



**REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC**

COUNTRY REPORT 2011

IRELAND

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State of affairs up to 1st January 2012

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, 1937. The Constitution takes precedence over all other sources of law, with the exception of European Law. European supremacy relates to its sphere of competency. Within that sphere Europe enjoys unquestioned supremacy. Bunreacht na hÉireann, 1937, the Constitution, establishes the State and its institutions and sets out the fundamental principles guiding the governance of the State. The Constitution is the basis by which the Irish legal system is run, and as such it is amenable to interpretation by the courts.

Inferior sources of law depend on the Constitution for their validity. A common law or a legislative rule that conflicts with a provision of the Constitution is invalid. The Constitution states that the sole law making body in the State is the Oireachtas.¹ Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. The common law consists of decisions that have been delivered by judges in the courts over the centuries. The common law adopts the doctrine of precedent, ensuring that court decisions have the binding force of law. The sheer quantity of decisions throughout the centuries has allowed the common law to develop into a substantial body of law. Employment law is an amalgamation of both common law and legislation. Legislation is of increasing importance, for instance in the context of non-discrimination measures.²

Ireland is a dualist state; ratification of a Treaty does not automatically result in its provisions becoming part of the internal legal system. This has the effect of externalising our international human rights obligations. Only after incorporation into domestic law can an international Treaty be relied upon directly in the Irish Courts, for example the European Convention on Human Rights Act, 2003.³ No other Convention has been incorporated into the national legal order; it is contended that we comply with our international legal obligations by means of national legislation.

¹ The Oireachtas is the National Parliament. Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The first chamber is Dáil Éireann and the second chamber is Seanad Éireann (Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

² Byrne, Kennedy, Ni Longain and Shannon, *Employment Law*, Dublin 2003, at 1.

³ www.irlgov.ie.



0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The Equality Act 2004⁴ amended the Equal Status Act 2000⁵ and the Employment Equality Act 1998⁶ in order to give effect to the following EU Council Directives: Council Directive 2000/43/EC – The Racial Equality Directive; Council Directive 2000/78/EC – The General Framework Directive; Council Directive 2002/73/EC – The Equal Treatment Directive. The Employment Equality Act 1998 has been amended again in 2007 to remove the upper age limit for receiving statutory redundancy payments.⁷ The amended Acts are entitled the Equal Status Acts 2000 to 2008 and the Employment Equality Acts 1998 -2008. The Social Welfare (Miscellaneous Provisions Act 2004⁸ was enacted to amend the Pensions Act 1990, now entitled The Pensions Act 1990-2008.

The legislation may be in breach of the directives in the following points:

⁴ <http://www.oireachtas.ie/documents/bills28/acts/2004/A2404.pdf>.

⁵ <http://www.oireachtas.ie/documents/bills28/acts/2000/a800.pdf>.

⁶ <http://www.gov.ie/bills28/acts/1998/a2198.pdf>.

⁷ Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007
<http://www.entemp.ie/publications/employment/2007/excollredact.pdf>.

⁸ <http://www.oireachtas.ie/documents/bills28/acts/2004/A0904.pdf>. Section 22 and 23 of the Social Welfare (Miscellaneous Provisions) Act 2004 give effect to the following EU Council Directives: Council Directive 2000/43 EC – The Racial Equality Directive; Council Directive 2000/78/EC – The General Framework Directive, as they relate to occupational pensions.



Both Acts:

The budget cut of 43% administered to the Equality Authority in October 2008 (compared to average budget cuts of 4% for other State Agencies) together with the continued decentralisation of the staff of the Equality Authority (in the context of a general decentralisation programme which has been halted) seems to constitute, in the author's opinion, a breach of Ireland's duty of ongoing and effective implementation of Art 13 of the Racial Equality Directive. The number of staff was reduced from 58 to 35. In 2011 the Equality Authority's budget was further reduced so that it has lost almost half of its funding since 2008.

Complaints about discriminatory advertisements or statements can only be brought before the Equality Tribunal by the Equality Authority.⁹ This seems to unduly curtail an individual's right to access an effective remedy for a directly or indirectly discriminatory act.

Associations may engage in civil proceedings before the Equality Tribunal or Labour Court only. Associations do not have standing in other types of proceedings or other courts.

Employment Equality Acts 1998 to 2008

- The exclusion of 'persons employed in another person's home for the provision of personal services'¹⁰ from protection against discrimination in regard to access is arguably too broad an exemption to be in compliance with both the Framework Employment Directive and the Racial Equality Directive.¹¹
- Section 37(1) of the Employment Equality Act 1998-2008 permits discrimination in employment for the purposes of maintaining, or the reasonable prevention of any undermining of, the religious ethos of an institution. The Act does not refer to the terms 'legitimate' or 'proportionate', as required by the Framework Employment Directive.
- The use of a hypothetical comparator is not permitted when claiming equal pay discrimination, whereas Article 2 of the Framework Employment Directive and Article 2 of the Racial Equality Directive do permit the use of a hypothetical comparator.¹²
- Section 82, Employment Equality Acts 1998 to 2008 imposes maximum levels of compensation. Based on the Court of Justice of the European Union decision in *Marshall No. 2* the imposition of a maximum limit is arguably not in

⁹ Equality Tribunal, DEC 2003-024 GTS Reprographics, and DEC E2004 – 016 Burke v FÁS.

¹⁰ Section 3 Equality Act 2004.

¹¹ http://www.siptu.ie/media/newsarchive2012/fullstory_15666_en.html

¹² DEC-E2008-072 Power v BlackrockCollege - The Equality Officer found that the facts did not support a finding of discrimination in pay on grounds of age, but even if the facts had been otherwise, the complainant could not rely on a hypothetical comparator under the Irish legislation.

compliance with Articles 17 and Article 15 of the Framework Employment Directive and the Racial Equality Directive.¹³

- Although there is no State retirement age in Ireland, Section 34 (4) of the Employment Equality Acts 1998 to 2008 allows any employer to set compulsory retirement ages, including different retirement ages, and this is not discriminatory under the legislation. The Framework Employment directive provides for Member States to set retirement ages if they so choose. But they may only do so “..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.”¹⁴ There is no limitation in Section 34 (4), where compulsory retirement ages are set differentially by employers, for objective and reasonable justification by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, nor that the means of achieving that aim must be appropriate and necessary as required by the Framework Employment directive and supported by the CJEU decision in *Palacios*.¹⁵ The most recent case to appear before the Irish courts was *McCarthy v HSE* in March 2010.¹⁶ Mr Justice Hedigan in the High Court rejected Ms McCarthy’s challenge to the HSE’s decision to dismiss her at 65. Unlike previous decisions the Judge addressed, albeit briefly, the EU law point and stated the CJEU in *Palacios de la Villa* had affirmed that “a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect”. The Judge made no reference to the need for objectively justifiable reasons for having a mandatory retirement age and, as such, the issue of compatibility of mandatory retirement ages with EU law remains to be decided authoritatively. In light of the recent case law it can no longer be said that the setting of mandatory retirement ages in employment contracts is absolutely immune from challenge on the grounds of age discrimination. However, until this matter is fully explored before the Irish courts the practice being taken by most employers is to continue enforcing mandatory retirement ages.
- Under Section 6 (3) (c) of the Employment Equality Acts 1998 to 2008 it is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment. This may be a breach of the Framework Employment Directive in view of the decision of the CJEU in *Mangold*.¹⁷
- Under Section 35(1) of the Employment Equality Acts 1998 to 2008, it is not discriminatory to pay a disabled person a lesser rate of remuneration if that person’s output during a particular period is less than a non-disabled person. This seems to negate the principle of equal pay where disabled employees are concerned.

¹³ Case C-271/91.

¹⁴ Article 6 of Directive 2000/78.

¹⁵ Case C-411/05, OJ C 297 of 8.12.07 p 6.

¹⁶ [2010] IEHC 75 <http://www.bailii.org/ie/cases/IEHC/2010/H75.html>.

¹⁷ C-144/04 *Mangold v Rüdiger Helm*, Judgment of 22 November 2005, OJ C 36, 11.02.2006, p. 10.

