Irish Congress of Trade Unions

Submission to Review of Equality Acts

December 2021

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Introduction

In June 2021, the Minister for Children, Equality, Disability, Integration and Youth announced a Review of the Equality Acts. The information published by the Department of Children, Equality, Disability, Integration and Youth suggests that this will involve a comprehensive review of all of Ireland's existing legislation concerning the promotion of equality and elimination of discrimination.

The Legislation under Consideration

The Review will consider Ireland's two primary pieces of equality legislation, the Equal Status Act 2000 and the Employment Equality Act 1998. It will also consider the subsequent legislation which has amended those Acts. Considered along with their amending legislation, those Acts are referred to as the **Employment Equality Acts 1998-2015** and the **Equal Status Acts 2000-2018**.

The Department has stated that this list "should not be considered exhaustive" and has listed a range of relevant Acts. Other relevant legislation may include the Workplace Relations Act 2015 (which provides the legal basis for the operation of the Workplace Relations Commission, the tribunal that hears most discrimination complaints). It may also include the Irish Human Rights and Equality Commission Act 2014 (which provides for the Public Sector Equality and Human Rights Duty, as well as for the powers and functions of the Irish Human Rights and Equality Commission).

The Purpose of the Review

In announcing the Review, the Minister noted that the Equal Status Acts and Employment Equality Act had been in place for over two decades, and that: "It is timely to take a deeper look at the legislation, to look at what is working and what is not working, and to identify where there may be gaps. We want to ensure that the legislation is as effective as possible in combatting discrimination and promoting equality".

The Review will consider matters arising from the commitments made in the Programme for Government in relation to equality. Specifically, the Programme for Government commits to an examination of "the introduction of a new ground of discrimination, based on socio-economic disadvantaged status to the Employment Equality and Equal Status Acts". It also commits to "amend the gender ground in equality legislation, to ensure that someone discriminated against on the basis of their gender identity is able to avail of this legislation". The Review will also include "a review of current definitions, including in relation to disability".

The Department has also indicated that the Review will examine the Equality Acts more generally:

"The review also provides an opportunity to review other issues arising, including whether or not further additional equality grounds should be added, whether existing exemptions should be

removed or modified and whether or not the existing legislation adequately addresses issues of intersectionality."

The Review will also include a practical examination of the operation of the Equality Acts "from the perspective of the person taking a claim under its redress mechanisms":

"It will examine the degree to which those experiencing discrimination are aware of the legislation and whether there are practical or other obstacles which preclude or deter them from taking an action".

The Review will also examine the use of non-disclosure agreements by employers in cases of sexual harassment and discrimination "in line with the issues raised in the Employment Equality (Amendment) (Non-Disclosure Agreement) Bill 2021". That Private Members Bill proposed to prohibit the use of "non-disclosure agreements" in settlement agreements reached on foot of complaints under the EEA in certain circumstances.

Finally, the National Artificial Intelligence Strategy, *AI – Here for Good*, contains a commitment to "consider the implications of [Artificial Intelligence]" in the context of the review of the Equality Acts.

As the Irish Congress of Trade Unions representing workers on this island, this submission will concentrate mainly on employment issues and the Employment Equality Act.

The Employment Equality Acts provide protection to employees and prospective employees who have experienced discrimination on one of the nine grounds of gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. The Act applies where a person has suffered unlawful discrimination in relation to employment, including access to employment and training.

Congress has produced a guide[1] to the Act and carries out regular training for affiliate trade unions in relation to taking a case under the Act.

The objects of Congress listed in our constitution include:

"To ensure full equality in all aspects of employment opportunity and to oppose discrimination on any such grounds as race, colour, nationality or ethnic or national origins, politics, religion, sex, age, disability, marital status, family status, sexual orientation, membership of the Traveller Community".

Congress recognises that equality legislation has a key role in progressing equality. Back in the late 90's we played a leading role in developing an agenda for new legislation with a range of equality groups that delivered the Employment Equality Act 1999. When the equality infrastructure was effectively dismantled in 2008 with budget cuts of 43% to the Equality Authority, we were founding members of the Equality Rights Alliance which campaigned against the cuts, then for a reversal of the cuts, and ultimately for a rebuilding of our equality infrastructure which lead to the formation of the Irish Human Rights and Equality Commission in 2014. Section 42 of the IHREC Act provides for a positive duty for equality, requiring public bodies to have regard to the need to eliminate discrimination, promote equality, and protect human rights in all of their functions.

