

ENFORCEMENT OF THE PRINCIPLE OF EQUAL PAY

Workshop 6

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1. Introduction

- 1.1. This paper comprises a number of issues for discussion that arise in relation to the enforcement of equal pay between men and women.¹ The pay gap is as a result of discrimination, job stereotyping, occupational segregation and the undervaluing of “women’s work” and part-time work.² This paper will consider a number of issues in respect of the enforcement of the principle of equal pay; a short case study is also incorporated into the paper.

2. Statistics on the gender pay gap

- 2.1. Recital 37 of Parliament and Council Directive on the Implementation of the Principle of Equal Treatment provides that comparable statistics in relation to the treatment of men and women should continue to be developed.³ We have had a number of statistical reports in relation to gender and pay.^{4,5} The gender pay gap for Ireland for the year 2010 was 12.6%; for 2011 was 11.7% and for 2012 was 14.4%. In 2011, men had an average wage of €33,364 and women, an average wage of €24,515.⁶
- 2.2. It should be noted that in 2010, there was an unemployment rate of 13.4%.⁷ As of the end of 2016, the rate of unemployment is 7.5%.
- 2.3. Morgan McKinley, the recruitment firm, published a survey entitled *Gender Pay Gap – Ireland 2016* in November 2016⁸. Salary data from more than 5,500 professionals working in Ireland was collated through an online survey. It was found that the average gender pay gap was 20%. On average men working in like for like professional jobs earn €12,000 more than women. These figures were based on average salary and bonus. However, when these two are split, the average salary gap stands at 16% while the bonus gap goes up as high as 50%. In Ireland, the Programme for Government includes a commitment to put the reduction of the

¹ The background to the various issues and Irish legislation are contained in the thematic reports on *Enforcement of the principle of equal pay for work of equal value between men and women* (October 2016) and *Transparency measures* (June 2016).

² See Karon Monaghan *Monaghan on Equality Law* Oxford 2nd ed. 2013 paras. 6.578-9.

³ See generally Frances Meenan BL and Owen Garvey BL *The Gender Pay Gap in Ireland – A legal review* CLP 2010, 17(11) 225-229.

⁴ Available at www.cso.ie.

⁵ The report measuring Ireland’s progress 2008 published in August 2009 set the gender pay gap at 17%. The pay gap as published in the National Employment Survey 2007 shows that in October 2007, average hourly pay for men was €21.17 compared to €18.91 for women. This amounted to an average hourly wage equal to 89.3% of male hourly pay. In all sectors, men earned more than women. The difference was smallest in public administration and the defence sector with men earning on average €24 per hour while women earned €22.40 (or 93.3% of male pay). The most significant difference in pay was found to be in the financial sector where the average hourly pay for males was €31.99 compared to €23.48 for females (i.e. 73.4% of male pay). The Survey further showed significant differences between the average hourly rate of pay between fulltime and part-time employees with an hourly wage of €21.17 comparing to €15.40. The largest gap between fulltime and part-time hourly rates was in the business services sector with an average hourly wage of €21.37 compared with €13.11. While fulltime male employees had higher hourly earnings than fulltime female employees in all sectors, the survey did note that part-time female employees were found to earn more than their male counterparts in some sectors, including manufacturing and construction. Published in July 2009.

⁶ Available at www.cso.ie.

⁷ At the time Ireland was in the throes of a deep recession. This unemployment rate masked provisions for back to education facilities for the unemployed, significant numbers of persons from the Accession States leaving Ireland and Irish people emigrating.

⁸ <https://www.morganmckinley.ie/>. Accessed 22 November 2016.

gender pay gap formally on the political agenda in what is envisaged will be wage surveys for employers employing more than 50 employees.

- 2.4. The same study states that the key impact factors that affect the gender pay gap are geographical factors (e.g. Dublin with key financial services is the location of senior management); education (the gender pay gap increases along with the education level attained); level in the company and years of experience (the gender pay gap widens with years of experience); discipline or sector (the pay gap is the widest where bonuses are an important part of remuneration); and flexibility.
- 2.5. Morgan McKinley ask as to what are the solutions? Address the diversity issues in recruitment (anonymise the name and gender of the application when presenting a shortlist of candidates); increase the number of females working in STEM related careers; introduction of family friendly work practices; focus on mentoring female professionals; and greater wage transparency (introduction of published wage surveys for employers of 50 plus employers).

