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Policy requiring employees to speak English at work justifiable (IR)

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Summary

A recent decision by the Labour Court found that a policy requiring employees to speak English in the workplace constituted discrimination on grounds of national origin but was objectively justifiable.

Facts

In this case, three Polish employees of Irish airline, Aer Lingus, were challenging the legality of an Aer Lingus policy which required that employees speak English while in the workplace but allowed them to speak in any language during their official breaks.

The three claimants were all employed in Aer Lingus' catering department which is responsible for the packaging of food for consumption by passengers and staff of the airline. The catering department employs 228 staff from 14 countries.

The claimants argued that it was either directly or indirectly discriminatory to require them to speak English at work, even when they were discussing matters that were not work related. They felt that when they were working with fellow Polish speakers that they should be able to discuss non-work related matters in their first language.

Aer Lingus argued that their policy was "reasonable, necessary and proportionate". They argued that the need to adopt a common language was due to the "multicultural and multilingual nature" of their workforce.

Aer Lingus noted that the policy was, firstly, required for business efficacy and, secondly, required for health and safety reasons as it allowed supervisors to understand the interactions between employees and ensure that hygiene standards were being adhered to. Thirdly, Aer Lingus argued that it was necessary to prevent members of the workforce from different cultural backgrounds from feeling excluded or isolated. They felt that if staff from one language group were sitting next to staff of another language group it would be impossible to prevent isolation or to achieve "any meaningful level of integration" if each of these groups were permitted to converse in their native language at work.

In order for a claim of discrimination to be successful, the complainants must establish, in the first instance, facts from which discrimination may be inferred (i.e. a *prima facie* case). It is only where such a prima facie case has been established that the onus shifts to the respondent to rebut the inference of discrimination.

Judgment

The case was heard at first instance by an Adjudication Officer of the Workplace Relations Commission. Having considered all the written and oral evidence, the Adjudication Officer found that the complainants had not established a *prima facie* case of discriminatory treatment in relation to conditions of employment and so he dismissed the case.

The complainants appealed the decision to the Labour Court.

The Court found that a *prima facie* case of discrimination on the race ground had been made out and that the policy was indirectly discriminatory against workers, such as the claimants, whose first language was not English. As such, the burden of proof shifted to Aer Lingus to justify the discrimination.

In this regard, the Court found that ensuring that managers and supervisors are certain that the food preparation instructions they issue to staff are understood was a legitimate objective. However, this objective alone could not justify requiring workers speak in English at work when discussing matters not related to work. The Court felt that this objective could have been met by requiring that staff engage with their supervisors in English to demonstrate that they understood the instructions.

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However, the Court accepted Aer Lingus' second objective of ensuring that employees from different linguistic and cultural backgrounds were fully integrated into the workforce irrespective of the first language of the colleagues that they were assigned to work with, was a legitimate objective. While the claimants had mentioned that they would have been happy to converse in English with their colleagues if they were asked to do so, the Court did not accept this was an adequate solution. They felt this would place an "intolerable burden" on workers as they would have to ask their colleagues not to speak in their first language and they may not be comfortable to do so due to fear of an adverse reaction.

The Court found that as there were workers of so many different backgrounds in the workplace, it was permissible to adopt a common language to be used in the workplace.

Further to this, the Court found that this was the minimum restriction necessary to meet the particular objective. The Court noted that workers in the workplace were assigned duties and had no choice as regards to the people with whom they were assigned to work or to the languages that they spoke. However, Aer Lingus had no influence over whom the employees spent their break with. Therefore, Aer Lingus allowed employees to speak in whatever language they chose on their breaks. To do otherwise, the Court stated, would be "oppressive" and Aer Lingus had recognised this and crafted their policy accordingly.

On this basis, the Court found the policy to be reasonable and proportionate.

Commentary

What is demonstrated by the above case is that although Irish law prohibits discrimination in the workplace on the grounds of, amongst other things, national origin, where this discrimination is indirect, it can be objectively justified by the employer.

Thus, it appears that an employer will be able to justify requiring employees to speak one common language while at work in order to prevent the isolation and exclusion of employees who cannot speak the language that their colleagues prefer to converse in. It is important, however, that employers ensure that their policy is reasonable and proportionate and that employees are allowed to converse with their colleagues in a language other than the chosen common language during official breaks.

Comments from other jurisdictions

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): The situation in Germany is comparable to that in Ireland. According to Sections 1 and 7 of the General Equal Treatment Act ('the AGG') it is prohibited to disadvantage employees on the grounds of ethnic origin. Whether an action amounts to unlawful discrimination depends on whether it can be linked to a protected characteristic (here ethnicity) and whether it can be objectively justified.

In the case at hand, Aer Lingus' policy required employees to speak English whilst at work but allowed them to speak in any language when on official breaks. As people can speak their native language best, making English compulsory leads to a disadvantage on grounds of ethnic origin. Native English speakers only have to speak in their mother tongue, whilst others have to adapt to English as a second language. But as Aer Lingus' policy did not pick out any particular group to apply this to, it was not directly discriminatory.

According to German law, indirect discrimination can be justified by appropriate and necessary aims. Clearly, a uniform language is necessary for reasons connected to the professional activity. From this perspective, the adoption of a common language to handle food packaging work was essential and proportionate for reasons coordination, health and safety. The supervisors also needed to be able to understand their workers.. Therefore, Air Lingus' policy was reasonable and any indirect discrimination was justified.

Italy (Caterina Rucci, Bird and Bird): Although there are no comparable cases on this subject in Italy, I found this case extremely interesting, because language is officially recognized as a possible area of discrimination both by the EU and much of EU domestic legislation – but rarely brought before the courts.

