

ADJ-00010217

ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00010217

Parties:

	Complainant	Respondent
Anonymised Parties	<i>A General Store Assistant</i>	<i>A Large Company</i>

Complaint:

Act	Complaint Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under section 77 of the Employment Equality Act, 1998	CA-00013308-001	25/08/2017

Date of Adjudication Hearing: 12/02/2018

Workplace Relations Commission Adjudication Officer: Patsy Doyle

Procedure:

In accordance Section 79 of the Employment Equality Acts, 1998 - 2015, following the referral of the complaint to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint.

Background:

This is a claim submitted by the complainant that she was discriminated and harassed by the Respondent on the ground of sexual orientation, contrary to S.6(2)(d) and 14 (A) of the Employment Equality Acts. The Respondent has denied the claim and advanced a defence under Section 14(A) (2) of the Acts. Considering the sensitivity of the subject matter at the heart of the claim, I have exercised my discretion and

anonymised the decision.

Both parties were represented at hearing, the complainant by her Union and the Respondent by their Human Resource support company. Both parties submitted extensive oral and written submissions.

I held a joint hearing of the parties on February 12, 2018. Supplementary submissions were received from both parties and have been incorporated into this document.

Summary of Complainant's Case:

The Complainant commenced employment with the respondent as a general shop assistant on a part time basis on 21 December 2016. She worked an average of 31 hours per week and received a wage of €9.35 per hour. The Complainant introduced her sexual orientation as lesbian. She submitted that she had been discriminated and harassed on this ground while in the respondent employment. She resigned her employment on 4 December 2017.

The Union outlined the case on behalf of the complainant. In Mid May 2017, the complainant submitted a written complaint which recounted interactions between her and a work colleague, Mr A. She complained of 4 incidents between 27 January and 27 April 2017. The Complainant was distressed by this and sought an investigation. The Complainant submitted that Mr A should be dismissed as a resolution to the complaint as he made her feel very uncomfortable working in the same place. An investigation followed and resulted in Preliminary findings on 2 June 2017 which determined that the allegations had been upheld in part.

On 4 June 2017, the complainant withdrew her complaint. She was informed that she could reconsider this withdrawal by the Investigator.

On 13 June 2017, the complainant furnished her response to the preliminary findings:

1. The Employment Equality Legislation governs these complaints.
- 2 While company policies on Grievance and Dignity at Work were provided, training had not followed for the complainant.
- 3 The Supervisor had not taken measures to ensure that she was not subjected to

further discrimination.

The Final Report issued on June 20, 2017 and the complainant attended a review meeting on June 26 accompanied by her Union Representative. The Complainant was placed in a difficult situation where she was being attributed as the Instigator for the comments which led to the complaint. She found that the Preliminary Report was not given weighting in terms of the level of distressed it caused her. She remained rostered with the alleged perpetrator.

The Complainant appealed the report on July 4, 2017. This was heard on 14 July 2017 and the Final Report issued on 27 July 2017 upheld the earlier findings. The Respondent did not apologise to the complainant for the bias and completely unfair findings in the report.

The Complainant was deeply affected by her experiences resulting from the Investigation of her complaints. She had sought to curtail the discrimination and harassment received by her only to be subjected to further harassment arising from a flawed investigation, findings of which were designed to intimidate the complainant.

The Union sought significant financial compensation for the distress caused by the discrimination.

Evidence of the Complainant:

The Complainant submitted that she was a self-funded college student and worked as a Sales Assistant at the Respondent store. She recalled being given a copy of the staff handbook on commencement of her employment. She signed it but it wasn't explained. She enjoyed her work. Over the course of a 4-month period January -April 2017 she received unwelcome remarks about her sexual orientation from a colleague, Mr A during her work.

1. She heard Mr A refer to her as "not a normal person".
2. She was asked by Mr A why she didn't want men?
3. Mr A attributed mental health issues to gay people in the complainant's presence.
4. A conversation with a colleague who attributed Mr A as linking the origin of

homosexuality to child abuse.