- Not all provisions containing discriminatory measures have been abolished; see for example the Organisation of Working Time Act, 1997.¹⁸ This is a potential problem for compliance with Article 16 of the Framework Employment Directive.¹⁹

Equal Status Acts 2000 and 2008

- Section 21(1) of the Equal Status Act provides that a complainant must instigate proceedings within two months of the discriminatory act, and send a written notification to the alleged discriminator. This system has proved problematic for a number of protected groups.²⁰ This is a serious bar to litigation and may therefore not be in compliance with Article 7 of the Racial Equality Directive.
- The scope of the Equal Status Acts 2000-2008 is arguably too narrow to cover all the elements of Article 3 (1)(e), (f) and (g) of the Racial Equality Directive (social security, health care); this is further impacted upon by the inclusion of section 14 of the Equal Status Act 2000-2008, whereby anything which is required to be done under another statute is not in breach of the Equal Status Act.
- Harassment is not defined as discrimination in Equal Status Act 2000-2008.
- Section 19 of the Intoxicating Liquor Act 2003 now governs the prohibition of discrimination in licensed premises which was formerly covered by the Equal Status Act. Nobody has been charged with disseminating information about the prohibition against discrimination in this Act, with the result that many members of groups experiencing discriminatory exclusion believe that the law has been repealed. This does not appear to comply with Article 10 of Directive 2000/43.
- The Intoxicating Liquor Act 2003, as stated, transferred jurisdiction to hear cases regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court, resulting in fewer complaints being made against licensed premises which refused access to Travellers. Procedures in the District Court are more complicated, hearings are adversarial and public and there is the risk of costs being incurred.

¹⁸ The Organisation of Working Time Act, 1997 'contains an entitlement to leave in respect of public holidays. The Second Schedule to the Act provides that an employer may, "for the purpose of fulfilling any relevant obligation imposed on him or her by this Act, treat as a public holiday, in lieu of a public holiday aforesaid, either (a) the Church holiday falling in the same year immediately before the public holiday, or (b) the Church holiday falling in the same year immediately after the public holiday" The Schedule goes on to list the applicable Church holidays, which are all Christian, and in the main Roman Catholic. The question is whether the entitlement of an employer to substitute a public holiday for a church holiday is contrary to the principle of equal treatment.' Religion report of May 2003 by Dave Ellis.

¹⁹ Religion report of May 2003 by Dave Ellis.

²⁰ Equality Authority, 'Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (Racial Equality Directive), Framework Employment Directive (FED and the Gender Equal Treatment Directive (GETD)' at 20.



The Equality Authority is aware of a growing number of claims which did not proceed because the claimant did not want to run the risk of having to pay the other party's costs. This was foreseeable as a consequence of the change made by the Government to the Equality Tribunal's jurisdiction and had been pointed out as representing an erosion of the Equal Status Act 2000.²¹ It seems to be a breach of the non-regression provisions of Article 15 of the Racial Equality Directive.

Compliance with article 3(1)(e) of the Racial Equality Directive is dependent on future judicial interpretation. The Equal Status Act 2000-2008 prohibits discrimination in relation to goods and services, on all nine grounds. In *Donovan v. Donnellan*²² it was suggested that this could cover State services such as health care, but the matter has to be finally determined. The impact of section 14 of the Equal Status Act may prove difficult in this regard, as it provides a broad statutory exemption to the Equal Status Act 2000-2004 where an act or action is required by virtue of another piece of legislation.²³

The Equal Status Act prohibits clubs from discriminating, on all nine grounds, at section 8, and permits certain exceptions to this rule in section 9. Those exceptions are where a club is set up to cater for the needs of a particular ground, such as gender, race or religion.

As a result of a seriously questionable judicial interpretation by the Supreme Court in 2009 this provision may contravene the directive. In *Equality Authority v Portmarnock Golf Club*²⁴ the High Court, assessing whether a male only golf club was a discriminatory club, held that section 9 of the Act permitted male only clubs, as the principal purpose of Portmarnock Golf Club is to cater only for the needs of men.²⁵ Such an interpretation in the context of gender could well apply across all nine grounds and is potentially not in compliance with the Racial Equality Directive. The Equality Authority appealed the case. On 4 November 2009 the Supreme Court confirmed the legal right of the golf club to restrict its membership to men by a majority of 3 to 2. The Court said that under the section 9 exemption it did not consider the club to be a "discriminating club" under the Equal Status Act, by reason only that it refused access to membership to women, as in the view of the Supreme Court the "principal purpose" of the golf club in question was "to cater only for the needs" of men.²⁶ This could include sporting or leisure needs such as a wish to play

²¹ <http://www.paveepoint.ie/pdf/NewsletterJuly03.pdf>.

²² DEC-S2001-011.

²³ Section 14 (1) Equal Status Act states "Nothing in this Act shall be construed as prohibiting (a) the taking of any action that is required by or under (i) any enactment.."
http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

²⁴ [2005] IEHC 235.

²⁵ Equal Status Act 2000 to 2007 Section 9

http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf at p 20.

²⁶ <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.



golf. The Equality Authority had opposed this interpretation which could be followed by similar clubs to discriminate against people on other grounds in a similar manner (e.g. a club for white people only).²⁷

0.3 Case-law

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences).

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

An important case decided in 2009 was the Portmarnock Golf Club case discussed in the preceding paragraph 0.2 in which the Supreme Court rejected the appeal of the Equality Authority and upheld the legitimacy of male-only golf clubs. This case is important because the court's seriously questionable reasoning in the case could extend beyond the gender ground.

Name of the court: Supreme Court

Date of decision: 4 November 2009

Name of the parties: Equality Authority v Portmarnock Golf Club

Reference number: <http://www.bailii.org/ie/cases/IESC/2009/S73.html>

Address of the webpage: <http://www.bailii.org/ie/cases/IESC/2009/S73.html>

Brief summary: see preceding paragraph 0.2.

The following cases are grouped under the headings of the various grounds (e.g. age, race, disability, Traveller Community, etc).

²⁷ The Equality Authority in 2009 reacted to the judgment however merely by saying it "welcomes this decision and is pleased that we now have a definitive interpretation of this particular provision of the Equal Status Act dealing with discriminatory Clubs" <http://www.equality.ie/en/Press-Office/Statement-from-the-Equality-Authority-regarding-Portmarnock-Golf-Club-case-decision.html>



Age

Date of decision: 16 December 2008

Name of the parties: Power v Blackrock College

Reference number: DEC-E2008-072

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2008/Employment-Equality-Decisions/DEC-E2008-072-Full-Case-Report.html>

Brief summary: Hypothetical comparator not allowed in age discrimination case.

The complainant was employed by the respondent as a security guard between January 1993 and August 2005, with a break of a number of months in 2002.

Prior to this break he worked on a full-time basis and after that break he worked mostly on a part-time basis. He stated that his employment was terminated by the respondent in August 2005 in circumstances amounting to redundancy and that the failure of the respondent to make a lump sum redundancy payment to him in those circumstances constituted discrimination of him on grounds of age contrary to the Employment Equality Acts, 1998 and 2004.

The Equality Officer ruled that the complainant is required to identify an actual comparator for the purposes of his complainant with whom he performs “like work” in terms of section 7 of the Employment Equality Acts, 1998 and 2004. He cannot rely on a hypothetical comparator. As the complainant had failed to identify an actual comparator with whom he performed “like work” his complaint must fail. Furthermore, the employer had made an ex-gratia payment to two other employees who were made redundant at the same time as the complainant. It states that (i) these employees were both in the same age bracket as the complainant and therefore age discrimination cannot be inferred from this and (ii) there were personal circumstances pertaining to these two employees which prompted the respondent to make those payments. The Equality Officer was satisfied that the employer’s decision not to make a similar ex-gratia payment to the complainant on termination of his employment with it was because he was not in the same personal circumstances as the other two employees. The failure to grant him an ex-gratia payment was not connected with his age and it did not therefore constitute discrimination of him contrary to the Acts. The Equality Officer found that the facts did not support a finding of discrimination, but even if the facts had been otherwise, the complainant could not rely on a hypothetical comparator under the Irish legislation.