The current review of the equality legislation holds the potential to energise equality legislation and to make it more comprehensive, including further grounds. Some of the exemptions need to be removed and some of the provisions strengthened. We know it has to increase its reach into

[1] https://www.ictu.ie/publications/employment-equality-guide

organisations, requiring systems and practices within organisations that respond effectively to the practical implications of diversity and that advance outcomes of equality.

Below we set out some areas for revision.

Revisions required in the Employment Equality Act

Section 8(2) – includes a requirement that an agency worker can only have another agency worker as a comparator. This is inconsistent with the Protection of Employees (Temporary Agency Work) Act 2012. In an equal pay or equal treatment claim, an agency worker can only rely on another agency worker as a comparator.

Recommendation

- **Revised Act should provide that an agency worker can rely on the pay / treatment of a comparable worker employed by the end user to which they are assigned**

Section 19 – equal pay – need to provide for a hypothetical comparator – also need to provide scope for selecting a comparator in employments other than the complainant's own employment (similar to the provision in the Protection of Employees (Part-Time Work) Act 2001 and Protection of Employees (Fixed-Term Work) Act 2003

- In claims concerning discriminatory treatment a hypothetical comparator may be relied upon
- The current state of the law appears to preclude reliance on a hypothetical comparator in equal pay claims (Brides v Minister for Agriculture and MacCarthy's v Smith)
- This anomaly should be corrected
- Section 19 also provides that a comparator must be employed by the same, or an associated employer, as the complainant
- The Protection of Employees (Part Time Work) Act 2001 and the Protection of Employees (Fixed Term Work) Act 2003, provide where a comparator is not available in the complainant's own employment, a comparator may be relied upon from within the same sector or industry
- A similar provision should be provided in the Act

Section 12(4 and 5) and Section 37 – Religious Ethos Defence

Section 12 (4) reads:

"For the purposes of ensuring the availability of nurses to hospitals and teachers to primary schools which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values, and in order to maintain the religious ethos of the hospitals or primary schools, the

prohibition of discrimination in subsection (1), in so far as it relates to discrimination on the religion ground, shall not apply in respect of—

(a) the nomination of persons for admission to the School of Nursing pursuant to clause 24(4)(a) or (c) of the Adelaide Hospital Charter as substituted by paragraph 5(s) of the Health Act, 1970 (Section 76) (Adelaide and Meath Hospital, Dublin, incorporating the National Children's Hospital) Order, 1996, or

(b) places in a vocational training course specified in an order made under subsection (5).

Section 12 (5) reads:

"Where an educational or training body applies to the Minister for Health and Children, in the case of hospitals, or to the Minister for Education and Science, in the case of primary schools, for an order permitting the body concerned to reserve places in a vocational training course offered by the body, the Minister for Health and Children or the Minister for Education and Science, as the case may be, may, with the consent of the Minister, by order allow the body to reserve places in such numbers as seem reasonably necessary to the Minister for Health and Children or the Minister for Education and Science, as the case may be, to meet the purposes set out in subsection (4)".

Section 37 reads:

"(1) Subject to subsections (1A) and (1B) , a religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or Part II if—

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

(1A) Were an educational or medical institution referred to in subsection (1) is maintained, in whole or in part, by monies provided by the Oireachtas more favourable treatment on the religion ground referred to in paragraph (a) of that subsection shall be taken to be discrimination unless —

(a) that treatment does not constitute discrimination on any of the other discriminatory grounds, and

(b) by reason of the nature of the institution's activities or the context in which the activities are being carried out, the religion or belief of the employee or prospective employee constitutes a genuine, legitimate and justified occupational requirement having regard to the institution ' s ethos.

(1B) Where an educational or medical institution referred to subsection (1) is maintained, in whole or in part, by monies provided by the Oireachtas, action of the type referred to in paragraph (b) of that subsection shall be taken to be discrimination unless by reason of the nature of the employment concerned or the context in which it is carried out —

(a) the action is objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution, and

(b) the means of achieving that aim are appropriate and necessary".

Congress welcomes the significantly reformed treatment of employees and prospective employees in educational institutions which are in receipt of finances precipitated by the amendment of the Equality (Miscellaneous Provisions) Act, 2015 which provides that religion is the sole ground on which an educational institution can positively discriminate. If religion is a genuine, legitimate and justified occupational requirement having regard to the institution's ethos, the treatment by the educational institution will not constitute discrimination and an educational institution can take action to prevent the undermining of its religious ethos if it can be objectively justified by the institution's aim and the action is appropriate, necessary and proportionate.