She found these remarks distressing and escalated the matter into a complaint in May 2017, citing 4 incidents. She was not advised on a template which the complaint should follow. This resulted in an investigation where she was interviewed. The Complainant confirmed that she had been refused representation.

The Complainant submitted that Terms of Reference were agreed for the investigation.

The Complainant was advised from the outset of the investigation that the alleged perpetrator would not be fired but may be advised of a final written warning in respect of his behaviour towards her. She was dissatisfied with the investigation, which upheld two of the complaints as she felt pressurised to come up with dates which were then not sought from the alleged perpetrator. She felt that she wasn't believed.

She was "shell shocked on reading the report". She formed the view that her supervisor had lied and she was depicted as causing the homophobic abuse. She was called a racist and instigator of the process. She became nervous about her job and was not confident going forward. She considered that confidentiality around the process had been breached. She found herself in a hostile environment.

The Complainant asked to sit down with the alleged perpetrator but he refused to engage.

The complainant explained that the Hierarchy of the Store consisted of Ms A, Deli Manager and a Supervisor. She confirmed that she had looked through the staff handbook prior to making the complaint. She was aware that changes were subsequently made to incorporate training in knowledge of cultural diversity.

The Complainant submitted that she had made a complaint of bullying and discrimination. The Complainant worked one day with the alleged perpetrator in the aftermath of the submission of her complaint. The Complainant submitted that she was aggrieved that she had not received witness statements prior to the preliminary investigation. She was aware that Mr A had been subjected to a Disciplinary Sanction by the Respondent. There were no further instances of the behaviour complained.

During cross examination, the complainant confirmed that she was phased when Mr

A told her that she wasn't normal and this was witnessed by her Supervisor. In response to the questions posed by the Respondent representative, she stated that she had raised the issue before May with her supervisor who had witnessed the behaviour. She did not accept that her reference to "lies" at the preliminary stage were part of the report findings.

In answering the respondent's questions on how she believed she was discriminated against. She responded by stating that her hours of work were reduced from 25-30 hrs to 10 hrs in the third week of June 2017. The Complainant then accepted that she had taken 12 and 16 hours annual leave. She confirmed that the terms of reference governing the investigation were vague. She confirmed that she had not had training while at work for the respondent.

In closing the Union for the complainant submitted that the complainant had been subjected to harassment and discrimination within weeks of commencing employment. This arose directly from a vacuum in training. The Complainant was exasperated by the investigation and felt that she was blamed which caused her to feel humiliated and degraded and intensified her hostile environment at work. There were no measures put in place to deter a recurrence and there was no training.

The Union contended that the procedural compliance throughput was stage managed as the decision makers functioned outside that process. The Union contended that the fundamental flaws in procedures subjected the complainant to further harassment. In citing a comparator as a named heterosexual colleague, the complainant was bereft as the absence of an apology from the respondent.

The Union closed by stating that the Respondent wanted to hurry to get report completed and put nothing in place to protect against discrimination.

In the supplementary submission received on 26 February 2018, The Union on behalf of the complainant re-iterated that the topic of discrimination should have directed the May complaint to be classified as such. She raised some issues with the insufficient introduction of the staff handbook to the complainant.

Finally, the Union submitted that other staff's hours were not demonstrated on the supplementary documents which impeded a comparative analysis with the complainant's hours of work.

Summary of Respondent's Case:

The Respondent refuted all claims of discrimination and/or harassment. The Respondent introduced the company as operating a retail shop and service station, one of a larger group.

The Respondent submitted that the complainant had commenced employment on a part time permanent basis on 21 December 2016 and left within the year on 4 December 2017.

The Respondent outlined that the complainant had raised a grievance which was upheld against a work colleague. This was completed in full in line with best practice and the rules of natural justice. The subject of the complaint was then disciplined as a result.