3. **Can we learn from other Employment Directives?**

The Hypothetical Comparator

- 3.1. The major problem with regard to the enforcement of equal pay is still the difficulty in obtaining a comparator. The difficulty is enhanced by the unavailability of a "hypothetical comparator". There must be "an actual concrete real life comparator of the other sex" performing "like work".⁹ In Ireland the implementation of Directive 97/81/EC on part-time work¹⁰ provides for definitions of "like work". In the Protection of Employees (Part-Time Work) Act 2001, there is a definition of "like work"¹¹ is drafted in similar terms to the Employment Equality Act. However, in the Act of 2001 where there is not a comparable fulltime employee in the employment concerned where the part-time worker is employed the comparator may be taken from the same industry or sector of employment. Given that women constitute a significant proportion of atypical workers, this legislation can be seen as significant in terms of its potential impact on the levels of pay for female workers. The Act prohibits discriminatory treatment in the terms and conditions of employment of part-time workers and provides for pro rata entitlements with fulltime employees. Before this Act was passed, part-time female employees who considered that they were being discriminated against had to rely on employment equality legislation to pursue a claim. In respect of pay, the female claimant would have had to obtain a male comparator. However, with this legislation the employee need only compare herself with a fulltime employee, regardless of gender. This should significantly enhance the ability of atypical female workers to achieve greater levels of remuneration. In addition, the Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006¹² provides that requests by employees to transfer from fulltime to part-time work, and vice versa or to increase working hours where the opportunity arises should be granted. This should significantly enhance the possibility of continuity of employment for workers.
- 3.2. This legislation highlights the fact that if a part-time female worker wishes to bring a claim for pro rata terms and conditions of employment that she does not have to

⁹ In *Brides v Minister for Agriculture* [1998] 4 IR 250. "Associated" employers were considered in *Abdel-Haq v Health Service Executive* [2010] ELR 189 under the Protection of Employees (Fixed-Term) Act 2003.

¹⁰ Directive 97/81/EC of 15 December 1997 of the Council of the European Communities concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ No.L14, 20.1.1998, p.9).

¹¹ Section 7 of the Protection of Employees (Part-Time Work) Act 2001.

¹² S.I. No.8 of 2006.

find a male comparator. Accordingly, it is arguable that such female worker has a wider choice of comparators.¹³

- 3.3. The issue of “same establishment or service” was considered in the case of *Catholic University School v Dooley*¹⁴ where the claimants were privately paid part-time teachers who compared themselves with a fulltime teacher on an incremental scale whose salary was paid by the Department of Education and Skills. The School argued that the appropriate comparator was a fulltime privately paid teacher employed directly by the School. Ms. Justice Dunne considered that the chosen comparators came within the definition of “comparable fulltime employees” determined that because the Minister determined the terms and conditions of the Department funded teachers and the school determined the terms and conditions of the privately paid teachers that the chosen comparators were not in “*the same type of employment contract or relationship as the claimants with the school*”. For the purpose of the Act, the Department had to be viewed as the employer.
- 3.4. There is similar legislation in relation to fixed-term work under Directive 99/70/EC¹⁵ which was transposed into Irish law by the Protection of Employees (Fixed-Term Work) Act 2003.
- 3.5. The “same establishment or service”¹⁶ was considered in *Lawrence v Regent Office Care Limited*¹⁷ and *Allonby v Accrington & Rossendale College*¹⁸ where the Court of Justice said that although there was nothing in the wording of Article [157(1)] to suggest that the applicability of that provision was limited to situations in which men and women work for the same employer, where the difference identified in the pay and conditions of workers performing equal work could not be attributed to a “single source” there was no body “*which is responsible for the inequality and which could restore equal treatment*”. Therefore, where the claimant and comparator work for different employers and the difference in pay did not derive from legislative provisions or collective labour agreements then the claim did not come within the scope of Article 157(1).
- 3.6. However, when one considers the application of the Directives on part-time work or fixed-term work, if there is no comparator in the employment concerned the claimant may look at the same sector of employment.
- 3.7. This is arguably logical given that there may be collective agreements for certain sectors of employment where there are a considerable number of women, e.g. contract cleaning.

4. Choice of comparators?

- 4.1. The issue of a presumption of indirect discrimination and when that presumption could be rebutted was considered in *Kenny v Minister for Justice, Equality and Law Reform*¹⁹. This case comprised two sets of claims. The first set of eight claims was

¹³ See generally Frances Meenan *Employment Law* chapter 6 Temporary, Fixed-Term and Part-Time Employment 1st ed. Round Hall, Dublin 2014.

¹⁴ [2011] 4 I.R. 517.