While the key issue in this legislation is the establishment of actual damage to the establishment's ethos as opposed to perceived or potential damage, significant concerns remain among employees, including teachers, whose personal life may not be fully congruent with the religious practice, doctrine or ethos of their school patron. These concerns centre on the potential of the religious patrons to make the case that a teacher's personal life or professional practice is undermining or causing damage to the school ethos. Continuing to allow denominational schools to potentially prefer teachers of their own denomination or to retain the right to provide for favourable treatment on the ground of religion not of the school's denomination would be completely counter to the objective of promoting inclusion or diverse beliefs and none and would be unnecessarily perpetuating differences in the treatment of employees on the basis of their beliefs and of their entitlement to be employed in a particular school.

Under Section 37 (b) the institution will not be taken to discriminate if it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution. These provisions could also have ramifications for union members in respect of their involvement in carrying out certain medical procedures that run contrary to the religious ethos of the medical institution.

It is our view that such a religious ethos exemption is no longer relevant and objectionable in principle in 21st Century workplaces.

Congress calls for an examination of the provisions of the Employment Equality Acts, which allows schools to discriminate against prospective and current employees on religious grounds and asks that consideration of the removal of Section 37.1 from the Employment Equality Acts in its entirety should form a central facet of this review. The provision for 'favourable treatment on the religion ground', as well as the provision for reasonable action to 'prevent… a prospective employee from undermining the religious ethos' could potentially have an equally discriminatory impact on prospective employment opportunities for members. It is our view that Section 37.1 runs counter to the principles of inclusion and constitutes legislative barriers to the equal treatment of employees.

Recommendation

- **Congress is of the view that the religious ethos exemptions/defences contained in Section 12 (4) (5) and Section 37 have no place in a modern-day workplace. The review should prioritise the consideration of the negative and discriminatory impact of Section 37.1 and Section 12 (4and5) in the promotion of inclusion in workplaces and consider their complete elimination.**

Definition of Disability – s.2 "disability" means—

(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,

(c) the malfunction, malformation or disfigurement of a part of a person's body,

(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;

Congress notes that such a definition is extremely broad and is wider than what is required by the EU Equal Treatment Framework Directive, which indicates the scope and potential of the concept of disability in recognising that alcoholism is a disability. Importantly, the Employment Equality Acts cover disabilities both past and present, temporary as well as permanent conditions, and covers chronic illness or disease as well as disabilities imputed to a person and disabilities which may exist in the future. Though not an exhaustive list, examples of disabilities which have arisen in the case law to date are cerebral palsy, visual impairment, astrocytoma, wheelchair user, schizophrenia, brain haemorrhage, diplopia (double vision), various heart conditions, anxiety/depression, manic depression, multiple sclerosis, psoriatic arthritis, asthma, irritable bowel syndrome, respiratory tract and lung infections, ulcerative colitis, dyslexia, epilepsy, diabetes, curvature of the spine, quadriplegia, alcoholism, vertigo, HIV, ADHD and dyspraxia.

We note that some have criticised this definition as being too broad, citing the corresponding UK definition which confines the concept to conditions that impact on normal functioning.

We do acknowledge that this definition has been criticised as being overly medically based, and therefore inconsistent with the social and rights-based definitions of disability contained in other legislation and the UN Convention on the Rights of Persons with Disabilities. The current definition makes it explicitly clear that a broad spectrum of factors is considered in determining a disability under the Act. However, we would urge caution and assert that the aim of legislation prohibiting discrimination in respect of disability should necessarily capture a broad range of circumstances which may arise during the course of an employee's career, to include both temporary and long-term disabilities, and must be capable of use in an adversarial process. The vast majority of disabilities are currently included and unions generally do not have to spend much time and resources having to prove that they come within the definition. The experience in the UK places a very significant burden on claimants who are trying to bring claims.

Any definition therefore must remain inclusive, and capable of being adjudicated upon in all relevant forums.