Name of the court: Equality Tribunal

Date of decision: June 2009

Name of the parties: Joanna Fortune v CARI

Reference number: DEC-E2009-052

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2009/Employment-Equality-Decisions/DEC-E2009-052-Full-Case-Report.html>



Brief summary: The case concerned a claim by Ms Joanna Fortune that the NGO Children at Risk in Ireland (CARI), discriminated against her on the ground of age (in this case youth).

The complainant claimed that a colleague harassed her on grounds of age by questioning her professional and life on grounds that she was too young to be a psychotherapist, undermined her chances of promotion, and that the respondent discriminatorily dismissed her. The Equality Officer awarded the complainant € 35,000 in compensation for the harassment endured over 2 years and the constructive dismissal that resulted from it.

Date of decision: 29 July 2004

Name of the parties: Department of Health and Children v Gillen

Reference number: EDA0412

Address of the webpage:

<http://www.labourcourt.ie/labour/labcourtweb.nsf/185190278967d05380256a01005bb35e/80256a770034a2ab80256ed60052a16f?OpenDocument>

Brief summary: The Court found that the complainant was discriminated against on the grounds of age when applying for promotion in the interview and promotion process.

- It set out the tests which are considered by the Labour Court and the Equality Tribunal when considering age discrimination. The factors which figured most strongly to date are: A marked statistical difference in success rates for different age groups in apparently similar circumstances.²⁸
- Evidence of a policy to prefer a particular age group.²⁹
- Lack of transparency, or unexplained procedural unfairness, may create an inference of discrimination.³⁰
- A mismatch between formal selection criteria and those apparently applied in practice may also create an inference of discrimination.³¹
- A pattern of significant inconsistency with older candidates previous assessments.³²

Other factors, which can be persuasive, are:

- (a) Discriminatory questions asked at interview.
- (b) The presence of a single successful appointee who was in the same age group as the complainants does not disprove age discrimination, notwithstanding that the appointee is of exceptional ability compared to other successful appointees.

²⁸ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

²⁹ *O'Byrne v. Department of Public Enterprise*, DEC-E2002-040.

³⁰ *O'Byrne v. Department of Public Enterprise*, DEC-E2002-040, *Madden v Aer Lingus* DEC-E2002-006.

³¹ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

³² *O'Mahony v Revenue Commissioners*, DEC-E2002-018.



Conversely, the following elements have weighed against an inference or a conclusion of age discrimination:

- The selection criteria appear objective and seen to have been honestly applied in practice;³³
- Statistics suggested that success rates are broadly similar for different age groups, in apparently similar circumstances;³⁴
- The employer tried to ensure that the Interview Board included a mix of gender and ages.³⁵

Finally, the fact that the respondent's overall policy is not discriminatory has been given limited weight in several decisions".³⁶

Name of the court: Equality Tribunal

Date of decision: 1 August 2006

Name of the parties: O'Brien v. ComputerScope

Reference number: DEC-E2006-030

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2006/Employment-Equality-Decisions/DEC-E2006-030-Full-Case-Report.html>

Brief summary: The complainant alleged both direct and indirect discrimination on the age and gender ground, as well as alleging victimisation.

The complainant was appointed to the position of Assistant Editor, she was 23 years of age: her comparators were both male and over 30 year's of age.

One comparator, her predecessor, as Assistant Editor was paid more than the complainant when working in that role; this was deemed *prima facie* evidence of discrimination on the gender and age ground. The Equality Officer in assessing whether indirect discrimination occurred did not address the issue of age and gender discrimination separately. The respondent did not dispute that the complainant was paid less than her comparator, but stated that there were grounds other than gender and age for the difference in pay. The respondent in this case submitted a market forces argument stating: "*severely deteriorating market conditions dictated that the remuneration for the role of Assistant Editor had changed, primarily due to the difficult trading conditions within the technology media sector, and the resulting financial constraints on ComputerScope Ltd.*" The Tribunal relied on a Labour Court decision³⁷ that stated:

³³ *Employee v. Department of Foreign Affairs*, DEC-E2002-038.

³⁴ *Byrne v. FÁS* DEC-E2002-045.

³⁵ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

³⁶ *Sheehan v. D.P.P.* DEC-E2002-047.

³⁷ *Roches Stores v. Mandate*, DEP013.

“An employer, seeking to rely on this defence, must prove that the difference in pay is genuinely attributable to a ‘ground other than sex’ (see *Irish Crown Cork Co. v. Desmond and Ors.* [1983] ELR 1780). This requires that the respondent must establish to the Court’s satisfaction that the reasons for paying the comparator the particular rate of pay are genuine, and that they do not apply in the case of the claimants.

The Court must also be satisfied that there is objective justification for the difference in pay, and that the justification is not just historical but is also relevant at the date of the determination (see *Flynn v. Primark* [1977] ELR 218”.³⁸

The Tribunal had to determine whether this reason was objective, and unrelated to the complainant’s gender and/or age. The Tribunal established that the complainants’ salary was frozen due to the difficult market conditions, but at the same time the comparator’s salary on promotion was not frozen.

This was attributed to “*his different level of skill and ability*” and in respect of the promotional post he was *doing “a completely different job with a different salary attached”*.³⁹ Relying on the European Court of Justice decision in *Jamstalldhetsombudsmannen v. Orebro lars landsting*,⁴⁰ the Equality Tribunal stated of the level of skill required that:

“It follows that genuine transparency, permitting an effective review is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women”.⁴¹

Further the Tribunal relied on *Brunnhofer v. Bank der Osterreichischen Postsparkasse AG*,⁴² which addressed the issue of effectiveness of an employee’s work relative to that of another worker, and on the question of objective justification in a pay related case it stated:

“... it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of the person’s appointment but come to light only during the actual performance of the employee’s activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing

³⁸ *Roches Stores v. Mandate*, DEP013.

³⁹ DEC-E2006-030 at paragraph 7.

⁴⁰ Case C-236/98.

⁴¹ Case C-236/98 paragraph 54.

⁴² Case C-381/99.

identical or comparable work”.⁴³

This ensured that the complainant could only be assessed after commencement of work, and difference in skill or capacity cannot be determined as a basis for a starting salary. It was further noted that in this instance the complainant’s capacity was not in issue. The respondent did not succeed in establishing that the difference in pay was objectively justified. No reference was made in the Tribunal to the issue of whether the action was appropriate and necessary. The complainant was awarded compensation for discrimination as well as the correct rate of remuneration for the period complained of.

Name of the court: Equality Tribunal

Date of decision: 30 June 2003

Name of the parties: Noonan v. Accountancy Connections

Reference number: DEC-E2004-042

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2004/Employment-Equality-Decisions/DEC-E2004-042-Full-Case-Report.html>

Brief summary: an age discrimination case taken to the Equality Tribunal, addressed the issue of rejecting the ‘overqualified’ candidate, and whether this amounts to indirect discrimination.⁴⁴ The respondent, an employment agency, advertised two posts requiring at least 2-3 years post-qualification experience. The complainant, in his 50’s, had 20 years experience as a qualified accountant. The complainant did not succeed in getting either position, and the respondent stated that 2-3 years was in fact the maximum experience sought, and that the complainant was too senior for the post. The complainant contended that the imposition of a maximum limit would in this instance exclude most candidates over the age of 30; no statistics were introduced to support this argument. The Equality Officer in addressing this lack of proof referred to the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*,⁴⁵ and quoted:

‘On the one hand, the burden is on the complainant to prove his case and, viewed in isolation, the statistics produced do not prove it. On the other hand it is most undesirable that, in all cases of indirect discrimination, elaborate statistical evidence should be required before the case can be found proved (*emphasis added*). The time and expense involved in [p]reparing [sic] and proving statistical evidence can be enormous, as experience in the United States had demonstrated. It is not good policy

⁴³ Case C-381/99 paragraph 76.