On 15 May 2017, the respondent received a written complaint from the complainant in respect of her work colleague, Mr A. The Respondent commissioned an investigation led by the store manager, Ms A. The Complainant was invited to attend an Investigation meeting on May 17. She attended but refused representation. Over the course of the following two weeks, the subject of the complaint and four witnesses attended the investigation. A Preliminary report issued on June 2, 2017,

Allegation 1 upheld

Allegation 2 Not substantiated

Allegation 3 (2 aspects upheld, 3 not substantiated)

Allegation 4 not substantiated.

The Preliminary report found that the complainant was subjected to inappropriate response comments to her sexual orientation from Mr A which constituted breach of company policy, had an impact on the complainant's dignity at work. The Complainant was found to be the instigator of the remarks.

On June 4, 2017, the complainant sought to revoke her grievance, she noted that she had a lack of evidence and that the outcome would amount to nothing. She wished to

secure a resolution through a direct engagement with Mr A. She revoked the grievance on June 7, 2017, but Mr A refused to participate in an informal meeting with the complainant. The next day, the complainant indicated that she wished to proceed with her grievance and had secured Union support. Final responses to the preliminary report were received on 13 June 2017.

Allegation 1 unchanged

Allegation 2 upheld (changed from preliminary findings)

Allegation 3 unchanged

Allegation 4 unchanged

The report found that based on the evidence presented by witnesses that the topic of sexual orientation was not brought to the forefront of conversation solely by Mr A, but also by the complainant.

The Complainant subsequently raised an issue with a diminution in her hours of work and attributed these to a legacy from the investigation. This was denied by the respondent and explained as a summer variation in business needs.

The Respondent held a grievance outcome meeting on June 27 and an outcome letter confirmed:

- Majority of allegations were substantiated.
- Disciplinary action would follow with Mr A
- Appeal provided
- Co-operation in process appreciated
- It was open to the complainant to submit a further complaint if her dignity or respect at work was affected in the workplace.
- The letter addressed issues raised by the complainant in her outcome meeting and were met with comprehensive rationale for the operation of the investigation.

The Respondent received an appeal of this Report on 4 July 2017. The Appeal was heard by a senior manager and not upheld. The matter was then placed by the

complainant before the WRC.

The Complainant commenced certified sick leave on 18 October 2017 and resigned on December 10, 2017, having been given an opportunity to reconsider her intention to resign.

The Respondent outlined the arguments in the case:

1. In response to the complainant's contention of harassment without intervention, the respondent argued that it wasn't for staff to intervene if the grievance belonged to the complainant. There was an instance where the Supervisor intervened.

2 In response to the contention that training in discrimination was absent, the respondent argued that employees are inducted and provided with the company handbook. The Respondent stressed that the complaint was upheld.

3 The Respondent outlined that the grievance was investigated in line with both the grievance procedure and the Dignity and Respect at work policy which were written to ensure compliance with the Equality Legislation. The complaint was upheld.

4 The Respondent stood over the investigative process as grounded in the full rules of natural justice. The Complainant was not exposed to any more rigorous investigative process than the other participants.

5. The fact that the complainant stated that she was made to feel the wrongdoer did not originate from the respondent approach to the complaint and was the "complainant's personal perception and opinion".

The Investigative report had confirmed that the complainant had spoken about her sexuality at work and Mr A had submitted that the Complainant was the first speaker in that regard. The Respondent had recommended a cessation in conversations on employee's private lives going forward.

The Report outlined:

As per the findings of the preliminary investigation report the complainant was subjected to inappropriate comments to her sexual orientation from Mr A which constitutes a breach in company policies provided including the grievance and Dignity and Respect at Work Policy. I find that the Complainant was subject to

unwarranted comments from Mr A which had an impact on her dignity and respect at work.

The Respondent submitted that the complainant's allegations were upheld. The Respondent submitted that the complainant held the belief that her complaint would result in more favourable treatment for her. The Respondent was bound by the limitations of clear findings and supporting evidence during the investigation. The Complainant had sought that Mr A be dismissed due to his homophobic behaviour but this did not transpire during the disciplinary procedure.

The Respondent contended that the complainant had not satisfied the burden of proof required in accordance with section 85A of the Employment Equality Acts 1998-2004.