Recommendation

- **Any change in the definition of disability must ensure that it is not regressive and maintains the current inclusive nature ensuring that people with disabilities generally do not have to prove that they come within the definition of disability and are thus protected from discrimination or the failure to provide reasonable accommodation.**

Section 16 – reasonable accommodation for people with a disability

The decision of the Supreme Court in Nano Nagle v Daly disclosed a number of anomalies in relation to the duty to provide a person with a disability with reasonable accommodation, viz: -

- A failure to provide reasonable accommodation does not provide a stand-alone cause of action
- The Act provides that redress may be awarded 'for the effects of discrimination or victimisation' (not for the failure to provide reasonable accommodation, *per se)*
- There is no statutory obligation on an employer to consult with a person with a disability, or their representative, in relation to the provision of reasonable accommodation

It is our strong view therefore that a failure to provide a person with a disability should be deemed to constitute discrimination on the disability ground and that the duty to provide reasonable accommodation should include an obligation to consult the person with a disability, or his or her representative in ascertaining their requirements and on the practicability or proportionality of any measures proposed.

On a practical level for trade unions, issues of contention in the past have related to reasonable accommodations when an employee may have a disability. While Section 16 of the Employment Equality Acts recognise that there is no legal obligation of an employer to retain an employee who even with provisions of reasonable accommodation is not able to perform the essential functions of the job, it requires an employer to take appropriate measures to facilitate persons with disabilities in accessing and participating in employment unless those measures would impose a "disproportionate burden" on the employer. While Congress commends the significant changes which have been applied in the workplace in respect of the provisions for reasonable accommodations, much of the reasonable accommodation test remains the same, being one that is easy to state but difficult to apply. The Supreme Court in particular noted that the test *"is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee, as this would almost inevitably impose a disproportionate burden on an employer".*

Although the case of *Daly v Nano Nagle School* confirmed that there is no mandatory duty to consult with an employee with a disability on their request for a reasonable accommodation, there is an existing expectation that *"a wise employer will provide meaningful participation in vindication of his or her duty under the Act".*[2] It is our submission therefore that the legislation ought to specifically

[2] Nano Nagle School v Daly [2019] IESC 63

refer to the employer's obligation to consult with the employee on the proposed reasonable accommodation.

While not on a statutory footing, the Labour Court has stated that an employer must also act without delay when it has been brought to its attention that reasonable accommodation is required for an employee with a disability to carry out their work. In light of the importance of fair procedures under Irish employment law, Congress supports this position in respect of the timely consideration of reasonable accommodation in workplace settings. The reality of the maxim of 'justice delayed is justice denied' can arise in circumstances where an employee's employment becomes untenable due to an unreasonable delay by an employer to (i) consider and (ii) put in place reasonable accommodations for the affected employee. On this basis, we would call for a proportionate timeframe in respect of applications for reasonable accommodation to be set out in statute in order to provide for a more accessible application of accommodations sought.

Recommendation

- **Failure to provide reasonable discrimination should be deemed to be discrimination on the disability ground.**
- **Employers should be deemed not to have fulfilled their obligation to provide reasonable accommodation if they fail to consult with the disabled person or her or her representative**
- **proportionate timeframe in respect of applications for reasonable accommodation to be set out in statute**

Redress for victimisation – where a person is victimised for having exercised a right under the Act the current limitation on compensation should not apply. Victimisation of an employee for having taken a claim, or asserting a right, under the Act is a particularly reprehensible form of conduct which can subvert the effectiveness of the Act. The maximum compensation which can be awarded for victimisation is the equivalent of two years remuneration.

Recommendation:

- **Compensation for victimisation should be increased in line with the level of compensation available under the Protected Disclosures Act 2014**

Reference to Cases to Circuit Court

In claims of discrimination on the **gender** ground the case can be initiated in the Circuit Court, which then has unlimited monitory jurisdiction (there is no limit on the level of compensation that can be awarded). There is no provision for initiating a claim before the Circuit Court in cases under the other 8 grounds. It is Congress' view that there is no reason in law or in logic for this distinction and it should be removed.

Recommendation

- **Provision for initiating claims before the Circuit Court under any of the discriminatory grounds should be introduced.**

Section 93- Power of the Circuit Court to vary an order for reinstatement

Section 93 of the Act provides that where an order for reinstatement is made by the WRC or the Labour Court for reinstatement, that can be varied by the Circuit Court and substituted with an order for compensation

Recommendation

- **The power of the Circuit Court to vary a reinstatement order should be deleted**

Section 101-Parallel claims

Currently, there is a prohibition on pursuing parallel claims for discriminatory dismissal and unfair dismissal based on the same facts. Section 101 of the Act provides that where a claim of discriminatory dismissal and a claim of unfair dismissal, under the Unfair Dismissals Acts, are made on the same set of facts, the complainant can be required to elect as between the claims and in default of an election, only the claim under the Unfair Dismissals Act can proceed.