⁴⁴ This case was taken under the Employment Equality Act 1998 prior to amendment, the provision on indirect discrimination is now broader, and arguably easier to prove.

⁴⁵ ED-02-34, the Labour Court in reaching its decision relied on a number of UK and Northern Ireland decisions, namely: *Price v Civil Service Commission*, [1977] IRLR 291, *Perera v. Civil Service Commission*, [1982] IRLR 147, *Clymo v. Wainsword London Borough Council*, [1989] IRLR 241 and *Briggs v. North Eastern Education Library Board*, [1990] IRLR 181.



to require such evidence to be put forward unless it is clear that there is an issue as to whether the requirements of Section 1(1)(b) are satisfied'.⁴⁶

The Equality Officer accepting that statistical proof is not always necessary, accepted that the maximum limit of 2-3 years would in practice ensure that the provision could be complied with by a “*substantially smaller proportion of prospective employees*”⁴⁷ who are in the over 30 age group. There was a *prima facie* case of indirect discrimination; the question that remained for the Equality Tribunal was whether the respondent’s action was capable of objective justification. The respondent referred to candidates with too much post qualification being potentially poor performers as they are more than qualified for the job, or that the job satisfaction of the employee will be reduced.

The respondent also referenced the fact that a person with 2-3 years experience would be at the right level of experience for the job, and would have a career path in the organisation. The Equality Tribunal relied on a European Court of Justice decision that stated:

“Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination on grounds of sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim”.⁴⁸

The respondent was held not to have shown that the imposition of the maximum requirement of 2-3 years post qualification experience was unrelated to any discrimination based on age, neither had the respondent established that the requirement could be considered as a suitable means of achieving the aim of providing the appropriate skill base. Therefore the respondent failed to rebut the complainant’s claim of age indirect discrimination.

Name of the court: Equality Tribunal

Date of decision: 11 September 2003

Name of the parties: Leahy v. Limerick City Council

Reference number: DEC-E2003-038

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2003/Employment-Equality-Decisions/DEC-E2003-038-Full-Case-Report.html>

⁴⁶ DEC-E2004-042 at paragraph 5.10, This quote is taken from *Perera v. Civil Service Commission*, [1982] IRLR 147 which was repeated verbatim in the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*, ED-02-34.

⁴⁷ Section 28 of the Employment Equality Act 1998, this was the wording used in the pre-amended Act.

⁴⁸ DEC-E2004-042 at paragraph 5.15 quoting from *Erica Steinicke v Bundesanstalt fur Arbeit* Case C77/02 11 at paragraph 64.



Brief summary: The employer sought to rely on section 34(4) relating to mandatory retirement ages. The complainant in this action was a fire-fighter who was obliged to retire from his position at the age of 55.

He claimed age discrimination, as different retirement ages were applied to fire officers. Equally the complainant was able to show that extensions of service beyond the age of 55 had been granted to fire-fighters in his district, and other local authorities had fire-fighters in service who were over 55 years of age. The respondent relied on section 34(4) and contended that as employers they were permitted to set different retirement ages for employees of different categories, and that fire-fighters formed a distinct category of employee from fire officers. Fire officers were required to have appropriate third level qualification for the post, there was a managerial function to the post, and they attended fires only in a supervisory role.

The respondent also contended that the terms and conditions of the complainant's employment stated that there was a mandatory retirement age of 55. There had been extensions to this in the past but these were exceptional cases and only sanctioned for operational reasons when the respondent was experiencing staff shortages.

The respondent set out the rationale underpinning the introduction and operation of the mandatory retirement age. The Equality Officer held that the respondent had consistently applied the retirement age of 55 for fire-fighters since 1974; those that stayed in service beyond that age did so as a result of a Labour Court

Recommendation, or because exceptional circumstances existed, and further these extensions occurred at a time when age discrimination was not unlawful. The Equality Officer also accepted that fire-fighters and fire officers were different categories of employee and consequently, she held that it was not unlawful for the respondent to set different mandatory retirement ages for the two groups.

Also see the 2010 case of *McCarthy v HSE*, P.7 above, in which high Court judge held that compulsory retirement by the employer was legal, making reference to the decision in *Palacios*.

A different outcome was reached in *Kiernan v Longford County Council*.⁴⁹ Here the complainant worked for the respondent as a General Services Supervisor. The general retirement age was 66 for outdoor workers but they were allowed to work beyond 66 and in some cases into their 70s, up to 73. The complainant wanted to work beyond 66 in order to give himself more service towards his pension, but the respondent forced him to retire at age 67, thus refusing him the same retirement age as others had been permitted. The respondent contended that their policy was

⁴⁹ DEC-E2011-067, <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-067-Full-Case-Report.html>.



implemented for legitimate aims, namely financial and manpower planning. The Equality Officer found that at the time the complainant reached sixty six it was custom and practice within the employment that there was no retirement age, in that working beyond 66 was at the discretion of the employee and up till then nobody who asked to work on had been refused. He therefore concluded that making the complainant retire before his legitimate expectation did not satisfy a legitimate aim and that the complainant's enforced retirement was discriminatory on the grounds of his age.

However, the Employment Appeals Tribunal reached a different conclusion in *Patrick MacMahon v G4s Secure Solutions (Ire) Limited* (UD 2200/2009), dealing with compulsory retirement of employees under the Redundancy Payments Acts, 1967-2007, and Unfair Dismissals Acts 1997-2007, where it found that an employer is entitled to terminate employment when this is clearly provided for in the contract of employment even where employees were facilitated in working past the retirement age previously.

Clearly, there is considerable confusion over the issue of age discrimination and mandatory retirement in Ireland.

Name of the court: Equality Tribunal

Date of decision: 29 October 2010

Name of the parties: Mr Kevin O'Connor v Iarnod Eireann (Irish Railways)

Reference number: DEC-S2010-048

Address of the webpage:

Brief summary: Equal Status Acts 2000-2008 - Disposal of goods and services, Section 3(2)(f), age ground - indirect discrimination

The Equality Tribunal ordered the railway company to review its policy requirement that holders of Free Travel Passes may obtain their ticket only on the day of travel, which it found to be indirectly discriminatory on grounds of age. It accepted that the railway company's policy was motivated by a legitimate goal of tackling fraud, but that the measures went beyond what was appropriate and necessary, and imposed disproportionate restrictions on passengers aged over 66 years, rather than being a targeted solution to a specific problem. The company was ordered to update its website accordingly and the complainant was awarded a sum of €500 as redress for the inconvenience caused.

Disability ground

Name of the court: Equality Tribunal

Date of decision: 30 July 2010

Name of the parties: Peter O'Neill v. Garda Síochána Ombudsman Commission

Reference number: DEC-S2010- 037

Address of the webpage:



Brief summary: Notion of “Services” in Equal Status Act. The Garda Síochána Ombudsman Commission, a body responsible for investigating complaints against the police, was exercising a quasi-judicial decision-making function, and this decision-making function was not a service and therefore was not subject to the terms of the Equal Status Acts. The complainant's case was that he was discriminated against by the respondent on the disability ground when it refused to extend the six month time limit for referring a complaint to the respondent.

Name of the court: High Court

Date of decision: 11 June 2010

Name of the parties: Cahill v Minister for Education and Science

Reference number: 2010 IEHC 227

Address of the webpage: <http://www.bailii.org/ie/cases/IEHC/2010/H227.html>

Brief summary: The High Court decided on appeal to uphold the practice of annotating the Leaving Certificate (final school examination) certificates of students with dyslexia. A student with dyslexia had claimed that she was discriminated against by the attachment of special annotation to her Leaving Certificate indicating she was not assessed on spelling and certain grammatical elements in language subjects. Supported by the Equality Authority, she took a complaint to the Equality Tribunal where it was upheld, but the Minister for Education appealed the decision and the Circuit Court overturned it. The authority then appealed to the High Court, which upheld the practice. The appellate Court decided that failure to record the “reasonable accommodation” made to Ms Cahill would “adversely affect the integrity of the testing process”, and “essentially defeat the purpose of the exam in the first place”. The judge accepted the Minister’s argument that the deletion of the notation from Ms Cahill’s certificate would constitute a misrepresentation to employers or other persons invited to consider or rely on that document. The judge also rejected the student’s claim that the Leaving Certificate exam itself was inherently discriminatory in applying a standardised testing to a student with dyslexia. She had claimed such standardised testing effectively tested a student’s disability rather than their ability in the subject being examined.

