SIPTU

SIPTU Submission to the Review of the Equality Acts

December 2021

Fairness at Work and Justice in Society

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Introduction

The Services Industrial Professional and Technical Union (SIPTU) is Ireland's largest trade union. SIPTU represents 180,000 members in both jurisdictions on the island. Members of SIPTU work in a broad range of industries across the private and public sectors.

We thank the Minister, Roderic O'Gorman, and the Department of Children, Disability, Equality and Integration for the opportunity to submit our views on the equality legislation and related institutional framework. We would welcome the opportunity to elaborate on our recommendations as part of any further consultative process.

In June 2021, the Minister announced a Review of the Equality Acts involving a comprehensive review of the Republic of Ireland's existing legislation relating to the promotion of equality and elimination of discrimination.

The Review considers two primary pieces of equality legislation, the Equal Status Act 2000 and the Employment Equality Act 1998 and the subsequent legislation amending those Acts i.e. the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018.

The Department has said that other relevant legislation may include the Workplace Relations Act 2015 and the Irish Human Rights and Equality Commission Act 2014.

In announcing the Review, the Minister noted that the Equal Status Acts and Employment Equality Acts had been in place for over two decades, and that:

"It is timely to take a deeper look at the legislation, to look at what is working and what is not working, and to identify where there may be gaps. We want to ensure that the legislation is as effective as possible in combatting discrimination and promoting equality".

The Review considers matters arising from the commitments made in the Programme for Government in relation to equality. Specifically, the Programme for Government commitment to an examination of "the introduction of a new ground of discrimination, based on socio-economic disadvantaged status to the Employment Equality and Equal Status Acts". The Review also includes "a review of current definitions, including in relation to disability".

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

"The review also provides an opportunity to review other issues arising, including whether or not further additional equality grounds should be added, whether existing exemptions should be removed or modified and whether or not the existing legislation adequately addresses issues of intersectionality."

The Review also includes a practical examination of the operation of the Equality Acts "from the perspective of the person taking a claim under its redress mechanisms". "It will examine the degree to which those experiencing discrimination are aware of the legislation and whether there are practical or other obstacles which preclude or deter them from taking an action".

Finally, the Review also examines the use of non-disclosure agreements by employers in cases of sexual harassment and discrimination "in line with the issues raised in the Employment Equality (Amendment) (Non-Disclosure Agreement) Bill 2021". That Bill is a Private Members Bill which proposes to prohibit the use of "non-disclosure agreements" in settlement agreements reached on foot of complaints under the Employment Equality Act in certain circumstances.

Employment Equality and SIPTU

Equality in the workplace, in the labour market and in society are the raison d'être of our trade union.

Representing approximately 180,000 workers, almost half of whom are women, and just under a fifth are migrants, our trade union has been at the forefront of campaigning on issues impacting on employment equality for over a century. Despite numerous advances however, certain categories of workers, remain discriminated against and disadvantaged in the workplace, in the labour market and in Irish society.

No single submission can address the full range of equality issues that workers in Ireland face. For that reason, our submission highlights the most critical employment equality issues facing our members and workers generally. Our submission will focus on issues relating to the employment legislation, case law and institutions. We will make recommendations which we believe would deliver improved equality outcomes.

Vindicating workers' collective and individual employment equality rights and interests is a central component of SIPTU's work. Advancing equality policy along with campaigning and lobbying for better equality outcomes for workers is also a key facet of our Union's work.

SIPTU's rule book sets out the centrality of our equality work when it states that one of the Union's objectives is,

"The promotion of equity in relation to gender, marital status, family status, sexual orientation, religion, age, disability, race, or membership of the Traveller Community."

In furtherance of this core objective, our rule book states that,

"The National Executive Council shall establish an Equality Sub-Committee of the National Executive Council. The Equality Sub-Committee shall promote equality, consider equality issues and report to the National Executive Council."

The Standing Orders for the Equality Sub-Committee provide for the following:

- at least 75% of its members are female
- there are reserve seats for migrant workers, young workers, older and retired workers and workers from Northern Ireland
- the Union's Honorary President, Honorary Vice President, Deputy General Secretary and National Equality Organisers are members of the Equality Committee
- the Honorary President chairs the Equality Committee
- the role of the Equality Sub-Committee is to encourage and pursue the implementation of equality policy and strategy as determined by the National Executive Council and Biennial Delegate Conferences
- The Equality Sub-Committee provides a written report of its activities to the National Executive Council on a quarterly basis

The Equality Committee has established working groups, focus groups and networks from time to time to address the particular requirements of certain members. These include the SIPTU Migrant Worker Support Network, SIPTU Disability Focus Group, SIPTU LGBTQI Network and the Young Workers Network. The Union has a separate and very active Retired Members Section.

All of this work is overseen at leadership level by the Union's Deputy General Secretary for Organising and Membership Development and at senior management level by the Union's National Equality Organiser.

SIPTU's Workers Rights Centre, Legal Rights Unit and Welcome Centre

SIPTU is the most frequent single user of the Workplace Relations Commission and of the Labour Court. Hence, we bring unparalleled practitioner knowledge and experience to the subject matter of this review.

Almost 12 years ago, in 2010, SIPTU established the Worker's Rights Centre with the aim of providing support, information and advocacy to SIPTU members when encountering individual industrial relations disputes and / or breaches of employment rights.

Our Worker's Rights Centre has a staff of 25 full-time Advocates located throughout the country, along with 9 administrative colleagues who staff our information services and lo-call phone line from Monday to Friday.

Most of our Advocates have had third level legal training in employment rights, many are legally qualified and all undertake continuous professional development in order to stay up to date with case law and precedent.

In turn, our Advocates together with full-time Tutors in SIPTU College, provide training on employment rights to our voluntary workplace representatives, Shop Stewards and Activists through the courses delivered by SIPTU College.