It is often prudent to bring claims arising from dismissal under both Acts in circumstances in which the dismissal appears discriminatory but in the event of that claim not succeeding, a claim of ordinary unfair dismissal may succeed. A better approach would be to provide that in these circumstances the claim of discriminatory dismissal should be heard first and, if successful, the parallel claim would be deemed to be withdrawn. It could also be provided that redress cannot be obtained under both Acts

Recommendation

- **Parallel claims for discriminatory dismissal and unfair dismissals should be allowed, with the discriminatory dismissal heard first, and if successful, the parallel claim is deemed withdrawn;**
- **Redress cannot be obtained under both Acts.**

Limitation on compensation

There are maximum limits on financial awards by the Workplace Relations Commission and the Labour Court. Section 82 of the Act provides that where a successful complainant is in receipt of remuneration, compensation of up to €40,000 can be awarded in circumstances in which 104 weeks' pay is less than that amount. In the case where a complainant is not in receipt of remuneration (i.e. where the claim arises from a job application) the maximum award is €13,000. These amounts were fixed by the Equality Act 2004 and it is our view that there is a compelling case for having them updated.

Recommendation

- **Maximum awards should be updated to reflect current circumstances and a process agreed for regular revisions at agreed time periods.**

Definition of vocational training

(Section 12(2) of the Employment Equality Acts contains an unnecessarily narrow definition of "vocational training". This means not everyone engaged in such training is protected by the Employment Equality Acts.

Recommendation

- **The definition of vocational training in the Employment Equality Acts should be amended in line with EU law.**

People working in other people's homes

The Definition of Employee (section 2 of the Employment Equality Acts) contains an exemption to who is considered an "employee". As a result, "so far as regards access to employment", the Acts do not apply to "a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons". The result is that people who do domestic or childcare work may not be fully protected against discrimination)

Recommendation

- **Exemptions to the Employment Equality Acts which reduce the protection for people working in other people's homes need to be removed.**

Lesser rate of pay for people with disabilities

The Employment Equality Acts contain important "Equal Pay" provisions. However, section 35(1) of the Employment Equality Acts states that it is not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability. IHREC have previously called for this exemption to be removed, with a previous report of the Equality Authority stating that section 35(1) undermines the positive provisions of the Acts such as Reasonable Accommodation.

Recommendation

- **Exemption in the Employment Equality Acts which allows for a lesser rate of pay for people with disabilities should be removed**

Additional Grounds for Discrimination

Socio Economic Ground

The Equality (Miscellaneous Provisions) Bill 2017 sought to introduce the ground of disadvantaged socio-economic status as a tenth ground for discrimination. The Bill defines disadvantaged socio-economic status as a 'socially identifiable status of social or economic disadvantage resulting from poverty, level or source of income, homelessness, place of residence, or family background'. Congress supports the inclusion of this ground in the main and would welcome its impact in

broadening the scope for prohibiting discrimination in accessing employment and with respect to conditions of employment.

The urgent need for the introduction of the ground was made clear in a 2019 Report by *ATD Ireland* – Does it only happen to me? [3] Recent research by Tamas Kádár for the Equality and Rights Alliance also clearly sets out how and why discrimination on the basis of socio-economic status should be prohibited in Irish law.[4]

Congress agrees with the Irish Human Rights and Equality Commission recommendation that the definition of socio-economic status is best developed by listing key practical and identifiable features of difference across social classes, to include family background such as inter-generational history of occupation, geographical location, home ownership, education background and economic situation.

We also support the INTO call for The INTO supports the addition of a socio-economic ground for the inclusion of the education background under the definition of socio-economic grounds for discrimination.

Recommendation

- **Congress believes the review should progress the addition of a socio-economic status ground to equality legislation thereby significantly improving the scope of the equality legislation.**

Gender Ground

The gender ground, as currently defined, does not reference transgender, non-binary and intersex people. However, the definition has been interpreted in a way which includes transgender people, as required by EU law. IHREC have stated that the Equality legislation "should explicitly prohibit discrimination against transgender, non-binary and intersex people".