The Dyslexia Association regretted the decision, pointing out that there is no annotation of degrees or diplomas at third level or higher, and questioned why it should be deemed appropriate to annotate the certificate at school-leaving level. The Equality Authority expressed disappointment and called for action at Government level to rectify the situation.

Name of the court: Equality Tribunal

Date of decision:

Name of the parties: An Employee -v- A Limited Company

Reference number: DEC-E2010-025

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-025-Full-Case-Report.html>

Brief summary: Disability - Discriminatory Treatment - Discriminatory Dismissal -



Reasonable Accommodation. Award: €27,000 for Discrimination.

The complainant commenced work as a fork lift driver/general operative in the respondent's warehouse in or about February 2005. His duties included picking and packing products, driving the forklift to get goods down from the shelves and transferring them to the dispatch area. He said that he also did some dispatch work which involved using the computer. He said that he had no problem with the work up until September 2006 when he was asked by his supervisor to dust shelves. The complainant submitted that he has asthma for about three to four years before he joined the respondent company. He said that it had not caused him any problem in this employment up until he was asked to dust shelves with a feather duster.

He asked for a mask and it was supplied but the mask was only a paper mask and it was not sufficient as the dusting created clouds of dust which was too excessive for his condition. He told his supervisor that he could not continue dusting. He argued he was eventually dismissed because of this grievance.

The respondent denied discriminating on grounds of disability but his evidence was not convincing. In particular, the Equality Officer noted that the respondent said that he did not discuss dusting with the complainant at the final meeting.

In evidence the respondent stated that the complainant was excused from dusting and if he had continued in the employment he would no longer have to dust. If the respondent had no problem about the complainant's continuing in the employment, the Equality Officer found it surprising he did not give him this information about dusting at the final meeting. This led her to believe that the respondent did not want the employment relationship to continue and she awarded €27k, half a year's salary.

Name of the court: Equality Tribunal

Date of decision:

Name of the parties: A Government Employee -v- A Government Department

Reference number: DEC - E2010-055

Address of the webpage:

Brief summary: Disability - Discriminatory Treatment - Reasonable Accommodation Conditions of Employment. Award €30,000 Discrimination

The complainant started working for the respondent in 1981. In 2002 he was diagnosed with hypertension. On 14 February 2005, whilst on sick leave, he advised the Department that he wanted to apply for early retirement on ill health grounds on the advice of his GP and a Consultant Physician. Following a medical assessment by the Chief Medical Officer (CMO) his application was refused. He appealed the finding of the medical report, but was subsequently informed that his appeal had been turned down and he was advised that if he did not return to work immediately he would be removed from the payroll. He was duly removed from the payroll and informed that his file was being submitted to the head of his work area for consideration of his dismissal.



In October 2006 he was assessed by the respondent's Specialist in Occupational Medicine who did not think that he was "totally and permanently disabled or a suitable candidate for ill health retirement".

The complainant submitted that he had been discriminated against by the respondent's rejection of his request to retire on ill health grounds and failure to provide reasonable accommodation which would have given the complainant access to employment.

The Equality Officer concluded that the respondent focussed on the complainant's application for retirement on ill health and when he was considered unsuitable for this they insisted he return to work. They had failed to consider how they might assist the complainant to return to work and to fully assess the complainant's capability in accordance with section 16 of the Acts.

He ordered that the respondent carry out a re-assessment of the complainant to be completed in 6 months, and pay him €30,000 in compensation for the distress experienced.

In another case involving disability discrimination, the complainant failed for lack of an appropriate comparator.

Name of the court: Equality Tribunal

Date of decision:

Name of the parties: An Employee v An Employer

Reference number: DEC-E2010-001

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-001-Full-Case-Report.html>

Brief summary: Disability - Discriminatory Treatment - Reasonable Accommodation - Equal Pay.

The complainant had an existing heart condition before starting with the employer in 2001. He argued he was discriminated against in that he received less pay than a female comparator. The respondent denied any discrimination and submitted that during 2005 the claimant was unfit 69% of the total working time and could not earn bonuses at the same levels as the comparator. Therefore he was not treated less favourably because of his disability but differently because he did not undertake his duties at work.

The equality Officer found that an appropriate comparator would have been someone else who had been absent for a significant period of time and either does not have a disability or has a different disability. The actual comparator was someone without a disability but who had not been absent for a significant period of time. The Equality Officer therefore found her to be an inappropriate comparator and the complainant was unable to establish a prima facie case in relation to his equal pay claim.



Name of the court: Equality Tribunal

Date of decision: 29 March 2011

Name of the parties: *An Employee -v- An Employer*

Reference number: DEC-E2011-066

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-066-Full-Caase-Report.html>

Brief summary: Grounds / Issues: Conditions of Employment, Discriminatory Dismissal, Gender, Disability. Award: €35422.71 Redress.

The complainant was diagnosed with Gender Identity Disorder in and around 2005 and is a male to female transsexual. The case was dealt with on the disability ground without examination as to whether Gender Identity Disorder can be seen as a disability. The Tribunal said: "It was accepted by parties that the complainant was suffering with a disability at all material times pertaining to this complaint. It is also clear that the respondent was notified of the complainant's condition in or about October 2006." From then on it treated GID throughout the judgment as a form of disability without further discussion. The complainant claimed that since she informed her employer of her true identity and her need to live in this identity her working conditions were made intolerable to such an extent that she was ultimately constructively dismissed as a result of her transition from male to female.

The complainant underwent transgender treatment whilst employed. She also had a period of absence. She alleged that on return to the office the next day she was asked aside and was informed that she could not use the female toilets nor mention the subject to anyone. The complainant stated that the female toilet was occasionally used by male staff and drivers when the male toilet was occupied. She was also told that she could only dress in her female identity while in the office but that she would have to change into her previous male identity when seeing clients. The complainant stated that she found this request impossible to comply with and when asked to visit a client company the very next day she chose to deal with them over the phone instead.

She then worked from home whilst new offices were being prepared but did not like it and there were problems in relation to payments. Eventually she resigned.

The respondent denied the allegations and referred to a transitional schedule that would help move the complainant forward in her transgender progression. However, the EO did not accept the purpose of this schedule and found, "... that the approach set out by the respondent has little in relation to actually enabling the complainant to work in her female identity and is not realistic in terms of timing... [and was]... not satisfied... that the respondent had a genuine business need for the complainant to work from home."

The Equality Officer awarded 79 weeks' pay, amounting to compensation of over €32k.



Name of the court: Equality Tribunal

Date of decision: 26 May 2010

Name of the parties: A Complainant (represented by the Equality Authority)
And An Irish Language College

Reference number: DEC-S2010-027

Address of the webpage: [http://www.equalitytribunal.ie/Database-of-
Decisions/2010/Equal-Status-Decisions/DEC-S2010-027-Full-Case-Report.html](http://www.equalitytribunal.ie/Database-of-Decisions/2010/Equal-Status-Decisions/DEC-S2010-027-Full-Case-Report.html)

Brief Summary: The complainant has dyslexia and was afforded reasonable accommodation in certain subjects in her Junior Certificate examination (intermediate state examination) in June 2005 in the form of a reader and a marking modification in respect of spelling and grammar. When she received her Junior Certificate, it had annotations attached to the subjects for which she had received an accommodation. The complainant received a grade A in higher level Irish in this examination. In January 2007, the complainant applied for a place on an Irish language course at the respondent's college, for which the entry requirements outlined on the application form were that "Standard A, B, and C grades are eligible". The complainant forwarded her application to the respondent in the belief that she had exceeded the academic entry requirements with the grade A she had been awarded in higher level Irish examination. Subsequently the complainant's mother was contacted by the college, asking her to explain the annotations on her daughter's Junior Certificate results which had been sent with the application form for the course.