¹⁵ Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

¹⁶ *Defrenne (No. 2)* Case 43/75 [1976] ECR 455.

¹⁷ C-320/00; [2002] ECR I-7325.

¹⁸ [2004] ECR I-873.

¹⁹ Case C-427/11; [2013] IRLR 425.

This case was first considered by the Equality Tribunal sub nome 14 *Named Female Employees v Department of Justice, Equality and Law Reform* DEC – E 2005 – O57; on appeal to the Labour Court sub nome *Department of Justice, Equality and Law Reform v Civil Public and Services Union* EDA 0713; [2008] 19 ELR 140; appealed to the High Court and reference to the ECJ sub nome *Margaret Kenny v Minister for Justice, Equality and Law*

referred to what was then called the Equality Tribunal in the year 2000 and the second set of six claims was referred in 2005. The claims were conjoined and investigated together by an Equality Officer in October/November 2005. At the time the first set of claims were presented there were 353 designated posts within the force; 279 of these posts were occupied by male members of the force and 74 were occupied by women. At that time there were 761 clerical officers deployed within the force. A breakdown by gender of those occupying clerical officer posts was not available but is acknowledged that they are held predominantly by women.

- 4.2. The claimants were 14 clerical officers employed by the Department of Justice, Equality and Law Reform who were assigned to clerical duties in An Garda Síochána and made a claim for equal pay. The comparators were members of the force who were assigned to perform certain clerical and administrative duties in An Garda Síochána. At first instance the matter came before an Equality Officer who found that seven of the claims were entitled to succeed and six were not; the respondent and claimants cross-appealed against the said decisions.
- 4.3. At the commencement of the appeal, the Court noted that the respondent would rely on the defence of grounds other than gender to explain any difference in pay between the claimant and their comparators. The Labour Court decided to assume without so holding, that the claimants and the comparators were engaged in 'like work'. The respondent relied on the defence of "*other than gender*" to explain any difference in pay between the claimants and their comparators. They contended that the claimants were paid the rate appropriate to the grade of clerical officer whereas the comparators were paid the rate applicable to their ranks as members of An Garda Síochána. It was, not in dispute between the parties that if the respondent succeeded in making out his defence to the claim that would dispose of the appeal and the cross-appeal in its favour.
- 4.4. The respondent contended that the claimant were paid the rate appropriate to the grade of clerical officer whilst the Comparators were paid the rate applicable to their rank as members of An Garda Síochána. The respondent submitted that this constituted grounds other than sex or in the alternative objective justification for the pay difference and it provided a full defence to the claims.²⁰ If the respondent's defence of grounds other than sex or objective justification were to prevail it would be determinative of the case. Therefore the Court proposed that it should deal with the respondent's defence of grounds other than sex or objective justification as a preliminary issue and for that purpose it should assume without so holding that the claimants and the comparators were engaged in like work. It was agreed that if the respondent succeeded in making out its defence to the claims that would dispose of the appeal and the cross-appeal in its favour. If the defence fails the Court will proceed to deal with all other issues arising in the case. The parties agreed to proceed accordingly.
- 4.5. The Labour Court accepted as objective justification genuine operational reasons for deploying members of An Garda Síochána in clerical posts (being the need for police knowledge and training in the discharge of functions connected to the post or, if that was not the case, the need to extend the process of civilianisation in a manner and at a pace which would attract the agreement of the Garda representative bodies). It was deemed essential to have Gardai undertaking clerical duties in order their continuity of service was provided at all times as these officers were prohibited from going on strike or engaging in any form of industrial action. The determination of the Labour Court was appealed to the High Court who referred a number of questions to the CJEU with regard to the objective justification which

Reform Case C-427/11; [2013] IRLR 425; *Kenny v The Department of Justice, Equality and Law Reform* [2014] IEHC 11, McCarthy J. 13 January 2014; and *Department of Justice, Equality and Law Reform v CPSU* EDA 1518.

²⁰ As per section 19(5) of the Employment Equality Act, 1998 (as amended).

has to be provided by the employer, and in particular whether the objective justification can relate to the category of workers in general or must be applicable to the specific named comparators named by the claimants.

- 4.6. It was also noted by the Labour Court that the practice of reserving certain clerical posts for members of An Garda Síochána had resulted in significantly more men receiving higher pay than women for 'like work'. This gave rise to a presumption of unlawful indirect discrimination. This presumption could only be rebutted by showing that the impugned practice was objectively justified on grounds other than sex.