Congress acknowledges the scope for greater inclusiveness in the current definition of gender under the Employment Equality Acts. In line with the protection of equal employment opportunities, participation and treatment regardless of gender identity or sexual orientation, we support the provision of a broader and more inclusive definition of gender, to encompass a wide range of LGBTQ+ terminology and identities and to ensure that someone discriminated against on the basis of their gender identity is able to explicitly avail of the legislative protections.

A clear statement of legal protection would ensure that transgender persons, including their employers, service providers and the public in general, would understand the protection offered by

[3] ATD Ireland (2019), *Does It Only Happen to Me? Living in the shadows of Socio-Economic Discrimination*, available at: http://17october.ie/wp-content/uploads/2019/09/SES-Discrimination-Report-ATD-Ireland-Sept-19.pdf

[4] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground,* available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf at 10.

the law and eradicate any doubts about who may be covered by the law or not. It would also ensure that gender identity and gender expressions are protected from discrimination.

Recommendation

- **Equality legislation should be amended to prohibit discrimination based on gender identity, gender expression and sex characteristics.**

Menopause

Menopause can undoubtedly be categorised as both an equality issue and an occupational health issue, in cases where work factors have the potential to impact significantly on a women's experience of this transitional period in their lives. A 2018 survey[5] by the Irish Congress of Trade Unions in Northern Ireland found not only that women face real challenges in the workplace as a result of menopausal symptoms but also that there was little or no support available to them. Traditionally the menopause has been a taboo subject, treated as a bit of a joke at best and shrouded in secrecy at worst. However, with more women than ever working and more working into their later years, it's clear that employers need to carefully consider how women can be supported in the workplace.

There are a broad range of experiences put forward by our members in respect of symptoms and specific accommodations which may be required in the workplace in respect of women transitioning into the menopausal phase of life.

A 2018 case[6] in Scotland confirmed that a woman with menopause, if her symptoms are sufficiently long term and substantial, may be deemed to be a disabled person for the purposes of the Disability Discrimination Act 1995. As such, her employer is bound by that law's reasonable adjustment duty. In this case, the employer recognised this, and made adjustments such as moving her desk so that it was closer to the toilet, giving her easy access to cold water for her medication.

Congress supports the position that the right to reasonable accommodation should be extended to conditions related to menopause, which can severely impact on women's ability to participate fully in the workplace.

Recommendation

- **The right to reasonable accommodation should be extended to conditions related to menopause.**

Maternity and Pregnancy

Furthermore, although maternity and pregnancy-related discrimination are deemed to be protected in the context of gender, as part of this review consideration ought to be given to the ground of maternity and pregnancy-related discrimination as separate and distinct grounds for discrimination under the legislation, similar to protections afforded to employees in Northern Ireland. This would

[5] https://www.ictuni.org/publications/ictu-menopause-survey-results
[6] https://www.bailii.org/uk/cases/UKET/2018/4104575_2017.html

afford specific and stand-alone protections in respect of pregnancy and maternity related discrimination in the workplace, inclusive of recruitment, promotion and conditions of employment.

Recommendation

- **consideration ought to be given to the ground of maternity and pregnancy-related discrimination as separate and distinct grounds for discrimination**

Discrimination on a combination of grounds (Intersectional Discrimination)

The Equality Acts do not adequately provide for situations where discrimination has occurred on the basis of more than one ground or a combination of grounds. While it is possible to make a complaint on more than ground, the Acts appear to require that discrimination on each ground has to be proven separately. In effect, this may exclude complaints on the basis of more than one ground where the discrimination occurred on the basis of a combination of grounds.

The Equality Acts do not clearly provide for such situations and, as a result, may be out of step with many people's lived experiences of discrimination, which often occurs as a response to their identity as a whole and cannot be distinctly and artificially categorised into separate grounds.[7] Many groups who currently enjoy the protection of the Acts also experience disproportionate levels of socio-economic disadvantage and exclusion. The Acts should provide for experiences of intersectional discrimination on the basis of socio-economic status (and another ground or grounds) by introducing a socio-economic status ground.

Recommendation

- **Congress recommends amending the Equality Acts to provide for intersectional discrimination.**

Other items for consideration as part of the review

Algorithmic Decision Making

A recent TUC report[8] has also found that while the impact of automation on functions such as the manufacture of goods and provision of retail services is well recognised, far less attention has been given to the rapid development of AI to carry out management functions. Aspects of the employment relationship (for example, decisions on recruitment, line management, monitoring and training) are increasingly being managed by AI, instead of by a person.