The Respondent sought to distinguish the case from **Piazza v Clarion Hotel (Dec - E2004-033) and An Employer v A Worker EDA 0916**. The Respondent was not aware of the complainant's sexual orientation until it was raised by her during her complaint.

The Respondent denied harassment. The Respondent submitted that it took reasonably practical steps to prevent harassment during the complainant's employment. The correct Grievance and Dignity and Respect Policies were in place at the workplace. The complaint was upheld and action followed through the company Disciplinary procedure. Mr A and the complainant were separated by departmental location at the shop. The Respondent held a strong belief that they could not reasonably have done anything more to reverse the effects of the alleged harassment.

Evidence of Ms A. Store Manager.

Ms A worked as the Store Manager. She received a complaint furnished by the complainant on 15 May ,2017. She was shocked by the complaint arising in her shop. She had just experienced a personal bereavement. She contacted her Area Manager for advice on dealing with the issue and received back up support on set procedures from the HR advisory service.

She commenced an investigation into the complaint and invited the complainant to expand on her written complaint at a meeting on 17 May 2017. The Complainant requested that the alleged perpetrator be fired. Her attention to detail on datelines was

uncertain during the investigation. She submitted approximate dates.

During cross examination, Ms A could not recall whether the word discrimination was used during the submission of the complaint. She worked under the Dignity at Work Policy for the company.

Ms A confirmed that she had received recent training in human resource, health and safety and manual handling but had not had recent training in investigation management. She submitted that she had extensive experience in investigation for other companies. She was aware of the complainant's high level of dissatisfaction regarding her investigation involving the alleged perpetrator. Ms A herself believed that she was chastised by the complainant in terms of the depth of her questioning of participants in the investigation.

Ms A reaffirmed that she led the Investigation and only relied on advice from the Company HR Advisory Service. She confirmed that the witness statements were not given prior to the preliminary stage. Ms A confirmed that she validated the complainants understanding of the Terms of Reference for the Investigation by issuing a letter of invitation, where they were outlined. There were no further questions and the terms of reference were not contested. Ms A accepted submissions from the parties and made an alteration to her final report which favoured the complainant.

She confirmed that she had not considered an external investigation. She was aware that Mr A and the complainant had worked together over the course of one evening since the complaint was lodged.

The Respondent closed by submitting that there were 15 employees based at the store , 7 of whom were directly involved in this case .The internal grievance was processed in line with the company procedures and the complainant was offered an appeal .Had the store been notified consistent with the first occurrence submitted by the complainant , they were certain that the Manager would have intervened .The Submission of a witness to the investigation as a bone fide comparator for the purposes of the Act was rejected by the respondent .

The Complainant did not suffer any environmental deterioration as the preliminary conclusions were amended prior to completion of the Final report. The Company were obliged to manage two employees, the complainant and the accused whose job

was on the line as a result.

The Respondent helpfully submitted details of the commissioning process of the investigation and importantly a copy of the complainant's request that the process of complaint management be formalised from the outset. The Respondent also submitted details of a comparative analysis of working hours at the store in disputing the complainants claim of discrimination.

Evidence of Mr B, Area Manager:

Mr B confirmed that he viewed the complaint from the outset and received Human Resource advice. He directed the complaint back to the store manager under the grievance procedure and he took a step back until the preliminary stage was finalised.

He confirmed that he held the grievance outcome meeting. He prepared by reading over the investigation prior to meeting the complainant and her representative. He listened and upheld the investigation findings. He was not involved in the Disciplinary process directed at Mr A.

Findings and Conclusions:

I have considered all the evidence both written and oral presented to me during my investigation. The Recast Gender Directive 2006/54/EC is now the key EU Directive setting out the requirement for equal treatment between men and women in the employment context.