SIPTU College is accredited to manage a modular training and education programme on behalf of the National College of Ireland. This programme leads to a Special Purpose Award at Level 6 on the National Framework of Qualifications. The 'Law and the Worker' module includes training on vindication of rights and entitlements arising from the Employment Equality Act.

The Advocacy Service provided to our members includes representation at local level within the member's

employment as well as at third party institutions, most frequently the Workplace Relations Commission and the Labour Court and, from time to time, at the Circuit Court, High Court and Supreme Court.

All cases referred to our Centre come directly from the union organiser assigned to work with our members in their employment and sector.

SIPTU Advocates have the support and advice of our in-house Legal Rights Unit. Our Legal Rights Unit is headed up at senior management level by a Barrister and staffed by another Barrister and a Solicitor. These three SIPTU staff are experts in employment law, industrial relations and employment equality law.

Our Centre has received over 30,200 referrals since its establishment, with almost 11,000 of these relating to a breach of employment rights. A further breakdown shows that close to 1,000 of the referrals to our Worker's Rights Centre relate to a breach of the Employment Equality Acts 1998 – 2015 (as amended)[1].

Of the approximately 1,000 referrals received for a breach of the Employment Equality Act 1998 – 2015 (as amended), gender, age and disability grounds were the most frequently cited, with race and family status grounds being the next most frequently cited.

To complement our Workers Rights Centre, SIPTU has a nationwide network of Welcome Centres which effectively operate as walk-in / drop-in centres for workers who are not members of the Union. The operation of Welcome Centres has been severely curtailed by the Covid-19 public health guidelines. Prior to the pandemic, non-members and those wishing to join and be represented by SIPTU were welcome to drop into a Welcome Centre for expert advice on employment related matters. Workers who, for whatever reason, are unable to access a Welcome Centre in-person, can call a local telephone number or join online. SIPTU can provide members with advice and representation in a range of languages.

Unique to SIPTU, as a trade union, is the existence of the ongoing and continuous relationship between us and our members and the support that we provide when they encounter any workplace problems, including but not limited to, potential breaches of their employment equality rights. This relationship facilitates not only the immediate advice that we provide to our members but also the potential of a resolution to their grievance within the workplace at local level due to the representations that are made, on their behalf, by the Advocate assigned to their case.

It is because of this unique relationship that recourse to a third party to resolve a problem is not always required. It is our experience, that while workers would prefer not to encounter any such workplace problems in the first instance, should they occur, they generally want a speedy and non-stressful solution to them. Generally, that means that workers preference is to resolve grievances at local level and without recourse to a third-party institution.

Therefore, despite the number of referrals by our Centre to third-party forums being significant, it is considerably lower and not reflective of the volume of cases that we deal with and resolve locally. In addition, many of these cases are submitted protectively while a member's internal workplace process is being utilised by the Union to resolve the issue.

The Mediation Services of the Workplace Relations Commission are also regularly utilised to reach a resolution on a matter before it progresses to a hearing.

As a consequence, survey results on the outcomes achieved by workers based on their representation at third party forums are not an accurate reflection of the level of the overall success experienced by our members in the resolution of their employment equality issues.

Where a local resolution cannot be reached, our members' cases are advanced by the Centre's Advocates through to hearing at the Workplace Relations Commission and on appeal to the Labour Court.

Our Legal Rights Unit assists in the enforcement of Adjudication Officer and Labour Court decisions when necessary and assists in the defence of points of law on

[1] Figures to end of year 2020

appeal where SIPTU's members' awards are at stake.

One such case taken by our Workers' Rights Centre and supported by our Legal Rights Unit all the way to the Supreme Court is the landmark employment equality case commonly known as the 'Nano Nagle case'. The Supreme Court held in this case that:

"The issues which arise are, undoubtedly, of significant importance, not only to the appellant, but in the broader field of disability law."

The case was taken on behalf of a SIPTU member and considered the rights of workers with disabilities and the obligations placed on employers to reasonably accommodate these workers in the workplace. It concluded before the Supreme Court in 2019, having originated before the former Equality Tribunal in 2012.

The member concerned was represented by one of our Centre's Advocates before the Equality Tribunal and on appeal in the Labour Court. SIPTU's Legal Rights Unit then fully supported the member when the decision was appealed by the employer to the Labour Court, the High Court, the Court of Appeal and then to the Supreme Court, where it was finally determined that there is a statutory duty on employers under s.16 of the Employment Equality Acts 1998 – 2015 (as amended) to explore the possibility of obtaining public funding which might facilitate them in providing reasonable accommodation to a worker with disabilities prior to deciding that a reasonable accommodation cannot be achieved. In addition, the Supreme Court held that an employer is also obliged to assess the possible redistribution of a worker's non-core tasks before deciding whether reasonable accommodation measures can be facilitated.

Time Limits

The time limit for taking a claim for discrimination (direct or indirect) and/or victimisation under the Employment Equality Acts 1998 – 2015 (as amended) are set out in Section 77, subsections (5)(a) and (6A) of the act. Both subsections provide that such claims must be taken within 6 months of the act of discrimination or victimisation. The deadline of 6 months for such claims causes workers an issue when they are attempting to resolve the matter giving rise to the claim within their workplace.

Where there is an internal process providing for the resolution of an allegation of discrimination (direct or indirect) and / or victimisation, it is our experience that workers wish to resolve such matters through this process within their employment if it is possible to do so. Therefore, requiring a worker to protectively lodge an equality claim while they are in the middle of such a process often causes the worker further stress in an already stressful situation.

An internal process also involves the establishment of facts and gathering of evidence in relation to the matter giving rise to the allegation which the worker can then rely on should a claim need to be made to a third party. But where an internal process has not been exhausted, this information will not be available to the worker at the time that a third-party claim must be made.