Reference to the Court of Justice of the European Union

- 4.7. On appeal to the High Court, McCarthy J. referred the following questions to the ECJ for a preliminary ruling:

- "(1) *In circumstances where there is prima facie indirect gender discrimination in pay, in breach of article 141 EC ... and Council Directive [75/117], in order to establish objective justification, does the employer have to provide:*
- (a) Justification in respect of the deployment of the Comparators in the posts occupied by them;*
 - (b) Justification of the payment of a higher rate of pay to the Comparators; or*
 - (c) Justification of the payment of a lower rate of pay to the [Appellants in the main proceedings]?*
- (2) *In circumstances where there is prima facie indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:*
- (a) the specific comparators cited by the [Appellants in the main proceedings]; and/or*
 - (b) the generality of the Comparator posts?*
- (3) *If the answer to Question 2 (b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen Comparators?*
- (4) *Did the Labour Court as a matter of community law err in accepting that the "interests of good industrial relations" could be taken into account in the determination of whether the employer could objectively justify the difference in pay?*
- (5) *In circumstances where there is a prima facie indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the [Respondent]? Should any such concerns have any relevance to an analysis of objective justification?"*

- 4.8. The Irish High Court reference presupposed that there was *prima facie* indirect discrimination but the CJEU questioned this pre-supposition on the basis that the civilian civil servants and the Gardaí had separate qualifications.

The Court of Justice of the European Union

- 4.9. The CJEU noted that the questions raised with the CJEU were on the basis that there was *prima facie* indirect discrimination and that it is only the difference in pay that has been established in the main proceedings. This was as a result of the agreement between the parties that the Labour Court decided to examine the question of objective justification of the *prima facie* case of indirect pay discrimination as a preliminary matter and therefore assumed that the claimants and the chosen comparators were engaged in 'like work' within the meaning of

section 7(1) of the Employment Equality Act 1998. Therefore, the Minister for Justice, Equality and Law Reform had to prove objective justification.

- 4.10. The CJEU stated “.. where seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for the performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 141 EC”.²¹
- 4.11. The CJEU stated at paragraphs 18 and 19 of its judgment that in accordance with the normal rules of evidence that it is in principle for the worker who believes himself or herself to be a victim of sex discrimination in pay to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 141 EC and Directive 75/117 are fulfilled. Paragraph 19 states “It is accordingly for that worker to prove by any form of allowable evidence that the pay he receives from his employer is less than that of his chosen comparators, and that he does the same work or work of equal value, comparable to that performed by his comparators, so that *prima facie* he is the victim of discrimination which can be explained only by the difference in sex....”.²²
- 4.12. If the worker provided evidence “to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied, a *prima facie* case of discrimination would exist. It would then be for the employer to prove that there was no breach of the principle of equal pay by establishing by any legal means, *inter alia*, that the activities actually performed by the two employees were not in fact comparable or by justifying the difference in pay by objective factors unrelated to any discrimination based on sex”.²³
- 4.13. The CJEU noted that it had already decided that in such a case it can rule on the question referred concerning the justification of a difference in pay without first establishing whether the jobs are the same (equivalent).²⁴
- 4.14. However, this presupposes that the claimants and the comparators ‘are in identical or comparable situations’, that it must be ascertained whether the claimants and the comparators concerned perform the same work or work of equal value.²⁵
- 4.15. Therefore, it is for the national court to find and assess on the facts and make the determination as to whether the same work or work of equal value is attributed. This would be required if the referring court were to find that the Labour Court had erred in law in finding that the difference in pay was objectively justified. Then where apparently identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether taking into account the nature of the tasks that may be assigned to each group that the training requirements for the performance of the tasks and the working conditions under which they are performed that the difference groups do in fact do the same work.²⁶

²¹ Kenny para. 28.

²² *Brunnhöfer* Case C-381/99 [2001] ECR I-4961 paras. 52, 53 and 57.

²³ Kenny para. 20.

²⁴ Kenny para. 23 and *Enderby* Case C-127/92 [1993] ECR I-5535 para. 11.

²⁵ Kenny para 24.

²⁶ Kenny para. 26.

