proceedings are given appropriate facilities and guidance to understand any charges laid against them and to know their rights to fully defend their position. The Court stated that the failure to ensure this could amount to discrimination.

A very term "shifting burden of proof" has gained some bad press with lawyers and other practitioners. It is sometime seen as an artifice which is used to attack the sacrosanct presumption of innocence. The terminology associated with it which is rooted in EC Directive-speak may bear some responsibility for this view. However, the development of the principle has been an essential part of the development of anti-discrimination law as an effective protection of rights. Courts in this jurisdiction, the UK and Europe have frequently restated the rationale for this approach as it was recited in the 1989 Social Charter:

> "plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that is practice is not in fact discriminating."[12]

Although arguments as to how, when and where the burden of proof should shift will continue to be advanced in each individual case, the principle itself is now firmly established in all jurisdictions of the EC.

[12] *Igen Ltd & Ors v. Wong* [2005] E.W.C.A. Civ. 142.

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# Sexual Orientation and the Management of a Diverse Workplace – Law and Best Practice

FERGUS RYAN*

Recent years have witnessed a growing appreciation of the importance of fostering a healthy respect for diversity in the workplace. The moral, social and political reasons in support of diversity are worthy and well rehearsed. There are also, however, good hard headed economic reasons favouring the promotion of employee diversity. A dynamic organisation depends to a large extent on the combined and diverse talents of its staff. It stands to reason, therefore, that the more diverse a workforce, the richer the inputs – and outputs – one may expect from one's employees. In an ever evolving and increasingly challenging business environment, the viability of a business depends largely on the ability of its staff to adapt and cope creatively in the face of often volatile market trends. The wider the pool of talent, the more diverse the range of experience and knowledge, the more responsive the company can be to new trends and developments. In addition, with an increasingly diverse customer base, the quality of one's response to clients and customers will depend significantly on one's appreciation of the needs of a range of client groups.

A diverse workforce nonetheless poses certain challenges. Almost by definition a homogenous workforce is more easily managed: in short, like people tend to think alike. A common framework of understanding largely obviates the possibility of conflict, and divergence in the workplace. A more heterogeneous workforce thus places additional challenges on management and fellow staff alike. The potential for misunderstanding, tension and conflict is heightened, and the risk of litigation thus correspondingly increased. Nevertheless, good management, responding pro-actively to the greater diversification of the modern workforce can override these challenges, harnessing the unique talents of employees to the overall advantage of the employer and employees alike.

## SEXUAL ORIENTATION DIVERSITY AND THE WORKPLACE

With net immigration into Ireland at an all time high, issues of ethnic diversity have received increasing attention in recent years. Diversity in terms of sexual orientation and sexual identity has received comparatively less attention. This may simply reflect the fact that members of sexual minorities, though possibly equivalent in numbers, are generally less visible than other minorities. Unlike gender and ethnicity, sexual orientation tends not to be an immediately obvious

feature of the individual employee. The difficulty in identifying gay and lesbian employees is often compounded by the employee's own concealment of sexuality.

Indeed, a 1995 study of gay men and lesbians in Ireland revealed that only 42% of those surveyed were "out" at work.[1] An employee may choose to conceal their sexuality for many reasons: Fear of a negative reaction is possibly the primary reason. A belief that sexuality is a private matter not relevant to the job in question may also be a factor.[2]

This latter point would not in itself be considered problematic if companies and their workers were in fact entirely neutral as regards the sexuality of workers and work colleagues respectively. In fact this is rarely the case. In most workplaces, heterosexuality tends to be the default sexual orientation. In short, unless one is positively identified or positively identifies as gay, the assumption is made that one is heterosexual. This form of exclusion comprises what is sometimes called "heteronormativity." In the employment context, "heteronormativity" refers to the practice of assuming (until otherwise informed) that all persons in a particular workplace exclusively are heterosexual. In itself, this is not necessarily an unreasonable assumption to make - the very large majority of most companies' employees will in fact generally be heterosexual. Problems arise, however, when this assumption is universalised to include *all* employees.