As a result of the need to lodge equality claims protectively, there is also an additional burden both on the worker and on the Workplace Relations Commission to ensure that the scheduling of any such claims occurs after an internal process has been completed and consequently does not impede the progress of such procedures.

While there is provision in the section 77(5)(b) of the Employment Equality Act 1998 – 2015 (as amended) to extend the time limit for making a claim from 6 months to 12 months, to do so, a worker must show that there is "reasonable cause" for the delay, and the utilisation of an internal process has been found not to satisfy the "reasonable cause" threshold established in case law[2] .

SIPTU therefore recommends that the solution to this problem is to amend the Employment Equality Acts 1998 – 2015 (as amended) to extend the existing time limit for

[2]Pfizer Pharmaceuticals Ireland v Whelan EDA 24/2019, Beaumont Hospital v Kanada EDA 30/2-19
[3]While the majority of employment rights claims have a time limit of 6 months the Redundancy Payments Acts 1967 – 2015 already allows for a 12-month time limit.

making such claims from 6 months to 12 months[3] and to further extend the 12-month time limit set out in section 77(5)(b) of the act to 18 months where a worker can show a "reasonable cause" for the delay.

Alternatively, the Employment Equality Acts 1998 – 2015 (as amended) could instead provide for the 6 months' time limit to start to run on the 'date of completion' of any pursued internal process rather than the 'date of occurrence of the discrimination or victimisation' as is currently set out in section 77(5)(a) of the Act. However, this amendment would require the proviso that a claim can be lodged earlier on notice to the employer where there is delay on the part of the employer in concluding the internal procedure.

SIPTU acknowledges that a worker is not currently required to invoke an internal process prior to lodging a third-party equality claim and does not propose a change to this. However, attempts to resolve alleged breaches of the equality legislation through internal workplace procedures offers a timely and cost-effective resolution for workers and therefore should be encouraged and supported in the practical application of the legislation.

Finally, although the Employment Equality Acts 1998 – 2015 (as amended) have always made provision for the discretion to anonymise Adjudication and Labour Court decisions made under the act, it is yet to be seen whether the recent Supreme Court case[4] will influence the Workplace Relations Commission and Labour Court in utilising this discretion going forward.

It is SIPTU's experience that this possibility of publication has a significant influence on a member's decision to pursue a third-party equality claim and as a result workers will often choose to pursue the matter through the available internal workplace processes instead.

RECOMMENDATION:

That a new subsection is added to Section 77 of the Employment Equality Acts 1998 – 2015 (as amended) to provide an extension of the time limit for taking a claim already provided for in this section, in circumstances where a worker is engaging in an internal process to investigate and resolve their claim.

6-month Time Limit and the Determining Act of Discrimination and/or Victimisation

As set out above, the time limits for taking a claim for discrimination (direct or indirect) and/or victimisation under the Employment Equality Acts 1998 – 2015 (as amended) are set out in Section 77, subsections (5)(a) and (6A) of the act.

Section 77(5)(a) states "a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence."

Section 77 (6A) states that "discrimination or victimisation occurs– (i) if the act constituting it extends over a period, at the end of the period, (ii) if it arises by virtue of a term in a contract, throughout the duration of the contract, and (iii) if it arises by virtue of a provision which operates over a period, throughout the period; and a deliberate omission by a person to do something occurs when the person decides not to do it, and a respondent is presumed, unless the contrary is shown, to decide not to do something when the respondent either (i) does an act inconsistent with doing it, or (ii) the period expires

[3]While the majority of employment rights claims have a time limit of 6 months the Redundancy Payments Acts 1967 – 2015 already allows for a 12-month time limit.
[4]Tomasz Zalewski v Adjudication Officer, WRC & Ors [2019] IESC 17

during which the respondent might reasonably have been expected to do it."

Therefore, where an act of discrimination occurs on one occasion, the current 6-month time limit is easily decipherable for a worker, such that they will be aware that they have 6 months from the date of the occurrence of the discrimination or victimisation to lodge a claim under the Employment Equality Act 1998 – 2015 (as amended). However, where there has been more than one occurrence of discrimination or victimisation the ability to identify the appropriate time limits to lodge such an equality claim becomes exponentially more complicated.

The Court in Cork VEC v Hurley EDA 1124 clarified this position in relation to cases of ongoing discrimination and firstly confirmed that s.77(5)(a) addresses situations in which there are "a series of separate acts or omissions which, while not forming part of regime, rule, practice or principle, are sufficiently connected so as to constitute a continuum" and secondly confirmed that s.77(6A) addresses situations where "an act will be regarded as extending over a period, and so treated as done at the end of that period, for example if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant".

The Court has also clarified in Department of Health and Children v Gillen [2005] E.L.R. that "two acts can be considered as the same disposition to discriminate. If the last alleged act of discrimination is within the time period specified in the Act, which both parties concede it was, the court may take into consideration the previous occasions in which the complainant was allegedly discriminated against on the same ground."

However, despite these clarifications SIPTU submits that the current wording of s.77(5)(a) and s.77(6A) is unclear, confusing and lacks the clarity required to allow workers to lodge their third-party equality claims within the correct time limits provided for under the Act. Without extensive knowledge of the above-mentioned case law and the ability to interpret its legal meaning, workers are unaware that they can sometimes include acts of discrimination which have occurred previously. It is SIPTU's experience that this has resulted in several of our members being out of time for their claim and/or failing to establish a prima facie case of discrimination.

SIPTU therefore recommends that the wording of these subsections be amended to reflect the above-mentioned case law and that the subsections be re-drafted and clarified in such way as to enable a successful practical application of the legislation.

RECOMMENDATION:

That Section 77, subsections (5)(a) and (6A) of the Employment Equality Acts 1998 – 2015 (as amended) are amended to reflect the jurisprudence that has developed in relation to these subsections for the purposes of clarification and a successful application of the legislation.