As far as I know, judicial cases based on this kind of discrimination (language spoken at work) are rare, at least in Italy, despite the fact that this country has more than one minority language, two of which are specifically protected under the law (German and Ladino).

The ECJ case of *Angonese* in 2000 concerned a language problem raised in Italy, but from a completely different perspective to the present case. In South Tyrol, in order to apply for the public service, a bilingual certificate was required, but the only certificate that South Tyrol accepted was for a specific exam held there twice a year in the local (German-based) language. It is worth mentioning that the test was not in classic 'hoch Deutsch' but a dialect spoken only in South Tyrol, which was quite different to standard German – although this issue was not the subject of the ECJs decision.

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The ECJ wisely decided that the public administration could not restrict itself to a test held only twice a year in South Tyrol and that it must accept other comparable certificates. The judgment read: *"Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State".*

The Irish case at hand is interesting because it concerns:
– the language actually spoken at work;
– among colleagues from the same country, which was different to the one in which they worked;
– to talk about things unrelated to work.

Despite these three characteristics, the policy requiring English to be spoken, rather than Polish, was held to be justified by the Irish Court, which explained that allowing the employees to speak their own language at work might make their colleagues feel excluded from the workplace, and would prevent the supervisor from being able to check if health and safety rules were being followed.

But what the decision did not seem to consider, is how a non-Irish worker might have felt if Irish workers spoke only Irish, made jokes in Irish or English, used slang or spoke with a strong Irish accent.

In my view, the same policy should apply to everyone at workplace, which would mean that Irish native speakers would not be able to speak Irish – or even speak English with a very strong accent or using local dialect. English spoken with an Irish accent can be almost incomprehensible to non-native English speakers.

The same applies to any internationally spoken language: it is very easy to (indirectly) discriminate against people by speaking using slang, puns or wordplays, or by making jokes. They may ostensibly be speaking the official language of the company, but in fact they might be excluding others. Therefore, in my view, those in internationally-facing roles should be trained to use their language in a neutral way, so as to ensure non-natives are able to follow what they say without difficulty.

The Netherlands (Peter Vas Nunes, BarentsKrans): This is one of the issues that crops up every so often in Dutch debates on workplace discrimination. The Human Rights Commission delivered opinions on this issue in 1997 and 2000. The 1997 case concerned a company with 1,600 staff of whom 250 were of foreign origin. Management had issued instructions that all employees, when communicating with one another audibly to others, should speak only Dutch whilst on the job. The Commission found that the instructions constituted indirect unequal treatment on the grounds of race and that this was not objectively justified, because the employer failed to demonstrate that there was a uniform and uniformly applied policy regarding language on the job.

The 2000 case concerned unskilled agricultural workers. The issue was whether an employer may require such workers to speak only in Dutch whenever they are in the presence of others with more than one nationality. The Commission found that this requirement constituted indirect unequal treatment on the grounds of race. Its objective was to maximise productivity, which is a legitimate aim. The means to achieve this aim were effective. However, they were not proportionate, given that a large percentage of the employees were unable to speak Dutch, the work was unskilled and the language requirement had not been a condition of hiring. Hence, the unequal treatment was not objectively justified. However, the Commission did note that where an employer stipulates the use of Dutch on the job when hiring staff, particularly where the work involved is of a skilled nature, language instructions may be justified.

Dutch law prohibits discrimination, not only on grounds of race, but also on grounds of nationality. It is not clear to me why the Commission decided the cases on the basis of race only (not that this matters much; the concept of race is sufficiently broad to cover the unequal treatment at issue). Likewise, Irish law prohibits discrimination on the basis of national origin, but this Irish case was determined on the basis of race only. A requirement to speak English while in the workplace, as in this Irish case, discriminates indirectly. But what if Aer Lingus' policy had been: you may not speak Polish? Technically, that would constitute direct discrimination, which cannot be justified.

One thing I like about this Irish judgment is the way in which the court handled both objectives separately. Aer Lingus' policy had two objectives (i) ensuring that instructions are understood and (ii) integration into the workforce. The court first assesses whether the means to achieve objective (i) are effective and necessary. Having found that this was not the case, the court proceeded to examine whether the means to achieve objective (ii) were effective and necessary/proportionate. This method of tackling the issue is better than lumping both objectives together and then applying the effective/proportionate test on the combined objectives.

United Kingdom (Bethan Carney, Lewis Silkin LLP): This is an interesting case on an issue that also concerns many UK employers. Employers increasingly have very international workforces. Some are concerned about what rules they can impose (if any) on the languages their staff can speak in the workplace. Although there is no UK case directly on these facts, it is likely that the UK courts would reach a similar decision to that of the Irish Labour court here. The Advisory, Conciliation and Arbitration Service (ACAS) says in its guidance note on racial discrimination that employers can specify a language of operation for business reasons but should be wary of 'prohibiting or limiting the use of other lan-

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guages within the workplace unless they can justify this with a genuine business reason'. Requiring employees to speak English during their breaks whilst at work would be potentially discriminatory although it might possibly be justifiable if other employees felt excluded or bullied. In the first instance decision of *Konieczna – v – Whitelink Seafoods* an employment tribunal found that a Polish worker who was required to speak English at work at all times had been discriminated against. The claimant HR manager was told she had to speak English even when talking to other Polish speakers who themselves couldn't speak English. This meant that the claimant had to use a translator to speak to some of her colleagues, even though they spoke the same language. The employer claimed that this rule was for health and safety reasons but the tribunal found that it was likely to make the workplace less safe.

Subject: Nationality discrimination

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