Studies have also shown that even where employees are ostensibly open about their sexuality, the employee may nonetheless manage or conduct himself in a manner that tones down the significance of the orientation. As the sociologist Goffman has observed, even "...persons who are ready to admit possession of [what is perceived to be] a stigma...may nonetheless make a great effort to keep the stigma from looming large".[3] Yale Law Professor Kenji Yoshino called this "covering", conduct that serves to acknowledge but nonetheless "downplay" the relevant orientation, that "... makes it easier for others to disattend" the orientation of another.[4]

While this adaptation may make for simpler intra-staff relations, the impact on gay men and lesbians in the workplace and for workplace relations generally can ultimately be detrimental. The pressure to conceal a sexual orientation, or to distract fellow employees from its significance, can place unnecessary stress and pressure on gay and lesbian employees. Heteronormative practices may ultimately lead to alienation among gay and lesbian staff, with such employees being more likely to disengage from a workplace – or leave it – on account of a perception that it does not welcome staff members who are gay or lesbian.

## LEGAL CONSTRAINTS ON DISCRIMINATION

For human resources professionals this latter point is a cause for concern. Given the work involved in recruiting and training talented staff, the prospect that a negative or unsupportive work environment might lead to a loss of staff should be viewed as a serious HR deficiency. The dangers for management are further compounded by the increasingly tight legal environment governing equality in the workplace, and in particular by the provisions of the Employment Equality Acts 1998–2004.

In former times, employees who were gay or lesbian found themselves in a particularly precarious position, the law providing no means of redress should a person be sacked or otherwise prejudiced on account of his or her sexual orientation. The first inklings of change in this regard came very quietly, in 1988, in the form of a Department of Finance Circular banning discrimination on the grounds of sexual orientation throughout the civil service.[5] In 1993, moreover, the Unfair Dismissals Act, 1977 was amended to include sexual orientation as an impermissible basis for the sacking of an employee, in this case across all sectors of employment, private and public alike.[6]

The most wide-ranging reform, however, came in the wake of the Employment Equality Acts, 1998-2004. The overriding principle in this context is that in all matters relating to the employment of a person, any one or more of a variety of grounds, including sexual orientation, should not be used as a motivating criterion for the making of a decision. This means that in selecting new employees and in promoting existing employees alike, sexual orientation should not be a factor. Similar principles apply in relation to the establishment of the conditions of employment, (including the payment of staff and the allocation of workloads), opportunities for progression and re-grading, the training of employees and the classification of posts. Likewise, a decision to dismiss a person, or to make a position redundant, motivated in whole or in part by the sexual orientation of the person holding that post, is no longer permitted.

The Act bans both direct and indirect discrimination. Indirect discrimination arises where a measure that, though formally neutral, leads to differentiation in practice between persons of different sexual orientation. This may arise, for instance, where preference is given to married persons over unmarried, or where childless workers are favoured over those with children. (Such conduct may also directly infringe the ban on discrimination regarding marital status and

[1] GLEN/NEXUS, *Poverty, Lesbians and Gay Men: The Economic and Social Effects of Discrimination,* (Combat Poverty Agency, Dublin, 1995).

[2] See further, Woods, *The Corporate Closet, The Professional Lives of Gay Men in America* (Free Press, New York, 1993).

[3] Goffman, *Stigma: Notes on the Management of Spoiled Identity,* (1963).

[4] Yoshino, "Covering", 111 Yale L.J. 769 (2002) at 772.

[5] Department of Finance Circular, 21/88, June 22, 1988).

[6] S.5(a), Unfair Dismissals (Amendment) Act 1993.

family status). The Act also generally proscribes advertising that suggests an intention to discriminate as well as policies that differentiate unlawfully. For instance, a code of conduct might quite appropriately ban sexual behaviour in the workplace, but its validity would depend on its being applied indiscriminately to heterosexual, bisexual and homosexual transgressors.

The banning of sexual orientation discrimination is further mandated by Council Directive 2000/78/EC, adopted November 27, 2000, establishing a general framework for equal treatment in employment and occupations (generally known as the "Framework Directive"). The adoption of this directive led in turn to the enactment of the Equality Act, 2004 which (noting the allied grounds of marital status and family status: questions and remarks that require a person to discuss either would more than likely fall foul of the Act.