Re-instatement and Re-engagement

Section 82(1) of the Employment Equality Acts 1998 – 2015 (as amended) provides for the remedy of the re-instatement or the re-engagement of a worker, "with or without an order for compensation, as may be appropriate in the circumstances of the particular case". Our members have experienced two practical problems in relation to the wording and lack of clarity contained in this provision such that it is arguable as to whether, in its current form, this provision provides an effective, proportionate, or persuasive remedy against discrimination.

Firstly, due to the lack of definition of the terms 'reinstatement' and 're-engagement' within the Act, disputes often arise between workers and their employers after they have received a third-party decision in their favour awarding them one of these two remedies.

While local discussions can and often do take place to rectify this dispute and the definition of these terms in the Unfair Dismissals Act 1977 – 2015 (as amended) are drawn upon for guidance, the disputes can often cause further stress to an already stressful situation for the parties involved and can sometimes result in a further or complete

breakdown of the employment relationship.

Secondly, due to the lack of clarity in the provision of the circumstances in which one of these two remedies may be awarded, difficulty has occurred for SIPTU members who have not been dismissed from work but have lost their position in work and been removed, transferred, or demoted because of discrimination and/or victimisation.

An example of where this has occurred throughout our membership is when mothers return from maternity leave and have not been allowed to resume the position that they held in work prior to their leave but are instead placed in a position where their responsibilities, exposure and career prospects are significantly reduced. While section 26 of the Maternity Protection Act 1994 – 2015 (as amended) provides for "a general right to the return to work on the expiry of protective leave" (with section 27 providing for a "right to suitable alternative work" where section 26 is not practicable), these sections have little or no real effect due to the confusion on when the 6-month time limit under the current Equality Act starts to run. In particular, when a worker has availed of additional maternity leave and has not been allowed to resume the position that they held in work prior to their leave, the current Equality Act leaves them with no claim at all due to the time limits as set out under the Act.

This lack of clarity has also caused difficulties for our older membership in circumstances where they have been dismissed on the grounds of age and upon a successful decision from a third party are neither awarded reinstatement or re-engagement.

While SIPTU accepts that it is well established that the Court is reluctant to reinstate or re-engage a worker where there has been a breach of mutual trust and confidence, neither of the above circumstances outlined demonstrate such a breach.

SIPTU therefore recommends that these two practical problems stemming from the wording of s.82(1) of the Employment Equality Act 1998 – 2015 (as amended) are resolved in the following way: by the inclusion of wording which clarifies the circumstances in which these two remedies can be awarded; by the inclusion of a requirement on Adjudication Officers and the Labour Court to give reasons as to why these remedies have not been awarded; and the adoption of the wording that already exists in s.7(1) of the Unfair Dismissals Act 1977 – 2015 (as amended) which states:

"Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the adjudication officer or the Labour Court, as the case may be, considers appropriate having regard to all the circumstances:

(a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or

(b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances."

RECOMMENDATION:

That Section 82(1) of the Employment Equality Acts 1998 – 2015 (as amended) is amended to provide a definition of re-instatement and re-instatement, set out the circumstances in which re-instatement and re-engagement may be awarded and require Adjudication Officers and the Labour Court to give reasons as to why they did not award this remedy in circumstances where a worker has sought such a remedy.

Section 101 of the Employment Equality Act 1998 – 2015 (as amended)

In three specific subsections of the Employment Equality Act 1998 – 2015 (as amended), workers are prevented from pursing parallel claims in redress of their termination of employment under both the Unfair Dismissals Act 1977 – 2105 (as amended) and the Employment Equality Act 1998 – 2015 (as amended).

The first prevention is set out in s.101 (2)(b) which states that if an "investigation has commenced" by the Director General of the Workplace Relations Commission in relation to an alleged discriminatory dismissal under the Employment Equality Act 1998 – 2015 (as amended), the complainant concerned cannot also pursue a claim of alleged unfair dismissal under the Unfair Dismissals Act 1977 – 2015.

Case law has determined what is meant by an 'investigation that has commenced' and it has been held in Cullen v Connaught Gold Limited UD 787/2006 that "an investigation and a hearing are not analagous, rather that a hearing forms part of the investigation.....the provision of submissions to the Director [therefore] can be accepted as showing that an investigation has begun."

The second prevention is set out in s. 101(4)(b) which states that a worker cannot bring a claim of alleged discriminatory dismissal under the Employment Equality Act 1998 – 2015 (as amended) if a decision has been made by an Adjudication Officer of the Workplace Relations Commission in respect of their dismissal under the Unfair Dismissals Act 1977 – 2015 (as amended). This prevention applies regardless of the outcome of the separate unfair dismissals claim and regardless of whether the unfair dismissals claim was upheld by the Adjudication Officer against the respondent concerned.

The third prevention is set out in s. 101(4A) which states that where a worker submits a complaint in relation to their termination of employment under both the Employment Equality Acts 1998 – 2015 (as amended) and the Unfair Dismissals Act 1977 – 2015 (as amended), the complainant will have 42 days from the date of their referral to withdraw one of the claims and if they do not do so, the Workplace Relations Commission will consider the claim submitted under the Employment Equality Act 1998 - 20115 (as amended) to be withdrawn.

Section 101(2)(b) was amended by the Equality Act 2004 to allow for a complainant to pursue a claim of alleged unfair dismissal under the Unfair Dismissals Act 1977 – 2015 in certain circumstances, namely when the Director General of the Workplace Relations Commission "having completed the investigation and in an appropriate case, directs otherwise". This amendment was introduced to ensure that complainants who had lodged their claim under the employment equality legislation and failed, had an alternative avenue of redress. However, SIPTU has found that this direction is rarely, if ever, exercised and is not aware of any notice in line with this provision having been administered to complainants or respondents. In any event, should this discretion be exercised by the Director General, the 6 months' time limit in being able to lodge an equality claim as set out in the Workplace Relations Act 2015 prevents a complainant from being able to utilise this discretion once received.