- 4.16. Professional training may not be one of the factors for an objective justification for a difference in pay but it is one of the criteria for determining whether or not the same work is being done. It is clear that the training and professional qualifications of the officers of An Garda Síochána assigned to designated posts and to clerical officers are different.²⁷
- 4.17. The parties did not agree to the number of Garda assigned to designate posts who perform solely clerical duties and the number of those who in addition perform tasks to meet operational needs such as communicating with the Europol or Interpol. In exceptional circumstances, Garda officers assigned to designated posts may be called upon to work in the field in order to meet operational needs.
- 4.18. If there is justification for the differences in pay, such justification must be based on a legitimate objective²⁸ and the means for choosing that objective must be appropriate and necessary for the purpose. It is not a case of justifying the remuneration paid to the different groups of comparators or the deployment of workers to one group or another, but it is the justification of the difference in pay.
- 4.19. In relation to indirect discrimination, there may be diverse reasons for the differences in pay may be diverse. There may be national legislation, collective agreements or a practice or unilateral action of an employer. It is for the employer to provide objective justification for the difference in pay between the workers who consider that they have been discriminated against. Where justification must be provided, if the pay of one group of workers is significantly lower than that of another group and if the former are almost exclusively composed of women and the former men, then there is a prima facie case of indirect discrimination when the two groups perform duties which are equal in value and the statistics describing that situation are valid. The statistics have to cover enough individuals and are not just short term phenomena.²⁹
- 4.20. A comparison is not relevant where groups are formed in an arbitrary manner with a view to carrying out successive comparisons.
- 4.21. The interests of good industrial relations may be taken into account to objectively justify a prima facie case of indirect gender discrimination in pay. There must be a real need on the part of the employer. The principles of good industrial relations are subject to the observance of the principle of non-discrimination between male and female workers in terms of pay. This cannot be the only basis justifying discrimination. The interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.
- 4.22. In summary the ECJ answered the questions to the effect that in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators.

Referral back to the High Court

- 4.23. The High Court stated that it could not see that the ECJ had decided that the choice of comparators made in this instance by the claimants was a valid or lawful choice. The Advocate General in his opinion³⁰ addressed the issue and his observations

²⁷ *Kenny* para. 29 and *Wiener Gebietskrankenkasse* Case C-309/97 [1999] ECR I-2865.

²⁸ *Kenny* para 37 and *Cadman* Case C-17/05 [2006] ECR I-9583 para. 32.

²⁹ *Kenny* paras 41 and 43.

³⁰ 29 November 2012.

assist in understanding the principles involved. At paragraph 44 he pointed out that equality was *"a relative or relational concept"* and was *".. nothing more than a right to be treated on the same terms as someone in an equivalent legal situation. Thus, it is a right which is always predicated on a comparison between at least two subjects. .."* and at paragraph 45 made the point *"[t]o be able to refer to a Comparator in a way which demonstrates the difference complained of is therefore the key element in actual pursuing the difference".*

If the difference is borne of the comparison, then its existence depends on the correct identification of the elements compared ..

The Comparator is the element of comparison by virtue of which the difference requiring justification is revealed."

4.24. The A-G also considered that the claimants must provide:

"A valid comparator demonstrating the existence of a group of persons who, in an equivalent situation to their own, receive different treatment in terms of their rates of pay" .. and in respect of this case he did not think

.. that the question is so much whether the relative comparators should be the specific comparators cited by the Appellants or the generality of comparator posts".

But that ".. the deciding factor is rather, whether the Appellants have been able to show that there is a representative number of workers, who although they do work that is equivalent to the work done by the Appellants are nevertheless paid at a higher rate".

And added:

"..the important point is whether the Appellants have been able to provide an appropriate Comparator for the purposes of establishing the existence of "a relatively large number of employees" who do the same work as the Appellants but are paid at a higher rate"."

4.25. He said that the claimants must establish:

".. a relatively large" number of men, or "enough" of them, are engaged in equivalent work and are paid at a higher rate than .. "the Appellants)" and in conclusion stated that:

"the important thing, in my opinion, is that, using the information provided by the Appellants, the National Court should be in a position to reach the firm view, in accordance with the applicable rules of evidence under the national procedural law, that the claimed difference actually exists, since [on the basis that] an unequivocally representative number of men who perform the same work as the Appellants are nevertheless paid at a higher rate".

4.26. Then for the guidance of the Labour Court, the law was summarised as follows:

- (i) "All issues arising in a claim of the present kind must be determined by the use of the same comparators.
- (ii) The comparators are valid comparators only if they cover enough individuals, do not illustrate purely fortuitous or short term phenomena and in general appear to be significant.
- (iii) Valid comparators cannot be based upon groups formed or individuals chosen in an arbitrary manner or on an artificial or unrepresentative basis. In this context it is, of course, to state the obvious that the choice must be made from the whole cohort of persons with whom one seeks parity.
- (iv) One cannot simply discard a succession of persons or classes in the cohort to arrive by a process of elimination, of classes within the whole group whose members are performing the same work.
- (v) The comparators must be in an equivalent situation to the claimants.
- (vi) The comparators must constitute as stated by Advocate General Cruz Villalón:

"A relatively large number of employees" who do the same work as the claimants but are paid at a higher rate ... [i.e.] a "relatively large number of men" or "enough of them".