Best practice also suggests that it is prudent to adopt, publish and circulate widely a comprehensive and explicit equality policy, accompanied by a robust complaints and grievance process. The dangers of implicit understandings around equality cannot be understated. No matter how fair-minded and liberal management may be, an organisation should never assume that it does not need an equality policy. In *Atkinson v. Carty*[7] (a case of alleged sex discrimination), for example, the absence of an explicit complaints procedure contributed significantly to a finding that the plaintiff had suffered discrimination.

## THE SCOPE OF THE LEGISLATION

For these purposes it is important to note that the employee in question need not be homosexual or bisexual. The legislation equally applies to *heterosexual* employees, 'sexual orientation' being defined as including a heterosexual, homosexual and bisexual orientation. (section 2, Employment Equality Act 1998 (henceforth, the "1998 Act")). In short, the guiding principle in this context is that the sexual orientation of an employee should not be deemed relevant in the context of his or her employment. This means, for instance, that as a general rule a decision to treat a person *more favourably* because he or she is gay or lesbian would be equally as illegal as conduct that disadvantaged a person on the same basis.

It is also unlawful to discriminate against a person on account of a sexual orientation wrongly imputed to that person.[8] In other words, an employee or prospective employee may complain that she was discriminated against on the basis of a *perception* that she was of a particular sexual orientation, even if the perception were unfounded. An allied point concerns discrimination against persons on the basis of an association with another person of a particular sexual orientation. It would, for instance, be unlawful to deny a promotion to a heterosexual woman on the basis that a family member was known to be gay.[9]

The Act does not explicitly include a transgendered status in its definition of "sexual orientation". In fairness, the term "sexual orientation" describes only the sexual and emotional preference of a person for other persons. Transsexuality, by contrast, concerns a more self-directed matter, that of one's personal gender identity, that is, how one perceives oneself in terms of gender. As such, it is probable that 'sexual orientation', in this context, does not include a transgendered orientation. That is not to say, however, that the Acts do not protect transsexuals – quite the contrary. In fact, transsexuals enjoy even more rigorous protections than other sexual minorities. It is now well established that for the purpose of employment law, discrimination on the basis of a transsexual orientation is deemed to constitute sex discrimination[10] and thus attracts the very onerous provisions of the Acts applying to discrimination on this ground.

## EXCEPTIONS: PERMISSIBLE DISCRIMINATION

A number of exemptions apply in this context, the most significant of which concerns faith-based organisations. Section 37(1) of the 1998 Act allows medical, educational and religious organisations that are run in accordance with the rules of a particular religious denomination to discriminate on certain grounds with a view to protecting their religious ethos. This means that a hospital or school run in accordance with the principles of a particular faith may lawfully discriminate against gay and lesbian employees, though only if the ethos of the organisation requires such discrimination. A heavy burden, however, lies on the relevant organisation to establish that the action involved is reasonably necessary in order to uphold its religious ethos. The action taken by the employer moreover must be proportionate, that is, no more than is strictly necessary to protect its ethos.

In this regard, it is arguable that the ethos clause only arises insofar as the relevant employee is or intends to be open about their sexuality. The simple fact that a person is gay or lesbian might not, in itself, be sufficient to justify a decision not to employ or promote that person. If a person were to agree to remain discreet about their sexual orientation, it is unlikely that the exception would permit the employer to discriminate.

The resulting "don't ask, don't tell" policy is, nonetheless, unfortunate. The net effect is that gays and lesbians seeking employment with religious employers may only be employed if they remain in or return to the closet. As the Equality Authority has observed, "... the inclusion of this clause has

[7] [2005] 16 E.L.R. 1.
[8] S.6(1), 1998 Act, as amended by s.4, Equality Act 2004.
[9] S.6(1)(b), 1998 Act, as amended by s.4, Equality Act 2004.
[10] See C–13/94 *P. v. S. and Cornwall County Council* [1996] I E.C.R. 2143.

reinforced fear of discrimination against workers in religious-run institutions ... and makes it even more difficult for such workers to be open about their sexuality".[11] The potential disadvantages for faith-based employers may not be so obvious: faced with the possibility of working in such an unpalatable environment, many gay and lesbian workers will likely prefer to practice their skills and talents elsewhere.

