

## Group Briefing

December 2018

# Gender equality in the workplace – What measures can be taken to advance the underrepresented gender?

**Ireland Client Service Law Firm of the Year 2018**  
Chambers Europe Awards

**Ireland Law Firm of the Year 2018**  
International Financial Law Review (IFLR)  
Europe Awards

**Advised on Equity Deal of the Year 2018 – Allied Irish Banks IPO**  
International Financial Law Review (IFLR)  
Europe Awards

**Ireland Law Firm of the Year 2018**  
Who's Who Legal

**Ireland Law Firm of the Year 2017**  
Chambers Europe Awards

**Best Firm in Ireland 2018, 2017 & 2016**  
Europe Women in Business Law Awards

**Best National Firm for Women in Business Law 2018, 2017 & 2016**  
Europe Women in Business Law Awards

**Best National Firm Mentoring Programme 2018, 2017 & 2016**  
Europe Women in Business Law Awards

**Best National Firm for Minority Women Lawyers 2018**  
Europe Women in Business Law Awards

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

We have been hearing much on the topic of gender equality in the workplace in recent times. Earlier this year, the Government published the general scheme of a Bill, which proposes to require employers over a certain size to publish information on the gender pay gaps in their organisations.

Last month, Minister for State at the Department of Education, Mary Mitchell O'Connor, TD, signalled the Government's intention to fund dozens of women-only professorships over the next three years to help "eradicate gender inequality" in higher education institutions. In this article, we consider the interaction between affirmative action and the prohibition on gender discrimination and analyse what steps can be taken.

### **AFFIRMATIVE ACTION: HOW CAN THE UNDERREPRESENTED GENDER BE ADVANCED?**

The principle of equal treatment for men and women is set out in Article 157 of the Treaty on the Functioning of the EU. There is an exception to the general equal treatment requirement in Article 157(4), which provides that the principle of equal treatment shall not prevent Member States from adopting measures making it easier for an underrepresented gender to pursue vocational activity or to compensate for disadvantages in

professional careers.

Directive 2006/54 specifically prohibits discrimination on grounds of gender in employment matters, with Article 3 of the Directive permitting Member States to engage in affirmative action aimed at ensuring full equality in practice between men and women in working life.

In an Irish context, the Employment Equality Acts 1988-2015 prohibit discrimination on the grounds of gender. This prohibition is without prejudice to measures adopted (a) to ensure equality between men and women in employment and (b) to make it easier for an under-represented gender to pursue vocational activity.

The case law of the EU has clarified the application of the principle of equal treatment, and the derogations permitted from same. This article proposes to examine the balance between affirmative action and discrimination.

### **AFFIRMATIVE ACTION MAY BE PERMITTED IF CANDIDATES ARE EQUALLY QUALIFIED**

In *Kalanke v Freie Hansestadt Bremen*, one male and one female candidate were shortlisted for promotion within Bremen's parks department. The Bremen council policy was to automatically promote a female candidate if two candidates were equally qualified, and females were underrepresented in that sector. The Court of Justice of the European Union (CJEU) was asked whether this policy was permitted pursuant to the derogation from the principle of equal treatment. The CJEU held that the automatic promotion of female candidates constituted discrimination, and the derogation in respect of removing inequalities affecting women's opportunities had to be narrowly construed.

This was elaborated on in *Marschall v Land Nordrhein-Westfalen* where the CJEU held that affirmative action was permitted in favour of a female candidate in the event of under-representation if, (i) objective factors specific to the male candidate were taken into account, and (ii) the criteria adopted did not discriminate against female candidates.

### **AFFIRMATIVE ACTION MUST NOT BE AUTOMATIC, AND MUST CONTAIN AN OBJECTIVE ASSESSMENT**

In *Re Badeck's application*, a question was referred to the CJEU in relation to a German law that permitted the adoption of advancement plans relating to the conditions of access and promotion of women in the public service, with binding targets. In the advancement plans, more than half of the posts to be filled in a section in which women were under-represented were designated solely for women. Additionally, in the event of equal qualifications of a female and male candidate, and the female gender being under-represented in that sector, selection criteria would be weighted in favour of the female candidate.

The CJEU noted that the selection

procedure began by assessing candidates' suitability, capability and professional performance in relation to the post to be filled. During this aspect of the assessment, certain positive and negative criteria were taken into account. The CJEU held that prioritising the selection of female candidates was lawful, but this selection:

1. could not be automatic; and
2. must contain an element of objective assessment.

In *Abrahamsson and Aderson v Fogelqvist*, the CJEU held that the affirmative action concerned was unlawful as it overrode consideration of the applicants' individual merits. In *Abrahamsson*, the university's policy was to prefer a candidate of the under-represented sex who was "sufficiently qualified", over a more qualified candidate of the other sex who would otherwise have been selected. The CJEU ruled that this practice was contrary to the principle of equal treatment as there was no objective assessment of individuals' qualifications. The CJEU found that ultimately, the candidate was selected on the basis of her gender and that the failure to engage in objective assessment meant that this process fell outside of the permitted derogations to the general principle of equal treatment. The CJEU held that the process adopted in this instance was disproportionate to the aim.

### **DEROGATIONS FROM THE GENERAL PRINCIPLE OF EQUAL TREATMENT MUST BE PROPORTIONATE**

In *EFTA Surveillance Authority v Norway*, the University of Oslo reserved 20 female-only post-doctoral positions, which were intended to stimulate the recruitment of women into permanent academic positions. The EFTA submitted that the automatic reservation of posts for females precluded any objective assessment of male candidates and exceeded the exceptions permitted to the general principle of equal treatment. The EFTA further submitted that any derogations from the general principle of equal treatment had to go no further

than was appropriate and necessary to achieve their aim, i.e. that the measures must be proportionate. The EFTA concluded that the government of Norway had not shown that a less invasive measure would not have achieved the same result.