Section 85A of the Employment Equality Acts 1998-2011 sets out the burden of proof which applies in a claim for discrimination. The Complainant is required to establish, in the first instance, facts of "sufficient significance" from which it may be presumed that there has been discrimination in relation to her. If a prima facie case is then established, the burden then shifts to the respondent. I am obliged to ascertain whether a prima facie case has been established in accordance with the test set down by the Labour Court in **Valpeters and Melbury Developments [2010] ELR 64?**

The Complainant has submitted that she was:

1. Discriminated on grounds of her sexual orientation in relation to her conditions of employment.

2. Discriminated against by means of harassment during her work.

These allegations were vehemently denied by the Respondent who relied on extensive oral submission and documentation during this denial.

I wish to make many preliminary remarks on the case. This is an extremely sensitive issue for both parties involved. The Complainant was an employee on probation during the early months of 2017. I appreciate that the store manager suffered a personal bereavement and this may have served as a relevant factor in how the complaint emerged some 3 months after the first incident, at least the complainant contended during the subsequent investigation that her delay in submitting her complaint was in some way attributable to this key absence.

However, as a first step, I reviewed the presiding document in this case, that is the written complaint lodged by the complainant on May 15 ,2017. This was an undated, unsigned document and read as an aide memoire /record of incident. It was bereft of a preferred stated course of action sought or required by the complainant and it wasn't prefaced by a targeted addressee. I note the complainants evidence at hearing that she was not advised of a template which her complaint should have followed.

I can accept from the evidence adduced that the behaviour recounted in the document was a major concern for the complainant. She told me that she had glanced at the staff handbook prior to submitting the complaint but she did not draw a connection between this document and the myriad of policies open to her. I was struck by this disconnect and find that it underpins some of the ambiguity that has flowed right throughout this case.

I found that the complainant did not have a working knowledge of the options open to her to resolve her concerns. I can understand that some of this may have arisen from a lack of a detailed exposure to the staff handbook, however, I also found that the navigation tools provided by the respondent were underutilised by the complainant. This may have arisen as she was unrepresented in the early stages of this case. I found this coupled with her obvious vulnerability made the process of raising the complaints an arduous task. I accept that the Respondent did not place any bar on representation and it was the complainant's decision to proceed alone.

The complaint was elevated to formal investigation from the outset. In so doing, it by passed the Respondent alternative courses of action, through support of a contact

person, informal procedures and mediation. I accept the Respondent submission of Diary entry dated 15 May 2017:

“Confirmed with the complainant which way she wanted investigation to proceed.... whether it was to be formal/informal. Explained both to her and she confirmed that she wanted to go the formal route”.

I was struck by the terms of section 14.9 Informal Procedure of the staff handbook:

In proceeding with the informal approach, measures to stop the behaviour and monitor the situation will be agreed with the parties.

I find that insufficient regard was applied to this course of action in the interests of an earlier resolution by both parties.

1 Complaint of Discrimination:

Section 8 of the Act contains the general prohibition of discrimination. Section 8(1) provides: -

In relation to—

- (a) access to employment,
- (b) conditions of employment,
- (c) training or experience for or in relation to employment,
- (d) promotion or re-grading, or
- (e) classification of posts,

an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.

Discrimination is defined at s.6(1) of the Acts as follows: -

(1) For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as “the discriminatory grounds”), one person is treated less favourably than another is, has been or would be treated.

The Complainant submitted that she experienced discrimination in terms of having her hours cut during the management of the complaint. She accepted in cross examination that she had received 16 hours annual leave in the third week (25) of June, 2017.

I accept that the complainant is covered by the grounds of sexual orientation for the purposes of the Act. However, she did not challenge her reduction in hours during her employment through the grievance procedure. I note that she raised the issue on one occasion but there was no follow up.

The Respondent submitted details of both the complainants and colleague’s hours of work during the cognisable period. I note the reliance by the respondent on seasonal variation in hours and I accept that the complainant was in her first year of employment.

I could not establish a connection between the treatment complained of and the complainant’s sexual orientation. I appreciate that evidence of discrimination is not always readily available and that I may need to rely on a series of inferences in any deliberative process. I note that the complainant viewed her reduction in hours as unfair and unreasonable but I could not establish that any action of the respondent amounted to discrimination, i.e. less favourable treatment here.