Another problematic exemption applies to workplace practices that favour the family members of employees.[12] Employers are entitled to grant to family members of employees certain benefits not accorded to the public generally. Benefits may also be bestowed in respect of an event related to members of the employee's family or any description of those members. This might include for instance marriage, (from which same-sex couples are excluded) or the birth of a child.

Ironically (given that this is a measure seeking to promote equality) the Act of 1998 effectively confines family membership for this purpose to persons related to the employee by blood, marriage or adoption, thus excluding non-marital partners.[13] Given that partners of the same sex cannot marry, this then means that it is legally possible to ring-fence these benefits in a manner that indirectly favours heterosexual employees. The Parental Leave Act, 1998 similarly confines the right to *force majeure* leave – an employee could demand such leave in respect of an emergency related to a spouse or opposite sex partner, but not, it seems, a same-sex partner.[14]

Best practice would nonetheless suggest that the partners of gay and lesbian employees should be included in such instances. The fact that the law does not require recognition of a same-sex partner does not mean that employers may be complacent. Exclusionary practices undermine staff loyalty, increasing alienation and potentially diminishing the commitment of workers to the goals of their employer. Given that employers are not generally required to recognise non-marital partners, the goodwill to be gained by so doing is arguably quite considerable.

Exemptions also apply in relation to workers employed in a private household and also where sexual orientation is a legitimate, genuine and determining occupational requirement for the qualification.[15] Although it is possible to identify areas of employment in which an awareness of and sensitivity to gay and lesbian issues might be relevant, (the post of lesbian or gay sexual health specialist might be one example), it is arguable that such occupations would not necessitate that the holder in fact *be* gay or bisexual.

[11] *Implementing Equality for Lesbians, Gays and Bisexuals* (Equality Authority, Dublin, 2002), 60.
[12] S. 34(1), 1998 Act.
[13] S.2, 1998 Act.
[14] S.13, Parental Leave Act 1998.
[15] S.37(2), 1998 Act, as amended by s.25, Equality Act 2004.

## HARASSMENT IN THE WORKPLACE

The Employment Equality Acts 1998–2004 also ban harassment directed at a person on account of his or her sexual orientation.[16] Such harassment may occur at the hands of an employer, a fellow employee (including a subordinate) or a customer or client of the business. For these purposes harassment refers to "... any form of unwanted conduct related to any of the discriminatory grounds" one of which is sexual orientation, being conduct which "... has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person." The Act also bans sexual harassment. Notably, the perpetrator and victim alike may be of either gender and may, moreover, be of the same gender. The legislation thus potentially extends to sexual harassment between parties of the same sex.

The Acts cover more than merely words. "Conduct", for these purposes, embraces requests and spoken words but also includes acts, gestures, or the production, display or circulation of written words, pictures or of other visual representations. The intention or purpose of the alleged harasser, moreover, is not conclusive. In other words, the fact that the person accused of harassment did not intend to cause offence, even that he or she is embarrassed or upset to be told that offence was caused is not, in itself, a defence to a charge of harassment. In the context of sexual orientation, in fact, the alleged harasser may claim not to have intended to cause offence simply because he or she assumed that the audience for the comments in question did not include homosexuals or that the conduct in question was not directed at any particular gay or lesbian employee. Neither claim amounts to a feasible defence of the conduct in question.

In all circumstances, the reaction to an allegation of harassment must be proportionate. In many cases, the allegation may be addressed informally by speaking to those involved and resolving any misunderstanding. The employer must, however, ultimately act in an effective fashion. Failure to act effectively may lead to the employer being deemed vicariously liable for the conduct of its employees.