Therefore the claimed difference must be on the basis of "an unequivocally representative number of men who perform the same work".

- 4.27. McCarthy J. considered that the comparators should be drawn from the generality of those engaged in Garda clerical duties as submitted by the claimants. His reasons were as follows namely that Gardaí and clerical officers are all performing clerical duties connected with policing; the present system or structure for performance of clerical duties has its origins in a policy of which all are beneficiary; on the claimant's case Gardaí who perform clerical work on a part time basis perform like work; there is plainly a great deal of overlapping work between the Gardai who fill posts where a Garda membership or expertise is essential of their nature and that of clerical officers; the number of persons in the chosen comparators class is precisely unknown but on any view of the evidence it is a modest proportion of the generality and an even smaller proportion of the total number of those involved in clerical work; the class from which the claimant's comparators are insufficient in themselves to be of significance for a valid comparison; to arrive at the chosen class of Garda engaged in any pure clerical work involves the forbidden course of excluding successive classes to arrive at an unrepresentative one, favourable, it is conceived, to the claimants and the choice pays no or no proper regard to the rationality relevant principles which have been elaborated above.
- 4.28. With respect to objective justification the first ground would be the deployment of Gardai to certain clerical posts on operational grounds; and the second ground pertains to industrial relations. The fact that the Commissioner has chosen for whatever reason to assign Gardaí to these tasks cannot justify a differential in pay. The objective justification for a differential should not be confused with the practical reasons which have led to it. The ECJ at paragraph 38 set out:
"Contrary to what the referring court appears to accept [I think, here, the ECJ must have been referring to the Labour Court], it is therefore not a question of justifying the rate of remuneration paid to the different groups of comparators or the deployment of workers to one group or the other, but rather of justifying the difference in pay in itself."
- 4.29. In the light of the conclusions, the matter was remitted to the Labour Court and the Court should adopt the following approach namely:-
- (i) "It should first choose comparators – all else follows from this. These should be drawn from the generality of all those engaged in clerical work for or as members of An Garda Síochána, that being the class for which the respondent's contend: they should be used for all purposes.
 - (ii) By reference to validly chosen comparators, it should then address the issue of whether or not the work performed by the claimants is like work.
 - (iii) If the work is held so to be, the Court should then address the issue of whether or not the differential in pay is objectively justified. For the avoidance of doubt, this will not involve consideration of the reasons for the assignment of Gardaí to certain posts as done at the instigation of the respondents when the case was before it.
 - (iv) Insofar as it may be necessary to deal with industrial relations issues, they cannot of themselves be the sole basis justifying a differential, but regard may be had to them as one of a number of factors.
 - (v) Consideration must be given to the context in which the generality work – by definition this will extend to taking into account the nature of not only the clerical work but all police work, including all incidents of service to An Garda Síochána."

Referral back to the Labour Court

4.30. This matter was referred back to the Labour Court which issued its determination on 26 November 2015. The Court heard submissions from the various parties and will choose the comparators. Those comparators will be drawn from, and be representative of, all members of An Garda Síochána of Garda rank who perform clerical work (other than to a de minimis extent) in the course of their duties. The Court does not believe that this extends to the entire membership of the force of Garda rank. This will include those Garda who perform ordinary policing duties and clerical work for or as members of An Garda Síochána.

4.31. The Court was to hear further submissions.

5. Civil Legal Aid

5.1. In Ireland, civil legal aid is not generally available for claimants in respect of gender discrimination. However, the Irish Human Rights and Equality Commission may provide legal assistance to a person who in their opinion needs such assistance more usually where there is a point of principle involved.³¹

6. Right to Information

6.1. The Irish Programme for Government (May 2016) provides that there will be "[W]age transparency by requiring companies of 50 and more to complete a wage survey".