The consequences of these three subsections of s.101 have proven to be severe for our members when faced with a termination of their employment. Workers are often dismissed with no notice and no explanation and are unaware of their employer's reasons in relation to their decision to dismiss them. As the Workplace Relations Act 2015, the procedures of the Workplace Relations Commission and the Labour Court Rules 2020 do not provide for a discovery process in relation to evidential documents, our members must decide based on the facts before them at the date of their dismissal whether they wish to pursue an unfair dismissal claim or an employment equality claim. Should new evidence or information which might alter their view come to light later in the complaints process when the 6 months' time limit to lodge a termination claim under either act has passed, workers can and often are left with no alternative avenue of redress, resulting in no recovery for a breach of their employment rights.

Consequently, SIPTU recommends that the three subsections outlined above are amended to allow workers to lodge both an unfair dismissal claim and a discriminatory dismissal claim containing the same facts at the same time. While SIPTU acknowledges that workers cannot receive redress, compensation and/or recovery for both claims on the same set of facts, we would suggest that the current legislative provisions prevent some workers from obtaining any redress at all and if two separate alternative claims under each act could be heard together, it would allow for a more thorough investigation and consideration of the entire circumstances of a worker's termination of employment and ensure that discriminatory behaviour towards workers is adequately addressed.

RECOMMENDATION:

Amend Section 101 of the Employment Equality Acts 1998 – 2015 to allow a worker to lodge a termination claim under both the Employment Equality Acts 1998 - 2015 and the Unfair Dismissals Acts 1977 – 2015.

Age Discrimination and Mandatory Retirement

Further to SIPTU's submission to the Pensions Commission in March 2021 (see Appendix A), and further to the Report issued by the Pensions Commission (available to view on the Pensions Commission website at https://www.gov.ie/en/publication/6cb6d-report-of-the-commission-on-pensions/), SIPTU is continuing to seek an amendment to section 34(4) of the Employment Equality Act.

It was then, and continues to be the case now, that many workers wish to remain in their employment at least up to the state pension age (now 66) and potentially for years afterwards. However, it is our members' experience that they continue to be forced by their employers to leave employment, for no other reason, than they have reached a particular age. The disproportionate effect of retiring workers at age 65 when the state pension is now payable at 66 is of particular concern to our members.

Under European Law, Article 1 and 2 of Council Directive 2000/78/EC prevents a worker from being discriminated against directly or indirectly on the grounds of their age. This prevention has been transposed into Irish national law under section 6 and section 8 of the Employment Equality Act 1998 – 2015 (as amended).

However, the Council Directive 2000 / 78/ EC also provides a derogation to direct or indirect discrimination on the grounds of age to member states in certain circumstances. This is set out under Article 6 (1) and states the following:

"Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that aim are appropriate and necessary."

This has been transposed into Irish national law under Section 34(4) of the Employment Equality Act 1998 – 2015 (as amended) but it is important to note the wording of this section:

"Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees if –

(a) it is objectively and reasonably justified by a legitimate aim, and

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

This section does not include any reference to the legitimate aims contained in the wording of Article 6(1) of Council Directive 2000/78/EC which states "including

legitimate employment policy, labour market and vocational training objectives". In addition, the requirement to objectively justify the imposition of a retirement age within a workplace by ensuring that the policy concerned was to achieve a legitimate aim and the imposition concerned was an appropriate and necessary way of achieving that legitimate aim was only included into this section in 2015[5] . This is despite the fact that the Council Directive 2000/78/EC had introduced this requirement for transposition into national law in 2000.

It is also important to note, when considering such changes to employment equality legislation, that Article 6 (1) 2000/78/EC allows but does not require member states to derogate from age discrimination in certain circumstances.

The European Court of Justice has held that member states, when transposing this derogation, must interpret the principle of equal treatment strictly and ensure that the policy aims of objective justification are discernible from the national law and its application.

This was confirmed in Palacious de la Villa v Cortefiel Servicios SA [2007] ECR 1853 where the Court of Justice examined the national legislation itself to determine if the inclusion of the derogation by way of a legislative section was objectively and reasonably justified by a legitimate aim that related to a national employment policy and/or the national labour market requirements.

In this jurisdiction, in Donnellan v Minister for Justice, Equality and Law Reform [2008] IEHC 467, McKechnie J has also held that while governments can impose fixed retirement ages through legislation, the legislation is required by EU law to be "compatible and conformable" with the Council Directive 2000/78/EC.

More recently in the UK in Seldon v Clarson Wright & Jakes [2012] IRLR 591, (wherein the European jurisprudence in this area was reviewed) the Supreme Court held that there is a distinction between the legitimate aim of national employment policies, national labour market requirements and/or national training objectives and the legitimate aim of individual employment, labour or training objectives which are only particular to a certain employer.[6]

In R (on the application of the Incorporated Trustees of the National Council on Ageing) v Secretary of State of Business, Enterprise and Regulatory Reform [2009] ECR I-1569, it was also held that national social policy objectives may be a sufficient legitimate aim to objectively justify the imposition of a retirement age but the same was not true for individual objectives that were only particular to a certain employer and their workplace.

However, there have never been any national employment policies, labour market requirements or social policy objectives set out by government to assist in the imposition of a workplace retirement age under the Employment Equality Act 1998 – 2015 (as amended). Nor is a workplace retirement age in anyway discernible from it.

Instead, private sector employers have been able to set mandatory retirement ages through no legal justification other than alleged custom and practice, individual employer requirements and cultural norms within that particular workplace.

The Code of Practice[7] on Longer Working 2017 also sets out examples of what constitutes a legitimate aim by an employer with no reference to national employment policies, labour market requirements or social policies. SIPTU has experienced a large volume of cases where employers have put forward spurious claims of objective justification by a legitimate aim by relying on the examples set out in the Code of Practice on Longer Working 2017.

