, a manifestation of sex-based discrimination, has become a growing concern at the national and international level. In the European Union, 40-50% of women have reported some form of sexual harassment at the workplace.

Although the Employment Equality Acts 1998-2004 does not use the phrase **hostile work environment** when defining sexual harassment, the statutory definition encompasses this form of sexual harassment. Sexual harassment includes: - *[a]ny form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment.*

The Employment Equality Acts 1998-2004 Act provides a non-exhaustive list of conduct, which constitute sexual harassment: *[a]cts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.* However there are clear limitations to the legal response because harassment and sexual harassment will continue to be facets of the workplace until equality and equal opportunities and norms are properly embedded in the workplace.

Section Five: From Diversity to Zero Tolerance

An employer is legally obliged to provide a workplace free of sexual harassment. An employer can satisfy this by monitoring the workplace and implementing an effective code of practice on sexual harassment. The Labour Court has taken such codes of practice into account when deciding whether the employer had taken reasonable steps to prevent the sexual harassment under the Employment Equality Act 1977.

As recently argued by the Equality Tribunal, there is a compelling argument for employers to:

- 1) Develop a code of Practice on Harassment on all of the nine discriminatory grounds covered by the Employment Equality Acts, 1998-2004, which is modelled on the Employment Equality Acts, 1998-2004's Code of Practice and that this Code must be in place within 3 months from the date of this decision;
- 2) Provide a copy of this Code was to all existing and new staff (on arrival) and ensure that the staff were fully acquainted with its contents. In addition, copies of the Code, or a brief synopsis of it, had to be displayed in prominent positions in areas of the hotel frequented by staff; and
- 3) Provide appropriate training in this policy to any staff member who had staff management functions and that this training was kept under review in light of developments/best practice in the area.

Recommendations

1. The approach to equality in the workplace needs to be a **twin-track** one that focuses equally on the **formal legal** domain and the **informal workplace** culture. Only a joined up strategy like this, implemented with vigour by all elements of the partnership will be successful.
2. The **shared norms, values and assumptions** within a workplace play a major role in facilitating or inhibiting the development of a strong equality agenda, in principle and in practice. Thus equal opportunity and diversity policies and practices need to include in their scope employees at all levels of an organisation including agency workers.
3. Work organisations need to engage vigorously with **informal workplace cultures** to create values and common understandings that are more comfortable with promoting equality than with just preventing discrimination. The presence of diversity in the workplace does not automatically bring about all the benefits of diversity, nor does it generate instant cohesiveness.
4. The **presence of trade unions** in the workplace is found to be a **positive asset**. The involvement of workers in workplace decision-making can support a proactive pro-equality culture. This is an essential precondition to combat informal workplace cultures where oppressive practices are common.
5. In addition, trade unions have the **legal means** to address equality issues in the workplace. Congress needs to make a **concerted drive** on both formal and informal fronts and their various layers. Furthermore, the trade unions need to go beyond policy declaration to secure the embedding of an equality culture amongst all its members.
6. There is very broad support among European Union citizens for adopting **measures that provide equal opportunities** for everyone in the field of employment. However, the biggest challenge to addressing workplace diversity and anti-discrimination is the **lack of information and awareness of diversity issues** and practices. Lack of awareness about diversity does not only pertain to employees, but mainly to employers and managers that have the power to implement diversity measures.

7. The 1998-2004 Equality Acts establish that the effect rather than intention is the significant factor in creating a **hostile working environment** for the employee. The definition includes an intimidating, degrading, humiliating or offensive environment. Thus, it is recommended that diversity initiatives need not only to be implemented. Such measures need to be monitored regularly and indicators need to be analysed as to their efficiency.

8. An employer is legally obliged to provide a **workplace free of sexual harassment**. It is suggested that an amendment should be made to the 1998-2004 Acts requiring employers to have a code of practice; to publicise, monitor and revise this code in accordance with best practice; and educate and train their staff about the operation of this code of practice.

9. The above principles in terms of preventing a hostile working environment and providing a workplace free of sexual harassment **applies equally to other forms of discrimination** and oppression be it racism, disablism, anti- Traveller prejudice or that based on sexual preference. We are arguing for a **methodology** based on zero tolerance for discrimination and a positive attitude towards equal opportunities and equality.

10. The next generation strategies will necessarily focus on action that is both ‘internal’ – within the organisation in question as an employer – and ‘external’, in the business of each organisation, especially in service delivery. This requires a **positive duty to legally establish equality as a core responsibility** of public bodies, and requires them to give “due regard” to promoting equality of opportunity and not simply comply with existing legislation to prevent discrimination. This must include a duty to promote **Good Relations** and to counter prejudice and victimisation in the community at large.

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