The complainant's mother asked if she could speak to the course director but was informed that she was away and that she didn't take "those students" and would not want to speak to her. The complainant's mother stated that there was no discussion whatsoever during the course of this telephone conversation of any special arrangements or accommodations which the complainant might or might not require in order to participate in the course.

The complainant's mother subsequently received an undated memorandum signed by the course director stating that her daughter "would suffer a sense of failure, humiliation and lack of self esteem" if she attended the course. The complainant claims that the respondent treated her less favourably on the grounds of disability by refusing to accept her onto the course, despite her having achieved a grade A in higher level Irish in her Junior Certificate examination when the stipulated minimum was a higher level grade C.

The Equality Tribunal awarded the complainant the sum of €3,500 as redress for the effects of the discrimination and ordered the respondent to review its procedures and policies for admission of applicants to its courses with a view to ensuring that these procedures are fully compliant with its obligations under the Equal Status Acts.

Name of the court: Equality Tribunal

Date of decision: 10 April 2006

Name of the parties: A Health Service Employee v. The Health Service Executive

Reference number: DEC-E2006-013



Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2006/Employment-Equality-Decisions/DEC-E2006-013-Case-Summary.html>

Brief summary: held that in this instance obesity could be considered an imputed disability. The employee had been offered the post of Staff Nurse, subject to a medical examination; medical clearance was not provided because of the complainant's weight, which it was alleged would not permit her to do the job. She was informed that her appointment was deferred subject to her satisfying the standards necessary for health clearance, and she would be reviewed in six months. Throughout the period where the respondent refused to make her permanent the complainant was deployed as a Staff Nurse when the respondent needed her. The complainant claimed that the employer in their actions imputed a disability to her, and whether obesity amounted to a disability was not in itself an issue. The respondents argued that obesity was not a disability. The Equality Officer referring to a letter from the respondent which stated about her weight that: "Nonetheless this condition does pose significant risk to [Ms. A's] health and is an independent predictor of work related disability." A different letter stated: "you have a serious weight problem which has been raised with you in order that you might address the significant risk to your own health and also the fact that this problem is predictive of work related impairment." The Equality Officer ultimately held that she was not going to determine whether obesity was a disability but found that the respondent had imputed a disability to the complainant as a result of her weight and had therefore discriminated against her. She ordered the respondent pay the complainant the sum of €3000 compensation for the effects of the discrimination and to appoint the complainant to the position.

Name of the court: Equality Authority

Date of decision: Casework activity 2008

Name of the parties: A mother on behalf of her son v A Special School and the Department of Education and Science

Reference number: None

Address of the webpage: <http://www.equality.ie/en/Publications/Casework-Reports/Casework Report 2008.html>

Brief summary: The Equality Authority settled a disability case regarding Irish Sign Language. The complainant claimed that her son, aged fourteen years and who was profoundly deaf attended a special school and was being discriminated against on the ground of his disability as the respondents were failing to provide him with an education through Irish Sign Language (ISL). The Equality Authority entered into lengthy correspondence with the school and the Department of Education and Science but the matter was not resolved and the complainant proceeded with the claim to the Equality Tribunal. The matter was settled on the second day of hearing with a number of the settlement terms relating to the student remaining confidential to the parties. The two terms which were not confidential were as following:

1. The Department of Education and Science agreed to invite tenders for the provision of a post graduate pathway in ISL, whereby the Teacher Education

Section of the Department Education and Science was inviting all interested third level institutions to submit a tender for the delivery of a programme of continuing professional development designed to provide teachers with the skills necessary for the design, implementation and evaluation of learning and teaching programmes for students learning through the medium of Irish Sign Language. The programme should be designed to provide teachers with: (i) a pathway to further studies i.e. Diploma and/or Masters, (ii) an incentive towards the pursuit of further research.

2. Pending the establishment and commencement of the course envisaged at one above, the Department of Education and Science and the school agreed to take such reasonable steps as were required to ensure that teachers of deaf children had access to university level training in ISL for deaf children. The school offered to support and use its best endeavours to ensure that at least three teachers from the school participate in such training each year.

Race ground

Name of the court: Labour Court

Date of decision: 7 October 2009

Name of the parties: *Goode Concrete and Shaskova*

Reference number: ADE/09/15, Determination No. EDA0919

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/Recommendations>

Brief summary: The complainant employee in this case was a Russian national who was employed in an administrative and personnel capacity. Her principal duty was administering the payroll. However, since she spoke good English, she also provided occasional translation services as the respondent had a number of employees who spoke Russian. The respondent employer alleged that she was dismissed on October 18th, 2007 on grounds of redundancy, due to a need to outsource the payroll function. The complainant argued that no redundancy situation existed as the payroll function was not in fact outsourced and that her dismissal followed from an argument with the Managing Director of the company some days previously. The Equality Tribunal had found in her favour holding that she had been selected for dismissal on grounds of her nationality and that this constituted discrimination on the race ground. On appeal, the Labour Court found that the complainant had discharged the onus of proof placed on her under the legislation, in that the facts established were significant enough to raise a presumption of race discrimination, which the employer had failed to rebut. She was awarded €20,000 in compensation.

Name of the court: Labour Court

Date of decision: 16 May 2008

Name of the parties: Ice Group Business Services Limited (represented by Doyles Solicitors) and Borzena Czernski (represented by the Equality Authority)

Reference number: EDA0812

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/Recommendations>



Brief summary: The Labour Court determined that a requirement that had been laid down by an employment agency for a Polish job seeker to provide two references, one being a character reference, did not equate to discrimination either direct or indirect in terms of race or gender. In doing so the Labour Court effectively overturned the controversial findings of the Irish Equality Tribunal decision of *Czerski-v-Ice Group*, which had awarded the Polish job seeker €7,000 following a finding that a requirement of two references amounted to indirect discrimination on the grounds of race. The award had been much criticised by employers and commentators. The Labour Court concluded that the requirement of two references, one being a character reference, did not amount to any form of racial or other discrimination.

Name of the court: Equality Tribunal

Date of decision: 5 December 2009

Name of the parties: An Employee v A Limited Company

Reference number: DEC – E2009 – 099

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2009/Employment-Equality-Decisions/DEC-E2009-099-Full-Case-Report.html>

Brief summary: The case concerned a claim by Ms Lyndsey Glennon that Bormac Ltd., t/a Carboni's Café (in liquidation) discriminated against her on the ground of race contrary to Section(s) 6(2)(h) of the Employment Equality Acts 1998 to 2008, in terms of being dismissed from the respondent's employment when she was their only Irish employee, while two non-national workers took up employment around the same time. At paragraph 4.5-4.6 the Equality Officer stated: "The respondent's liquidator provided additional documentary evidence on this matter, which clearly shows that one week after the complainant's part-time employment was terminated, a Chinese national took up a position of full-time employment with the respondent."

According to the complainant, the complainant's position working the counter was filled by her colleague Thomas, an Eastern European national. The Equality Officer found that the complainant's evidence as to her successful complaint to the Rights Commissioners, the fact that she had been asked not to inform her colleagues about their entitlements, and her dismissal shortly thereafter, together with the fact that the respondent hired a Chinese national on a full-time basis at the same time and deployed a non-national worker to her former counter duties, were sufficient to raise an inference that the complainant was indeed dismissed because she was Irish and in possession of the language skill and able to stand over her rights successfully. He found that she had established a prima facie case of discriminatory dismissal on the ground of her nationality,⁵⁰ and this had not been rebutted. The respondent was ordered to pay the complainant €5000 in compensation for her discriminatory dismissal and €1000 in compensation for her victimisation.

⁵⁰ In the Irish equality legislation, the race ground includes nationality as well as ethnic origin, see section 4.1 below.