It is also our experience that little, if any, attention is given by employers to the fact that they must evidence the means of any legitimate aim put forward by them as being an appropriate and necessary way of achieving that aim. SIPTU considers this to be the consequences of such a delay in transposing this requirement from the Council Directive 2000/78/EC into section 34(4) of the Employment Equality Act 1998 – 2015 (as amended).

The Report of the Interdepartmental Group[8] on Fuller Working Lives 2016[9] on page 17 states the following:

"It is also clear that 65 has been, and to a large extent, continues to be regarded as a de facto threshold between working life and retirement. These cultural 'norms' need to evolve. A framework that facilitates working to, and beyond, the State Pension age, should be the new 'norm' for both workers and employers."

SIPTU therefore recommends an amendment to section 34(4) of the Employment Equality Act 1998 – 2015 (as amended) that acknowledges the evolution of our cultural norms around age and longer working and enforces the specific requirements on member states that are contained in Article 6(1) of Council Directive 2000 /78/EC.

RECOMMENDATION:

An amendment to section 34(4) of the Employment Equality Act 1998 – 2015 (as amended) to include the requirement of a legitimate aim that amounts to a national employment, labour market or social policy objective to ensure that workers can remain in their employment at least until the state pension age but past any retirement age set by the employer unless that age can be objectively justified by a legitimate aim including 'including legitimate employment policy, labour market and vocational training objectives.'

Non-Disclosure Clauses

Women experience higher rates of workplace sexual harassment than men. In a 2019 Irish Congress of Trade Unions national opinion survey dealing with sexual harassment at work, 72 per cent of the responses were from women.

The survey found that four out of five workers experiencing sexual harassment at work do not report the incident to their employer. One in five harassment incidents had taken place at a work-related social event. One in seven had taken place on the phone, by email or online. In eight out of ten cases, the perpetrator of the incident was a man. For the majority, the harasser had been a colleague.

The Australian Human Rights Commission published a report in 2020 entitled 'National Inquiry into Sexual Harassment in Australian Workplaces'. This report mirrors the ICTU findings in that women experience higher rates of sexual harassment in the workplace than men and in most incidents of workplace harassment the harasser was a male.

Non-disclosure clauses were invented by the legal profession to protect intellectual property. In SIPTU's view, they should not be used to create an atmosphere of secrecy in the workplace. When employers introduce settlement agreements, they always include some degree of non-disclosure. SIPTU supports the proper use of clauses of this nature when and where it is appropriate.

It is important to look at the protections that are available to victims of sexual harassment and harassment in employment under the Employment Equality Acts. The 1998 Act was amended by the 2004 Act to include a section at 14A of the Act defining sexual harassment. There is a criminal offence of harassment on the statute books under s. 10 of the Offences Against the Person Act 1997 and s.4 of the Harmful Communications and Related Offences Act 2020 to support the position that any person who is subjected to sexual harassment or harassment has a right to bring this to the appropriate authorities and any clause in an agreement should not limit this right whatsoever.

[5]Equality (Miscellaneous Provisions) Act 2015 (43/2015), s. 10, S.I. No. 610 of 2015
[6]At the time of taking this case, the UK had a default retirement age of 65 provided for in its national legislation
[7]SI No 600/2017 – Industrial Relations Act 1990 (Code of Practice on Working Longer) (Declaration) Order 2017
[8]This interdepartmental group comprised representatives of six government departments, with over half of the group being represented by the Department of Public Expenditure & Reform and the Department of Social Protection. There was just one representative from the Department of Justice and Equality.
[9]https://assets.gov.ie/4984/191218122321-2472d175810b4278a78cce28d1118a07.pdf

The principle of equal treatment in matters of employment was set out in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006. Sexual harassment was defined in Article 2(1)(d) of Directive 2006/54/EC as follows:

"any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

This definition is reproduced (but broken down into sub-clauses) in s.14A(7) of the Employment Equality Acts,

"(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."

Paragraph 6 of the preamble to the Directive provides that:

"Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties."

Further definition and guidance can be found in the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (S.I. No. 208 of 2012) which acknowledges that sexual harassment, and harassment on the eight other non-gender grounds, can have a "devastating effect upon the health, confidence, morale and performance of those affected by it".

The Code of Practice gives examples of sexual harassment (bearing in mind that the Code of Practice deals with harassment on 9 different discriminatory grounds, not just gender with which sexual harassment is concerned). It states,

"Many forms of behaviour, including ... the display/circulation of words, pictures or other material, may constitute harassment. A single incident may constitute harassment. The following list of examples is illustrative rather than exhaustive:

- Verbal harassment – jokes, comments, ridicule or songs
- Written harassment – including faxes, text messages, emails or notices
- Physical harassment – jostling, shoving or any form of assault
- Intimidatory harassment – gestures, posturing or threatening poses
- Visual displays such as posters, emblems or badges
- Excessive monitoring of work
- Isolation or exclusion from social activities
- Unreasonably changing a person's job content or targets
- Pressure to behave in a manner that the employee thinks is inappropriate, for example being required to dress in a manner unsuited to a person's ethnic or religious background."

In SIPTU's experience, training in the use of S.I. No. 208 of 2012 where there is an allegation of sexual harassment is of

extremely poor quality. In the Act one occurrence is enough to show that there was sexual harassment. The support of representation is critical. However, if the investigators are not adequately trained, this leads to poor investigation which in turn leads to poor outcomes.

Where a member of SIPTU have been discriminated against, they are fully supported through procedures in their employment. This process can lead to a situation where, in the interests of our member/s, there is the possibility of a compromise agreement that includes a non-disclosure clause. SIPTU broadly supports the use of compromise agreements where it is in the best interests of our members. Safeguards and expert advice are in place so that each member can make an informed decision.