I considered the records submitted on the hours worked by the complainant and did not identify less favourable treatment with the comparator. I note that she was facilitated by two weeks leave to prepare for exams immediately before her complaint came before the WRC.

I find that the complainant was not discriminated in relation to her conditions of employment due to her sexual orientation in relation to a diminution of her hours of work.

2. Complaint of Harassment:

As stated earlier, The Recast Directive lays down a minimum requirement standard for observation by the member states. Section 14 A of the Act inserted by Employment Equality Act 2004 was designed to ensure implementation of definitions of harassment and sexual harassment from EU Directives.

The Complainant has submitted that she was harassed by Mr A during her employment. She sought to raise this in May 2017 by logging four incidents of serious concern to her. She told me at the hearing that she raised the complaints as episodes of bullying and the parties were very far apart on whether the complainant had ever raised the title of discrimination during the complaint /investigation. This goes to the heart of this case. In **Piazza v Clarion Hotel (Dec -E2004-033)**, The Grievance procedure was viewed as insufficiently weighty to address the type of complaint formulated by the complainant. It warranted an individualised approach. I note that the Respondent has relied on the contention that the complaint management embraced the grievance and dignity at work policies. I can understand how this occurred given the complainants early reliance on “a bullying complaint”. However, the extent complaint was framed differently from 13 June 2017 when the Union picked up the case on behalf of the complainant and introduced the word discrimination to the circumstances surrounding the complaint.

“It has to be noted that this is a complaint of Discrimination and reference to the employment equality acts is the governing legislation for complaints of that nature “

I found a reluctance on the Respondents behalf in the subsequent investigative documentation to incorporate this submission. Given that the respondent had highly accomplished policies covering harassment within the Dignity at work policy, I was struck by this reluctance. I found that the terms of reference agreed by both parties permitted a more expansive consideration of this submission.

Harassment and Sexual Harassment are both set out in Section 14(7) of the Act.

(7) (a) In this section —

(I) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and

(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(b) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Section 14(A) (2) provides for a defence for the Respondent.

Section 15 of the Act sets out the liability of employers and principals.

Section 15(1) Anything done by a person during his employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that person's employer, if it was done with the employer's knowledge or approval.

It shall be a defence for the employer to prove that the employer took such steps as were reasonably practicable to prevent the employee

(a) From doing that Act

(b) From doing during his employment acts of that description.

It is important for me to take a moment to reflect on the circumstances surrounding this case. This was a multi-cultural workforce. The Respondent had formulated some revision in the handbook to reflect this reality. The Complainant refused to sign acceptance of the amendments on cultural diversity in March 2017, saying that she didn't understand the changes in the staff handbook. It is clear to me from a careful review of the investigation report that there was a sub plot of cultural diversity challenges co-existent in this case. The complainant was the only staff member I met outside the Management Team. I formed the view that this was a complex and fast paced work environment.

I asked the complainant what made her think that the Report had not gone her way, given the substantiated complaints? She told me that she was troubled for having been referred to as the Instigator of comments which prefaced the complaint and by being

referred to as racist. I have reflected on this.

I found that the complainant exercised her right to move to formal investigation from the outset of the case. She was clearly and understandably deeply affected by what she understood she heard Mr A say to her. I found that the complainant participated in the preliminary stages alone and did not realise that the burden of proof would rest with her. I found that the complainant did not anticipate the extent that her complaint would be investigated and that she would not hold any control over parties/witness's responses. She had not anticipated that the responses of her colleagues would differ from her recollection of events and this upset her further to the point where she sought to cease the progress of the complaint.

I found that the Investigator managed this aspect of the case very well and it was regrettable that Mr A did not avail of the informal meeting at that point. This may just have harmonised the parties at an earlier juncture. I note that the complainant suggested this course of action which was courageous.

The parties were very divided on the role that training in procedures around discrimination played in this case. The Union put forward the vacuum as a major contributing factor. The Respondent contended that the Induction was followed by the staff handbook which addressed all aspects of the workplace. For my part, I found the staff handbook to be a top-class document but I found a variance in the principals extolled by the company and the reality on the ground. This may have arisen in part from an insufficient supervision. I note that the Supervisor confirmed the first complaint at investigation.