Name of the court: Equality Tribunal

Date of decision: 28 May 2003

Name of the parties: Two Complainants v. The Department of Education and Science

Reference number: DEC-S2003-042-043

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2003/Equal-Status-Decisions/DEC-S2003-042-043-Full-Case-Report.html>

Brief summary: This was a race discrimination case taken to the Equality Tribunal. The Tribunal had to assess what is a service within the meaning of the Equal Status Act. The Department of Education provide maintenance grants which are payable to adults on further education courses. The two complainants were refused such grants. Section 2 of the Act defines 'service' as "a service or facility of any nature which is available to the public generally or a section of the public." The Equality Officer firstly relied on the decision in *Donovan v. Garda Donnellan*,⁵¹ to establish that the Act covered services provided by the State. The second element of this decision was to establish what was meant by the term 'facility'. The Equality Officer found that the provision of a maintenance grant is a 'facility' covered by the provisions of the Equal Status Act.

Name of the court: Equality Tribunal

Date of decision: 15 November 2007

Name of the parties: Maphoso v Chubb

Reference number: DEC2007-067

Brief summary: The complainant claimed that he was not allowed to use the toilet or canteen facilities at the site where he was working as a security officer. He believed that this was on racist grounds as he is black. The complainant also claims that he had been victimised since filing his complaint with the Tribunal. The Tribunal accepted his claim on the evidence and on the balance of probabilities and awarded him €8000 compensation for the effects of the acts of discrimination and victimisation.

Name of the court: Labour Court

Date of decision: 23 July 2004

Name of the parties: Campbell Catering Ltd. v. Rasaq

Reference number: EED 048

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/HomeSearch>

Brief summary: The Labour Court highlighted the difficulties faced by migrant workers, and stated:

"It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of

⁵¹ DEC-S2001-011.

disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence including the right to representation ... Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.

Name of the court: Employment Appeals Tribunal

Date of decision: -

Name of the parties: 17 Complainants v. Eamonn Murphy t/a Kilnaleck Mushrooms

Reference number: UD155/2006

Brief summary: This case was taken under the Unfair Dismissals Act 1977-1993, to the Employment Appeals Tribunal. The employees, Latvians and Lithuanians, were employed as mushroom pickers. In January 2006 the employees left their employment due to a dispute and contacted their local SIPTU office.⁵² The Union official contacted the employer who stated: *“they’re not with me now, they’re with SIPTU.”* He later denied this, and denied that they were dismissed, or that they were dismissed because they had joined a trade union. The Employment Appeals Tribunal determined that the employees were unfairly dismissed because they had joined a trade union. The dismissals were held to be blatantly unfair due to the employees being non-nationals with limited English and having been brought to Ireland specifically to pick mushrooms.

The Tribunal awarded the maximum award of 2 years salary, €26,000, in addition to varying amounts of compensation for lack of notice and annual leave/holiday pay to the 13 employees that proceeded with their claims. The total award was €355,850. This is one of the highest awards made by the Employment Appeals Tribunal, and suggests that the Employment Appeals Tribunal will not tolerate exploitation of non-national workers.

Name of the court: Labour Court

Date of decision: 26 January 2009

Name of the parties: NUI Galway and McBrierty

Reference number: ADE/08/1, Determination No.EDA091

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/Recommendations>

Brief summary: This case concerned an appeal by the complainant employee against a decision of an Equality Officer rejecting her claims of discrimination on grounds of race, gender and a complaint that she had been victimised in response to her complaints of discrimination. In the case of gender, the complainant had argued that she had been discriminated against on grounds of pregnancy, but the fact that she had her temporary contract extended twice after her employer became aware of

⁵² SIPTU; The Services, Industrial, Professional and Technical Union is one of the largest trade unions in Ireland.



her pregnancy and she continued to be considered for vacancies was sufficient to reject this aspect of her appeal, and the Court could find no evidence of victimisation. However, the race aspect of her claim was considered in most detail. The complainant was Welsh and therefore a UK national.

When she applied for work with the respondent, it had a practice of filling secretarial and clerical posts from two panels, the first for full time, long term jobs carrying possible permanency, the second for short term and casual work. The key difference between qualification for the two panels was a necessity for proficiency in the Irish language.

The complainant applied for the second panel and worked in a number of different roles for a continuous period of almost seven months, when she decided to apply to transfer to the first panel. She alleged that her application to join the first panel was blocked because a requirement to have Leaving Certificate Irish was posed and that she was subsequently prevented by the respondent from sitting a proficiency examination in Irish.

She argued that this treatment was discriminatory on the nationality aspect of the race ground and that the requirement was not reasonable in all the circumstances. The Court accepted that such a requirement was discriminatory in principle in that non-Irish nationals, in the main, do not have qualifications in the Irish language. However, it also pointed out that national languages have been protected by the European Court of Justice (CJEU) and it cited the case of *Groener v Minister for Education and City of Dublin VEC*, where the CJEU held that a linguistic requirement may be valid where it is part of a policy to promote the first official language.

Given the location of the respondent university and its special relationship with surrounding Gaeltacht areas, the Court held that the requirement was reasonable in this case. In this specific case, the Court found that there had been some confusion caused by the respondent as to whether Leaving Certificate Irish or merely proficiency in Irish generally was a requirement for placement on the first panel. Ultimately, however, it concluded that this confusion was removed by a letter the complainant received that clearly explained that she could apply in the future for posts on the first panel provided that she was in a position to sit and pass an Irish proficiency examination.

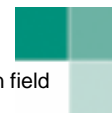
As a result her claim of discrimination on grounds of race also failed.

Religion ground

Name of the court: Equality Tribunal

Date of decision: 29 October 2010

Name of the parties: A Complainant -v A Respondent and A Government Department



Reference number: DEC-E2010 -189

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-189-Full-Case-Report.html>

Brief Summary: Religion, Access to Employment, Discrimination. Award: €12697 for Discriminatory Treatment.

This dispute concerned a claim by an employee that she was discriminated against by the Board of Management of a national primary school and the Minister for Education and Science⁵³ on the grounds of religion contrary to section 6(2)(e) of the Employment Equality Acts in relation to access to employment in terms of section 8(1)(a) of the Acts. The complainant submitted that in May 2007 she applied for a permanent teaching post in the school. She was offered a post and verbally accepted it. She received a letter dated 28 June 2007 from the Chair of the Board of Management confirming the appointment. On 5 July 2007 she received a call from the Chair of the Board of Management as the local priest had asked her to check a few things. She was asked if she had a Catholic religious certificate. The complainant said she did not have a certificate but she was familiar with and willing to teach the required religious programme. She also told the chair she was a member of the Church of Ireland and the Chair said it should not be a problem as she would be teaching 4th class which was not involved in Communion or Confirmation. The post was not confirmed and was re-advertised. The reason offered by the respondent was that neither the Principal nor the Chair of the Board of Management had the authority to make an offer to the complainant without permission of the Board of Management and this constituted a fundamental breach of procedures and therefore re-advertising the post was the "prudent" course of action.

The Equality Officer concluded that the Board of Management was influenced by the fact that the complainant did not have a Catholic Religious Certificate and awarded the maximum payment of €12,697.

The Labour Court considered in one case what elements are necessary in order to establish a case of victimisation in employment on grounds of religion.

⁵³ In Ireland, a national school is a type of primary school that is financed directly by the State, but administered jointly by the State, a patron body, and local representatives. They are multi-denominational in fact and law, but for historical reasons the patron is often the local Catholic archbishop. (There are other forms of primary school, generally private denominational schools attached to secondary schools - unlike their second level counterparts, these primary level private schools receive no support from the state.) In national schools, most major policies such as the curriculum and teacher salaries and conditions are managed by the State through the Department of Education and Science. Minor policies of the school are managed by local people, often directed by a member of the clergy, as representative of the patron, through a local board of management. Most primary schools in Ireland fall into this category, which is a pre-independence concept. The procedures for national schools set out that all appointments would be made by the Board of Management, subject to the prior approval of the Patron of the school. The exception relating to ethos was not discussed in this case.