Improvements and safeguards are necessary, in the form of, though not limited to, legislation to provide that:

- no provision in a non-disclosure clause/s can prevent disclosures to An Garda Siochána, regulated health and care professionals, trade union officials and legal professionals;
- limitations in non-disclosure clauses are clearly set out in employment contracts and compromise agreements;
- guidance for solicitors and legal professionals responsible for drafting compromise agreements;
- enhancement of the independent legal advice received by individuals signing compromise agreements and,
- enforcement measures for non-disclosure clauses that do not comply with legal requirements in written statements of employment particulars and compromise agreements.
- that an employer may only enter into a non-disclosure agreement if the agreement is the express wish of the person who is the subject of the harassment.

RECOMMENDATION:

Insert (the foregoing) safeguards in legislation that would give victims access to the Workplace Relations Commission where employers breach their rights. These should aim to strike the right balance between continuing to allow the legitimate use of NDA clauses and preventing their misuse.

Increase of Awards

There is paucity of data available to us relating to the quantum of awards under the Employment Equality Act.

2014 is the last year for which data is available. In 2014, the average award was €22,614. In 2013, the average award was €18,000 and awards ranged from €1,400 to €81,000. The number of cases lodged under the Acts was 570 in 2013 and 607 in 2014 compared with 1288 in 2019 and 939 in 2020.

Section 82 of the Act provides that where a successful complainant is in receipt of remuneration, compensation of up to €40,000 can be awarded in circumstances in which 104 weeks pay is less than that amount. The quantum was increased by the Civil Law (Miscellaneous Provisions) Act 2011. From Oireachtas debates at the time, it appears that the reason and rationale was "to provide for greater redress for applicants in low-paid employment. This is designed to align the text of national law more closely with EU equality directives."

The majority of SIPTU members go through internal processes at local level, such as dignity at work procedures or bullying and harassment (including sexual harassment) procedures before they bring cases to third parties. This process can take a toll on their health and well-being and many suffer stress and long periods of certified sick leave, with no sick pay, leading to financial hardship. This is before they lodge a case to the Workplace Relations Commission.

In equality cases the burden of proof is on the worker that

makes the complaint. They must make a prima facia case that he/she has been the victim of discrimination or victimisation. This puts pressure on the worker adding to the suffering that they have gone through in their workplace. It is only then that the employer is asked to raise a defence.

On a number of occasions to date, the Labour Court has relied on the 'Van Colson' principles[10] where an award is made to provide a deterrent in cases where discrimination is proven.

More recently an Adjudicator Officer found that "it is well established as a reference point for the awarding of compensation in cases where discrimination is found and utilised for the purposes of having a persuasive effect on the Respondent, in this case a public body, to take all necessary steps to apply the legislation and to prevent discrimination into the future."[11]

What is required is to establish an award that provides the deterrent that the Directive intended. The Protected Disclosures Act 2014 has introduced an award of up to 260 weeks remuneration where a person is dismissed for making a protected disclosure under the Act.

For a worker on a low income raising the maximum would provide redress to them where they have been victimised and suffered discrimination. The effects to a worker's well-being on a low wage, or because a worker works part-time, can be the same as the effects to a worker on a large salary. An increase to 260 weeks would allow an Adjudicator/the Labour Court to award compensation that is just and equitable and to provide a real deterrent which is the ultimate aim of the Directive.

RECOMMENDATION:

Section 82 of the Act should be amended to increase the awards to 260 weeks remuneration in cases of victimisation and discrimination.

Socio Economic Ground

The European Charter of Fundamental Rights prohibits discrimination on several grounds in the context of poverty and social exclusion. Citizens and those residing in Ireland should have access to a robust state system in which to lodge a complaint in circumstances where they feel they have been discriminated against, whether in the workplace or in their treatment by public duty bearers.

The Charter of Fundamental Rights states that,

"'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

There is a range of socio-economic disadvantage in Ireland and the State's objective should be to prohibit associated experiences of discrimination by including this ground in the Equal Status and Employment Equality legislation. The legislative task of prohibiting discrimination has settled practice in other member states upon which to draw.

The EU equal treatment directives cover the grounds of race and ethnic origin, gender, age, disability, religion or belief and sexual orientation. They do not cover socio-economic status or any similar ground. However, numerous other directives and legal instruments refer to discrimination in the context of poverty and social exclusion. The European Commission study, 'A comparative analysis of non-discrimination law in Europe 2015', records that in 20 European counties there is some type of

[10]Sabine Von Colson and Elisabeth Kamann v Land Nordhein-Westfalen ; see also DWT1474
[11]ADJ-00024740 Marie O'Shea v HSE

statutory provision prohibiting socio-economic discrimination.

In Ireland, there is no formal, statutory, or explicit reference to socio-economic discrimination in constitutional or legislative provisions. However, in 2002 the Equality Authority proposed the introduction of a socio-economic ground under prohibited discrimination. This was followed by a 2004 report, commissioned by the Department of Justice, Equality and Law Reform, suggesting that a socio-economic status ground would "serve the objectives underpinning equality legislation, and would also enable a more sophisticated intersectional approach."

The 2014 Irish Human Rights and Equality Commission Act encompasses what is described as a 'public sector duty':

"1) A public body shall, in the performance of its functions, have regard to the need to:

a) eliminate discrimination,

b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and

c) protect the human rights of its members, staff and the persons to whom it provides services."

The proposed amendments to these acts will address the reality of persons in Ireland being treated less favourably in the workplace and by public duty bearers, while not having access to the law.

The recorded experiences of socio-economic discrimination are based on norms and assumptions that have no place in a modern Ireland. The proposed amendments can be viewed as an adjustment to existing legal mechanisms that have had a positive regulatory and social impact in Irish society.