6.2. When seeking information, it is fundamental to remember that "remuneration" has a broad definition.³²

6.3. Section 76 of the Employment Equality Act 1998 (as amended) provides for a right to information. If a person ('X') considers *inter alia* that 'another person ('Y') who is responsible for providing remuneration to X is not providing that remuneration as required by an equal remuneration term,..' and needs assistance in order to decide whether to bring a claim under the legislation and in the event of such a claim the person needs to present their claim in the most effective manner, then the person may question the employer so as to obtain material information. The employer if it wishes may answer the questions. However, if the questions are not answered then the Director General of the Workplace Relations Commission or the Circuit Court may draw such inferences as are appropriate from a failure to supply such information.³³

6.4. The 'information' for the purposes of the Act is 'material information' if it is –
(a) 'Information as to Y's reasons for doing or omitting to do any relevant act and as to any practices or procedures material to any such act,
(b) Information, other than confidential information, about the remuneration or treatment of other persons who stand in relation to Y in the same or a similar position as X, or

³¹ See section 40 of the Irish Human Rights and Equality Commission Act 2014.

³² Remuneration has a broad definition as defined in section of the Employment Equality Act 1998. It does not include pension rights but includes 'any consideration, whether in cash or in kind which the employee receives, directly or indirectly, from the employer in respect of the employment. Therefore all aspects of gross remuneration can be sought and obtained. However, net remuneration should not be released as this would be a breach of confidentiality as it would incorporate an employee's income tax deductions, Pay Related Social Insurance and any other levies required by law. 'Occupational benefits' mean benefits in the form of pensions and fall within the scope of the Pensions Acts 1990-2015.

³³ Section 81 of the Employment Equality Act 1998 (as amended). Note also *Irish Ale Brewries Ltd. v O'Sullivan* EDA 6/2011; [2007] ELR 150.

(c) Other information which is not confidential information or information about the scale or financial resources of the employer's business and which, in the circumstances of the case in question it is reasonable for X to require.'

'Confidential information' means 'any information which relates to a particular individual, which can be identified as so relating and to the disclosure of which the individual does not agree'. Therefore, it is clear that the provision of information is restrictive. The Employment Equality Act 1998 (Section 76 – Right to Information) Regulations 1999³⁴ provides a statutory form on which the claimant or prospective claimant may seek information from the employer and the statutory form on which the employer may provide the information.

6.5. It would be useful to have provision for a case management conference in respect of cases where there are a large number of claimant/ comparators. This should assist all parties.³⁵³⁶ Witnesses may give evidence and be cross-examined; a member³⁷ of the court may ask questions of a witness. In addition the court may seek further information from either party and may make preliminary rulings on any matter.

6.6. Section 19(4) of the Employment Equality Act 1998 (as amended) provides that statistics are admissible in any proceedings in an equal pay claim based on indirect discrimination. The Labour Court has stated³⁸ that statistics are frequently used as an evidential tool in seeking to establish a prima facie case of indirect discrimination. Statistics can be used to show that a particular provision, criterion or practice puts a person of one gender at a particular disadvantage relative to those of the other gender. There can be situations where there is no discernible provision, criterion or practice but statistical evidence can be adduced to show that persons in a particular category are disadvantaged compared to those in another category. The Equality Tribunal (now adjudication officers), the Labour Court and the High Court have followed the jurisprudence of the ECJ/CJEU namely *Enderby*³⁹ and *Seymour-Smyth*⁴⁰. The latter was adopted in *King v Minister for Finance*⁴¹ by the Labour Court and upheld by the High Court. In summary, the Labour Court has summed up that a practice, criterion or provision can be held to be indirectly discriminatory where it bears significantly more heavily on workers of one gender relative to those of the other gender. The statistics must suggest something that is systemic or indicative of a pay structure that is intrinsically discriminatory, rather than fortuitous or a short-term phenomenon.⁴²

³⁴ S.I. No. 321 of 1999.

³⁵ The Irish Workplace Relations Commission has published 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints'. See Meenan, F. (2015), *Employment Law First Supplement to the First Edition*, Dublin, Round Hall Thomson Reuters pp. 117-123. November 2015. <https://www.workplacerelations.ie/en/>. Accessed 4 October 2016.

³⁶ In the case of an appeal from an adjudication officer of the Workplace Relations Commission, the Labour Court (Employment Rights Enactments) Rules 2015 provide that an appeal from a decision of an adjudication officer shall be initiated by notice in writing within 42 days from the date of the decision being appealed. The Rules require that the grounds of appeal be set out in the notice and then the factual and legal submissions must be filed within three weeks of initiation of the appeal. There is provision that there may be a case management conference before the court in advance of any hearing. The parties to an appeal must send a notice with the names of the witnesses that will be called along with witness statements and any document that the parties intend to rely on in the course of the appeal. An appeal hearing is a de novo hearing of the complaint. These Rules are made pursuant to section 20 of the Industrial Relations Act 1946 as amended by section 52 of the Workplace Relations Act 2015. <https://www.workplacerelations.ie/en/>.