In this regard, the Massachusetts case of *Salvi v. Suffolk County*[17] is instructive. The plaintiff in this case, a corrections officer who was gay, suffered serious and consistent harassment at the hands of co-workers on account of his sexuality. When Salvi complained to his employer, the latter failed to take any appropriate action. In fact, the employer appears to have punished Salvi for raising the issue, by altering his work assignments in a manner prejudicial to the plaintiff. This combination of inaction and retaliation proved costly. In the circumstances, a jury ruled that

[16] S.14A, 1998 Act as amended by s.8, Equality Act 2004.
[17] 00-3374 (Mass. Super. Ct., June 30, 2003).

the employer had unlawfully discriminated against the plaintiff, awarding $624,000 in damages.

In a recent British case, a manager of a waste management company was awarded £35,345 in compensation for constructive unfair dismissal arising from persistent anti-gay comments made by both his superiors and by subordinate staff.[18] Although the plaintiff, Mr. Whitfield, never made an issue of his sexuality at work (seeing it as a "private matter"), colleagues constantly belittled him, regularly referring to him as a "queer" and a "queen" and as someone who "likes poofy drinks and handbags". The company had not come to his aid – in fact senior management appeared to have been significantly complicit in the matter.

## CONCLUSION

There are undoubtedly, then, good legal reasons for treating minority staff members with respect. Nonetheless, issues of wider significance also arise. While a manager will be concerned to ensure compliance with the law, and the avoidance of liability for discriminatory acts, a workplace that appropriately accommodates the diversities of its staff members will reap benefits beyond merely avoiding litigation: These include:

- **Employee loyalty:** Gay and lesbians employees are more likely to become and remain loyal to a company in which their sexual orientation is either not an issue or is openly accepted.
- **Continuity in Employment:** As a corollary to the above, gay and lesbian employees are more likely to remain in a workplace in which they feel valued and appreciated as individuals. Workers who feel that their sexuality is or may be an issue in a particular workplace are more likely to leave, with the attendant inconvenience and cost of recruiting and training new staff. (The GLEN/Nexus Report (*op. cit*) indicated that 23% of gay and lesbian respondents had left a job because of issues around their sexuality.)
- **Employee focus:** Closeted employees often expend considerable energy maintaining the appearance of heterosexuality. Arguably such energy and creativity would be put to better use in the service of the company. The stress of maintaining the pretence of heterosexuality, or of avoiding awkward questions may also impact on the health of the employee.
- **Creativity:** The dynamics and creativity of a workplace are likely to be affected by the openness with which members of staff deal with diversity. In a workplace in which creativity and openness to new ideas are valued and encouraged, a working atmosphere that stymies individual self-expression and openness may in fact considerably frustrate such creativity.
- **Industrial Relations:** Many prominent unions, including IMPACT, ESBOA and MSF, have adopted policies favouring sexual minorities and opposing discrimination on the basis of sexual orientation.
- **Customer loyalty:** Gay and lesbian customers will tend to be more likely to do business with a company that openly embraces diversity. Indeed, many companies in the United States advertise inclusive employment policies with a view to securing a gay and lesbian customer base. (In Baker, Strub and Henning, *Cracking the Corporate Closet* (Harper Business, New York, 1995), U.S. companies are rated based on the existence or otherwise of gay-friendly policies. The implication is that readers should not buy from, or invest in, companies that do not rate well.)

A 1992 report *Out at Work*,[19] identified a number of supportive strategies, the most notable of which were encouraging active support from colleagues and the adoption of a clear, explicit equality policy, including an affirmation of support for all workers, regardless of their sexual orientation. Measures that effectively and proportionately address anti-gay behaviour, if and when it arises, are also integral to the creation of a workplace in which gay, lesbian and bisexual workers feel safe and supported. These measures stand to benefit not only the employee – employers too will profit and not merely in terms of avoiding legal liability. A genuine and overt commitment to diversity thus offers potential benefits for all involved, workers and employers alike. A management team that takes pro-active steps to accommodate diversity within its workforce will thus reap rewards beyond the legal sphere alone.

[18] Wainwright, "Landmark ruling on homophobic taunts", *The Guardian*, January 29, 2005.

[19] Labour Research Department, London, 1992.

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