While the exact wording of any such prohibition on socio-economic discrimination will need careful consideration, a good starting point could be the definitions and statutory interpretations included in two recent private members bills. The first argued that a new definition of 'Disadvantaged socio-economic status' be inserted into the equality legislation:

"'Disadvantaged socio-economic status' means a socially identifiable status of social or economic disadvantage resulting from poverty, level or source of income, homelessness, place of residence, or family background"

Another recent private member's bill stated that,

"'Socio-economic disadvantage' means having disadvantaged social status or disadvantaged economic status, or both, that may be indicated by a person's inclusion, other than on a temporary basis, in a socially or geographically identifiable group that suffers from such disadvantage resulting from one or more of the following circumstances:

a) poverty,

b) source of income,

c) illiteracy,

d) level of education,

e) address, type of housing or homelessness,

f) employment status,

g) social or regional accent,

or from any other similar circumstance"

The access to complaint provided by the legislation in other member states is proving workable for discriminated individuals to assert their fundamental rights. These assertions are providing the case law on which to communicate new norms in the private and public sectors. There are new emerging norms that are already helping the status and treatment of disadvantaged citizens.

The short-term effect of a new socio-economic ground may be limited as it would take time to build up a jurisprudential body of rulings and interpretations which are case specific. However, the amendments could also provide for non-legal routes of redress for victims that would act to combat the bias underlying discrimination given the potential penalty of a more formal redress.

RECOMMENDATION:

Introduce a new socio-economic ground of discrimination which can act as a potential guard and remedy against such discrimination.

Definition of Disability

Section 2 of the Act states that disability means,

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

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

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

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

(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;

This definition is extremely broad and is wider than what is required by the EU Equal Treatment Framework Directive, which indicates the scope and potential of the concept of disability in recognising that alcoholism is a disability.

The Employment Equality Acts cover disabilities both past and present, temporary as well as permanent conditions, and covers chronic illness or disease as well as disabilities imputed to a person and disabilities which may exist in the future. Though not an exhaustive list, examples of disabilities which have been addressed in the case law are cerebral palsy, visual impairment, astrocytoma, wheelchair use, schizophrenia, brain haemorrhage, diplopia (double vision), various heart conditions, anxiety/depression, manic depression, multiple sclerosis, psoriatic arthritis, asthma, irritable bowel syndrome, respiratory tract and lung infections, ulcerative colitis, dyslexia, epilepsy, diabetes, curvature of the spine, quadriplegia, alcoholism, vertigo, HIV, ADHD and dyspraxia.

In its submission to the Review, the Irish Congress of Trade Unions noted that some commentators have criticised this definition as being too broad, citing the corresponding UK definition which confines the concept to conditions that impact on normal functioning.

While acknowledging that this definition has been criticised as being overly medically based, and therefore inconsistent with the social and rights-based definitions of disability contained in other legislation and the UN Convention on the Rights of Persons with Disabilities, the current definition makes it explicitly clear that a broad spectrum of factors is considered in determining a disability under the Act.

SIPTU would urge caution here in respect of a redefinition of disability. We would argue that the aim of legislation prohibiting discrimination in respect of disability should necessarily capture a broad range of circumstances which may arise during the course of a worker's working life, to include both temporary and long-term disabilities, and must be capable of use in an adversarial process. The vast majority of disabilities are currently included and unions generally do not have to spend much time and resources having to prove that they come within the definition. The experience in the UK places a very significant burden on claimants who are trying to bring claims.

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

RECOMMENDATION:

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

Reasonable Accommodation for a Worker with a Disability

As previously mentioned, SIPTU protected and defended our member's interest in the precedent setting Nano Nagle case all the way to the Supreme Court.

The decision of the Supreme Court in Nano Nagle v Daly (taken by SIPTU) disclosed a number of anomalies in relation to the duty to provide a person with a disability with reasonable accommodation, including:

• A failure to provide reasonable accommodation does not provide a stand-alone cause of action

• The Act provides that redress may be awarded 'for the effects of discrimination or victimisation' (not for the failure to provide reasonable accommodation, per se)

• There is no statutory obligation on an employer to consult with a person with a disability, or their representative, in relation to the provision of reasonable accommodation

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

On a practical level for trade unions, issues of contention in the past have related to reasonable accommodations when an employee may have a disability. While Section 16 of the Employment Equality Acts recognises that there is no legal obligation on an employer to retain an employee who even with provisions of reasonable accommodation is not able to perform the essential functions of the job, it requires an employer to take appropriate measures to facilitate persons with disabilities in accessing and participating in employment unless those measures would impose a "disproportionate burden" on the employer.

While acknowledging the significant changes which have been applied in workplaces in respect of the provisions for reasonable accommodations, much of the reasonable accommodation test remains the same, being one that is easy to state but difficult to apply.

The Supreme Court in particular noted that the test:

"is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee, as this would almost inevitably impose a disproportionate burden on an employer".

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

It is our submission therefore that the legislation ought to specifically refer to the employer's obligation to consult with the employee on the proposed reasonable accommodation.

While not on a statutory footing, the Labour Court has stated that an employer must also act without delay when it has been brought to its attention that reasonable accommodation is required for an employee with a disability to carry out their work.

In light of the importance of fair procedures under Irish employment law, SIPTU supports this position in respect of the timely consideration of reasonable accommodation in workplace settings. The reality of the maxim of 'justice delayed is justice denied' can arise in circumstances where an employee's employment becomes untenable due to an unreasonable delay by an employer to (i) consider and (ii) put in place reasonable accommodations for the affected employee. On this basis, we would call for a proportionate timeframe in respect of applications for reasonable accommodation to be set out in statute in order to provide for a more accessible application of accommodations sought.

RECOMMENDATION:

Failure to provide reasonable accommodation should be deemed to be discrimination on the disability ground. Employers should be deemed not to have fulfilled their obligation to provide reasonable accommodation if they fail to consult with the disabled employee or her or his representative in respect of applications for reasonable accommodation.

Fairness at Work and Justice in Society

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