I recall the evidence of Ms A when she recounted her shock at receiving the complaint in May 2017. I accept that she had no prior knowledge of the issue and this caused her some upset as store manager. I found Ms A to be a very honest witness and she presented as very caring about her staff.

While, I accept training has its place, and I note the special mention in the Report recommendations, the role of the first line manager is a key person in terms of administration and implementation of a staff handbook. I found that the company's principal of zero tolerance to harassment was not in evidence outside of the staff handbook during the months preceding the complaint. I say this as I was struck by the extent and general permissiveness which appeared to exist surrounding highly

personal issues. I note that this was picked up during the internal investigation and a recommendation directed at cessation.

I have reflected on the Respondent submission that a line exists in all employment relationships where to “walk in the shoes “of the complainant and to take on other people’s grievance is effectively wrong. However, it is important that all floor employees and their supervisor try to right a wrong if they see a wrong on the floor and to at least report it if they are not comfortable to intervene This was missing in this case.

On the other hand, I noted the efficiency of the respondent response once the complaint was lodged. As stated previously, I find that the complaint should have been assessed administratively to correspond to a workable standard. However, I accept that the respondent acted in good faith throughout the investigation and formulated some very strong recommendations to cover the way forward for the shops employees.

While I appreciate that the words of discrimination/harassment did not find their way into the final report on the May complaints. I thought it wise to incorporate the outcome in the body of this work.

As per the findings of the preliminary investigation report, I find that the complainant was subjected to inappropriate comments to her sexual orientation from Mr A which constitute a breach of the company policies provided including the grievance and dignity and respect at work policy. I find that the complainant was subject to unwarranted comments from Mr X which had an impact on her dignity and respect at work.

Based on the balance of probabilities, I find that based on the evidence presented by witnesses and the topic of sexual orientation is not brought to the forefront of conversation by Mr A solely and that the complainant has brought it for discussion too.

.....

As a recommendation going forward, I recommend the Company ask all employees to cease engaging in conversation which relates to each other’s personal lives and respect, regardless of agreement with the individual choices and opinions of others.

I found that the respondent took steps to maximise safety for the complainant once in possession of the complaint

1 By Investigation

2 Offer of Informal Meeting

3 Disciplinary action

4 Recommendations for training

5 Mr A and the complainant were separated at work bar one day of joint working.

The Jurisprudence on claims for harassment has been informative. I have included a section from **Employment Equality Law, Bolger, Kimber and Bruton, 2012.**

Even where harassment involves verbal abuse only, it can have serious effects on the victim. In **Odion v Techniform (Waterford) Ltd, DEC -E2007-018**, the claimant was a Nigerian national who had been subjected to ongoing negative remarks referring to his nationality and colour. He made a formal complaint of harassment. An external investigation found that no bullying or harassment had occurred, but considered that cultural differences had arisen which required tolerance and acceptance by both sides. By that time the claimant was on sick leave due to his experiences at work. The Equality Officer found that the claimant had been subjected to harassment on grounds of his race and while the employer had acted promptly in dealing with the complaint, the Equality Officer was not satisfied that the outcome of the investigation adequately described the circumstances between the workers. She found that the employer's failure to deal with the situation left the claimant feeling isolated in the workplace, which constituted discrimination on grounds of race.

A Worker V A Hotel [2010]21 ELR 72

An employer is obliged to take such steps as are reasonably practical to prevent harassment of women in the work place: it is not sufficient to show that measures were taken to prevent a reoccurrence of harassment after it has taken place. This requires the employer to show, at a minimum, that a clear anti-harassment or dignity at work policy was in place before the harassment occurred and that the policy was effectively communicated to all employees. Moreover, management personnel should be trained to deal with incidents of harassment and to recognise its manifestations.