The use of algorithmic decision making has become popular of late as it can reduce time for HR professionals and hiring managers in screening large numbers of applicants, improve selection processes, and provide the potential for predictive analysis. As awareness grows of the problem of discrimination in recruitment it is often assumed that such automated decision making is more effective at reducing bias than human hiring managers. However, it is increasingly clear that AI is

[7] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at page 142. Judy Walsh has noted that "a legislative amendment could explicitly allow for a flexible approach by specifying that dual or even multiple grounds could be applied with reference to a single hypothetical comparator

[8] https://www.tuc.org.uk/research-analysis/reports/technology-managing-people-worker-experience

now recognised to reproduce and amplify human biases, and the particular capacity for this to exaggerate bias in HR processes is widely acknowledged as deserving of attention. Algorithms can reinforce discrimination if they focus on qualities or markers associated only with particular (already dominant) groups. While some of these markers are easily recognised (e.g. career gaps and gender), the current lack of racial diversity in workplaces across Europe makes markers of racial bias less well recognised.

The digital transformation, and specifically Artificial Intelligence has also been incorrectly deemed gender neutral, while the opposite is true. The need to overcome the gender gap in STEM fields in ICT professions has also been identified as a means to counter vertical and horizontal segregation of the labour market and as a condition to tackle existing gender bias in Artificial Intelligence that is linked to a predominantly male workforce that programs and shapes Artificial Intelligence. When used in recruitment & management processes, Artificial Intelligence reproduces gender bias, targeting women, as well as people of colour and / or people with disabilities, to give only a few examples.

To address and prevent the dangers that are posed by Artificial Intelligence, it is of outmost importance that workers and their unions are fully consulted on the use of AI in the workplace.

Recommendation

- **The review should consider how best to ensure that moves towards the use of Artificial Intelligence decision making ensure equality of outcome and access, including non-discriminatory outcomes**

Workplace Relations Commission

The trade union experience of the WRC has been a generally positive one with timeframes for cases greatly reduced. The WRC has also been generous with their time in participating in training courses for trade union officials in relation to bringing equality cases. It is important however that they continue to examine their processes to ensure that the WRC is as accessible as possible for all groups who are protected under the Equality Acts.

One such matter for example relates to equal status cases. The WRC was established after the Equality Tribunal was disestablished. The majority of cases before the WRC concern employment law. Unlike the Equality Tribunal, the WRC does not have specific processes for dealing with discrimination complaints. Only one WRC complaint form exists and it is tailored to employment complaints, although it is necessary to use it to submit a complaint under the Equal Status Acts. The form contains compulsory fields in relation to employment which are wholly irrelevant to complaints under the Equal Status Acts.

Congress also recommends that the WRC's power to investigate claims is strengthened. This would reduce the burden on complainants to make technical legal arguments and to provide evidence.

Recommendation

- **The WRC continue to examine their processes to ensure that the WRC is as accessible as possible for all groups who are protected under the Equality Acts.**

"Pay gap" information legislation

The International Labour Organisation (2020) has carried out important research into pay gaps faced by migrant workers across 49 countries. It found that in the last five years the migrant pay gap has widened in Ireland to 21 percent from 19 per cent in 2015. [9] 2020 research by the TUC showed that disabled workers now earn a fifth (20%) less than non-disabled workers[10].

Congress believes that the introduction of mandatory pay reporting on ethnicity and other grounds such as disability has the potential to transform our understanding of inequality at work and most importantly, drive action to tackle it where we find it. It would enable employers to identify, consider and address the particular barriers facing various groups in their workplace, and complement and enhance the work that some already do to address gender pay gaps. All large employments will have to do so under the new gender pay gap information act and imminent regulations.

Making it mandatory for employers to report on such pay gaps could provide a real foundation to better understand and address the factors contributing to pay disparities. Also, any pay gap data should be supported by a narrative – comprised of key data, relevant findings and actions plans to address inequalities.

Recommendation

- **Consideration be given to the introduction of mandatory pay gap reporting across other grounds beyond the current legislation, the Gender Pay Gap Information Act 2021.**

[9] https://www.ilo.org/global/topics/labour-migration/publications/WCMS_763796/lang--en/index.htm
[10] https://www.tuc.org.uk/news/disabled-workers-earning-fifth-less-non-disabled-peers-tuc-analysis-reveals