The EFTA also concluded that in order for the derogations to apply (i.e. that the principle of equal treatment would not prevent measures making it easier for the underrepresented gender to pursue a vocation), the criteria imposed could not be unconditional, and could not exclude objective assessment.

The government of Norway's position was that the "earmarking" of the posts was justified by the gender imbalance in academic posts, and that the means used were proportionate to the aim. The government stated that less invasive measures had been used in the past with almost unnoticeable effects, and therefore the pace of change in increasing representation of the underrepresented gender was too slow.

In contrast with *Re Badeck's* application, the CJEU noted that men were completely excluded from consideration for the "earmarked" posts. The CJEU noted the exception to the general requirement of equal treatment in the context of an underrepresented gender, and stated that as this was an exception, the criteria applied must be strictly interpreted. The CJEU cited the case of *Marshall v Southampton and South-West Hampshire Area Health Authority* and held that any exception to the equal treatment principles must have an element of objective assessment of candidates from both the under-represented gender, and the other gender. The CJEU reiterated that the criteria (i) could not be unconditional and (ii) must have an element of objective assessment.

The CJEU noted that in creating female-only posts there was no question of the objective assessment of male candidates, and therefore this constituted a breach of EU law.

## FEMALE EMPLOYEES MAY BE PREFERRED IN THE ALLOCATION OF NURSERY PLACES

In *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, nursery places were reserved for female employees' children only, unless a male employee required a space as a matter of "emergency". The rationale for this policy was that women were more likely to abandon their careers on the basis of poor child-care facilities, therefore reserving nursery places for female employees' children would encourage women to remain at work.

The CJEU confirmed that the allocation of nursery places constituted a "working condition" and held that the allocation of female-only nursery places was permissible, provided that male employees who took care of children alone were afforded the same access to the nursery places as female employees.

## KEY PRINCIPLES IN ENGAGING IN AFFIRMATIVE ACTION

As outlined by the aforementioned cases, the jurisprudence of the CJEU distils certain principles in relation to the balance between affirmative action and discrimination, which include:

1. affirmative action is permitted if one gender is underrepresented and the action falls away when a balance is struck;
2. affirmative action is an exception to the general rule of equal treatment and therefore is subject to strict construction before the courts;
3. it is unlawful to grant absolute and unconditional priority to one gender;
4. it is lawful to:
  - a. prefer a female in an equal contest;

- b. reserve half of all training slots for women;
- c. prefer female employees in the allocation of nursery places.

Therefore, while affirmative action is permitted, it is only allowed as an exception to the general rule prohibiting gender discrimination. Care must be taken to ensure that the above principles are observed in the implementation of any measures, whether by Government or by employers, intended to make it easier for an underrepresented gender to achieve gender equality in the workplace.

## KEY CONTACTS

For further information please speak to your usual Arthur Cox contact or any member of the team:



**SEAMUS GIVEN**  
HEAD OF EMPLOYMENT GROUP  
+353 1 920 1210  
seamus.given@arthurcox.com



**SARAH FAULKNER**  
ASSOCIATE  
+353 1 920 1296  
sarah.faulkner@arthurcox.com



**NIAMH FENNELLY**  
PROFESSIONAL SUPPORT LAWYER  
+353 1 920 1392  
niamh.fennelly@arthurcox.com

OUR TEAM



**SEAMUS GIVEN**  
HEAD OF EMPLOYMENT GROUP  
+353 1 920 1210  
seamus.given@arthurcox.com



**KEVIN LANGFORD**  
PARTNER  
+353 1 920 1226  
kevin.langford@arthurcox.com



**CIAN BEECHER**  
PARTNER  
+353 1 920 1193  
cian.beecher@arthurcox.com



**LOUISE O'BYRNE**  
PARTNER  
+353 1 920 1185  
louise.obyrne@arthurcox.com



**DEBORAH DELAHUNT**  
ASSOCIATE  
+353 1 920 1085  
deborah.delahunt@arthurcox.com



**GRACE GANNON**  
ASSOCIATE  
+353 1 920 1077  
grace.gannon@arthurcox.com



**SARAH LAWN**  
ASSOCIATE  
+353 1 920 1769  
sarah.lawn@arthurcox.com



**SALLY DOYLE**  
ASSOCIATE  
+353 1 920 1785  
sally.doyle@arthurcox.com



**NIAMH FENNELLY**  
PROFESSIONAL SUPPORT LAWYER  
+353 1 920 1392  
niamh.fennelly@arthurcox.com



**RACHEL BARRY**  
ASSOCIATE  
+353 1 920 1281  
rachel.barry@arthurcox.com



**JOHN CASEY**  
ASSOCIATE  
+353 1 920 1268  
john.casey@arthurcox.com



**SHANE MCCARTHY**  
ASSOCIATE  
+353 1 920 1263  
shane.mccarthy@arthurcox.com



**MAILLE BRADY BATES**  
ASSOCIATE  
+353 1 920 1351  
maillie.brady.bates@arthurcox.com



**SARAH FAULKNER**  
ASSOCIATE  
+353 1 920 1296  
sarah.faulkner@arthurcox.com

arthurcox.com

**Dublin**  
+353 1 920 1000  
dublin@arthurcox.com

**Belfast**  
+44 28 9023 0007  
belfast@arthurcox.com

**London**  
+44 207 832 0200  
london@arthurcox.com

**New York**  
+1 212 782 3294  
newyork@arthurcox.com

**Silicon Valley**  
+1 650 943 2330  
siliconvalley@arthurcox.com