I found a considerable overlap in the instant case here. Many years may go by in any workplace before a complaint of harassment is made by an employee. I note the Respondent argument that they felt that they were obliged to manage two employees in this case. In addition, another 5 employees were involved as well as three Senior Managers. I can accept that this was operationally challenging.

1. I have considered the Labour Court case of **Limerick County Council V Mannering**, EDA 1210, where the Court found that the respondent was permitted to rely on Section 14(A) (2) of the Act in the face of a single non-recurring act of racial harassment where an anti-harassment policy had been disseminated during training and implications for disciplinary action in the case of non-adherence up to and including dismissal. The Courts views are instructive here.

“the adequacy or otherwise of the investigation undertaken after the occurrence of the event complained of is irrelevant to the question of if the respondent had taken steps which could have prevented that event from occurring. Rather, in cases such as this, the focus should be on if the respondent had in place adequate policies and procedures intended to make all employees aware that harassment on any of the discriminatory grounds is unacceptable and will not be tolerated by the respondent.”

I have considered the facts as presented and the evidence adduced. It is clear to me that the Complainant received treatment which constituted both harassment and sexual harassment on grounds of her sexual orientation in the early months of her employment. This is prohibited conduct.

Section 14(A) (3) provides that a person’s rejection of or submission to harassment may not be used by an employer as a basis for a decision affecting that person. I find that the complainants linkage to instigation on some of the comments to be peripheral. The comments were found to be “unwarranted “and as having” an impact on her dignity at work.” I found this to be a conservative understatement. I found that the complainant experienced behaviour as provided for in Section 14(A) (7) of the Act which violated her dignity at work, caused her to be humiliated and placed her in an offensive environment.

I considered the measures taken by the respondent to make all employees aware that

harassment/sexual harassment constituted prohibited behaviour at work. I found that the respondent handled the issue well once reported but I found some shortcomings in the initial stages of the complainant's employment. I found that the issuing of the staff handbook was overly casual and not sufficiently grounded on employee "buy in" I note that this has since been rectified.

Taking everything into account, I find that the complainant has proved her case that she was both harassed and sexually harassed on grounds of her sexuality in the respondent employment and while the respondent made strident measures once the complaint came to light, I find that they cannot rely totally on Section 14(A) (2) as a defence on this occasion.

The Complainant has met the prima facie case and the respondent has not rebutted it.

Decision:

Section 79 of the Employment Equality Acts, 1998 – 2015 requires that I decide in relation to the complaint in accordance with the relevant redress provisions under section 82 of the Act.

I have found that the Respondent did not discriminate against the complainant in respect of an alleged reduction in her hours of work.

I have found that the Respondent did discriminate against the complainant in respect of harassment and sexual harassment during the early months of her employment. While efforts were made to prevent its recurrence, I am satisfied that the effects of this behaviour led to the complainants hurt and humiliation. I found evidence of a workplace culture where casual talk on highly personal and sensitive issues was permitted without redirection.

I also found evidence of a sub plot of multicultural uncertainties, where boundaries were perceived as being breached without reportage or intervention. This is a workforce that needs careful management, tolerance and support going forward. The Complainant is no longer a participant in this workforce.

1. I make an order for compensation for the effects of the acts of harassment in the amount of 8,000 euro which is approximately 6 months' pay. This corresponds to the duration of the discrimination and takes account of the Recast Directive in terms of an

effective, proportionate and dissuasive penalty. This does not attract a tax component.

2. I also make an order that the Respondent secures a written apology from Mr A for the hurt and humiliation caused to the complainant. This, together with the previous sanction should be presented to the complainant and accepted as closure in the case.

3. I also direct the Respondent to showcase the policies relevant to harassment from the moment of employment and compliance with same to be evaluated through staff meetings. **Limerick County Council and Mannering** applied.

4. All first line managers are to be trained in recognition and management of complaints of harassment within three months of this decision.

Dated: 18th July 2018

Workplace Relations Commission Adjudication Officer: Patsy Doyle

Source: <https://www.workplacerelations.ie/en/Cases/2018/July/ADJ-00010217.html>