³⁷ Each division comprises the Chairman (or deputy chairman), the employer member and employee member.

³⁸ *Nationalist & Leinster Times Ltd. v Ashmore* EDA 13/3.

³⁹ C-127/92 [1993] ECR I-5535.

⁴⁰ C-1676/97.

⁴¹ [2010] IEHC 307.

⁴² The Labour Court decision in *Nationalist & Leinster Times Ltd. v Ashmore* EDA 13/3 provides a useful and clear determination on the use of statistics in claims of indirect discrimination.

- 6.7. When seeking information it is important to not only seek documentary evidence but all other discoverable information whether it be electronic or otherwise. One cannot discount the individualisation of pay rates.
- 6.8. There is a right to access of personal data under the Data Protection Act 1998-2003.⁴³
- 6.9. A request can be made under the Freedom of Information Acts 1997-2014 which apply to the public sector only to obtain rates of remuneration, however, a person's personal information cannot be obtained thereunder.
- 6.10. The Workplace Relations Commission has the right of entry and inspection of an employer's premises.⁴⁴
- 6.11. There is an issue that employment claims that are brought under the various employment statutes are brought to the Workplace Relations Commission and on appeal to the Labour Court where either party do not have the normal access of bringing applications for inspection and discovery. These claims are not brought in courts of law and thus claimants do not have the same rights and entitlements to a person bringing a personal injury claim, for example.
- 6.12. Costs may not be awarded to a successful employee claimant, for example.

Irish Human Rights and Equality Commission

- 6.13. Section 35 of the Irish Human Rights and Equality Commission Act 2014 provides that the Commission may conduct an inquiry if it is considered that there is any body, institution, sector in society or geographical area where there is evidence of a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons or a systematic failure to comply with human rights or equality of treatment obligations where the matter is of grave public concern and in the circumstances it is necessary to carry out the inquiry. If during the course of the inquiry or after such inquiry has been conducted, the Commission may if it is satisfied that any person has inter alia contravened or is contravening section 8(4) of the Employment Equality Act 1998 (as amended) (an employer shall not have rules or instructions which would result in discrimination against an employee or a class of employees in relation to conditions of employment, promotion or re-grading of posts or the classification of posts), or has failed to comply with an equality clause or an equal remuneration term or has violated or is violating human rights.
- 6.14. The Commission may invite a particular undertaking or group of undertakings making up a particular industry or sector thereof to carry out an equality review in relation to that undertaking or those undertakings. An equality review is an audit of equality of opportunity which exists in employment in a particular undertaking or group of undertakings making up a particular industry or sector. There should be an examination of the practices of and procedures to see if such practices and procedures are conducive to the promotion of equality of opportunity. Further to such review, there may be an 'equality action plan' is a programme of actions that is prepared by the undertaking or by the Commission to be implemented in the undertaking to further promote equality of opportunity in the employment concerned. The Commission may carry out an equality review or carry out an equality action plan in relation to any undertaking comprising 50 or more employees or group of undertakings or such undertakings making up a particular industry or sector. Such review may refer to a particular aspect of discrimination.

⁴³ However, there is privacy in respect of a person's personal data.

⁴⁴ See *Foley v Workplace Relations Commission* [2016] IEHC 585.

7. Sanctions or damages?

- 7.1. The Irish legislation provides that an adjudication officer may make an order in respect of arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for ongoing equal pay.⁴⁵ If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Interest may be awarded and the Circuit Court may award costs. If a claimant also succeeds in a victimisation claim, they may get an award of up to an additional two years' remuneration.⁴⁶ There may also be an order to take a specified course of action, e.g., an equality review of the employment concerned.
- 7.2. Article 18 of Directive 2006/54 provides for measures that covered in full the loss and damage sustained but did not provide for punitive damages. Article 25 allowed but did not require Member States to introduce the payment of punitive damages.⁴⁷

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⁴⁵ Section 82 of the Employment Equality Act 1998 (as amended).

⁴⁶ If a claimant also succeeds in a victimisation claim, then the maximum amount which may be ordered by the Director General of the Commission by way of compensation in any case where the claimant was in receipt of remuneration at the date of the reference of the claim, or if it was earlier, then the date of dismissal an amount equal to the greatest if 104 times the amount of that remuneration determined on a weekly basis, 104 times the amount, determined on a weekly basis which the claimant would have received at that date but for the act of victimisation concerned, or EUR 40 000.

⁴⁷ *Camacho* Case C-407/4; [2016] ICR 389.