Name of the court: Labour Court

Date of decision: 30 September 2010

Name of the parties: Department of Defence and Barrett

Reference number: ADE/09/39, Determination No EDA1017

Brief summary: In this case, the complainant argued that he had been subjected to adverse treatment in the form of being denied meaningful work and being subject to an unfair disciplinary process, as a direct result of complaints he had made that he had suffered discrimination on the ground of religion at work. The Director of the Equality Tribunal had originally dismissed his complaint of discrimination on grounds of religion as misconceived in law pursuant to her powers under S.77A of the Act but had directed that his complaint of victimisation should proceed to a full investigation. The Equality Tribunal subsequently upheld his victimisation complaint and awarded him €40,000 in compensation. The respondent appealed this decision to the Labour Court and the complainant also appealed on the basis that the level of compensation he was awarded was inadequate. The Court summarised the three key ingredients that must exist for a complaint of victimisation to be sustained:

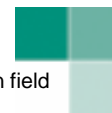
- First, the complainant must have taken an action that is ‘protected’ under the legislation, such as a complaint of discrimination, legal proceedings related to discrimination or supporting another employee who has alleged discrimination.
- Second, the complainant must be subjected to adverse treatment and
- Thirdly, that adverse treatment must be a reaction to the protected act having been taken.

Subjecting the facts of this case to these criteria, the Court first examined what protected act the complainant had originally taken. It noted that when asked to provide detail of the alleged discrimination against him on grounds of religion, he stated that he had objected to the saying of mass on the Department’s premises and to the making of a presentation to an Army Chaplain on the occasion of his appointment as a bishop. These objections stemmed from the complainant’s ‘humanist’ belief system and his view that the respondent was endowing a particular religion contrary to the Constitution.

The Court noted that the definition of discrimination under the legislation involved one person being treated less favourably than another is, has been or would be treated on one of the prohibited grounds.

Although it was well settled law that protection against victimisation is not limited to situations in which a complaint of discrimination is subsequently upheld, the catalyst alleged for adverse treatment must at least come within the ambit of a protected act.

The Court found that the Department had facilitated the saying of mass on its premises for those who wished to attend and the presentation to the Army Chaplain on his elevation to bishop, and that the complainant had objected to this. However these objections could not be considered to have been complaints of discrimination on grounds of religion from an employee to an employer, as he was not obliged to



have any involvement in these occasions and could not therefore be considered to have been disadvantaged or treated less favourably by them. The complaint fell at the first hurdle. In the Court's view, as there was no valid complaint of discrimination, there was no protected act within the meaning of the legislation. Therefore it was not necessary to go on to consider whether there was any subsequent victimisation.

Sexual orientation ground

Name of the court: Equality Tribunal

Date of decision: 11 September 2008

Name of the parties: A Construction Worker v A Construction Company

Reference number: DEC – E2008 – 048

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2008/Employment-Equality-Decisions/DEC-E2008-048-Full-Case-Report.html>

Brief summary: Large compensation to victim of harassment due to sexual orientation. The complainant, Mr X., worked with the respondent from June 1996 to April 2006 as a general operative and banksman (i.e. person who directs the operation of a crane) on various building sites. He alleged that he was sexually harassed, and claimed that the respondent treated him in a discriminatory manner and victimised him when the respondent changed his conditions of employment, placed him on sick leave and ultimately made him redundant. The complainant had informed his employer he was sexually harassed but this was not properly investigated. The complainant mentioned that he had once had suicidal thoughts as a result of the harassment on site; following this the employer asked him to go on sick leave and receive counselling. Finally he was made redundant, although there was no evidence of clinical depression.

The Equality Officer ruled on 11 September 2008 that the complainant was discriminated against, sexually harassed and victimised on grounds of his sexual orientation and awarded the sum of 14,700 Euro as compensation for lost earnings, 10,000 Euro as compensation for the distress and effects of the harassment and 25,000 Euro as compensation for the distress and effects of the victimisation.⁵⁴

The Equality Officer also ordered the construction company to ensure that its current policies relating to harassment and sexual harassment were in accordance with the Code of Practice on Sexual Harassment and Harassment issued by the Equality Authority, that all existing and new staff were fully acquainted with the policy and that a specified contact person be appointed as the first point of contact for employees making initial enquiries or complaints, in line with best practice as included in the Health and Safety Authority's Code of practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.

⁵⁴ The powers of the Equality Tribunal are delegated to the Equality Officer who has the power to make the ruling.



Name of the court: Equality Tribunal

Date of decision:

Name of the parties: An Employee v A Government Department

Reference number: DEC-E2010-006

Address of the webpage: <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-006-Full-Case-Report.html>

Brief summary: Sexual Orientation - Discriminatory Treatment - Victimization. Award: €20,000 for Victimization. This dispute concerned a claim by an employee that she was subjected to discriminatory treatment by the Department of Foreign Affairs on the grounds of her sexual orientation. The complainant provided details of various incidents where she alleged that she was treated in a less favourable manner by the respondent, including being given only average marks in a performance review and failing to be promoted. In addition, a claim of victimisation had been raised. No direct discrimination was found but the complainant received a revised appraisal document after she had complained of discrimination. The Equality Officer established that the complainant had initially been given a rating corresponding to "meets the requirements of the job/role" and that this was signed off by her manager. After her complaint, a "revised" document presented to her for signature in September 2008 gave a rating corresponding to "needs improvement - role holder has met some role requirements to required standard but performance has fallen short in some respects". He awarded the complainant €20,000 for victimisation.

Traveller and Roma ground

Regarding Roma and Travellers, no separate statistics are kept on these by the Equality Tribunal. There is no evidence of any cases having been brought as yet by Roma people. Regarding travellers, employment discrimination cases brought by Travellers are very rare, and only 2 cases were referred in 2010. Regarding access to goods and services under the Equal Status Acts, 22 cases were taken on the Traveller community ground, an increase of 10% over 2009).⁵⁵ Many of the cases taken by Travellers continue to concern problems in accessing hotels and licensed premises. The Intoxicating Liquor Act 2003 transferred jurisdiction to hear cases regarding access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court, resulting in fewer complaints being made against licensed premises which refused access to Travellers; procedures in the District Court are more complicated, hearings are adversarial and public and there is the risk of costs being incurred. The Equality Authority has stated that it is aware of claims which did not proceed because the claimant did not want to run the risk of having to pay the other party's costs. No body has been charged with disseminating information about the legal protection against discrimination regarding access to licensed premises, an apparent non-compliance with Article 10 of Directive 2000/43 and Article 12 of Directive 2000/78.

⁵⁵ Equality Tribunal Annual Report 2010.



A national voluntary group that works with and represents Travellers has informed the present author that Travellers wrongly believe that the law prohibiting discrimination by licensed premises has been repealed.⁵⁶

In the Equality Authority files, no complaints by Roma have been recorded. While only 3 of the Authority's investigations of complaints under the employment equality acts related to the Traveller ground in 2008, anecdotal evidence suggests that the figure may be significantly higher, and it is of the view that discrimination is a significant factor for Travellers in the workplace.⁵⁷ Cases on access to goods and services (40) under the Equal Status Acts predominantly concern hotels, restaurants, bars and shops, but there are now some cases regarding educational provision and discrimination in schools. In the case of *Faulkner*,⁵⁸ a mother was awarded compensation of €4000 for discrimination on the Traveller ground when her son was unable to gain admission to a special needs school to which he had been referred by the psychological services.

In *Mrs A v a Primary School*,⁵⁹ a mother claiming on behalf of her son was awarded €6,350 for victimisation when the school refused to enrol her son, although her claims of discrimination on the Traveller and disability grounds were not upheld.

Name of the court: Circuit court, subsequently High Court

Date of decision: 25 July 2011, 3 February 2012

Name of the parties: Christian Brothers High School Clonmel and Mary Stokes (on behalf of her son John Stokes)

Reference number: Unreported judgments

<http://www.pila.ie/bulletin/february-2012/8-february-2012/irish-high-court-rules-on-traveller-boy-s-right-to-attend-school/>

<http://www.pila.ie/bulletin/2011/july/27-july-2011/irish-secondary-school-wins-traveller-discrimination-case/>

Brief summary: Courts uphold school admission policy which Equality Tribunal had declared discriminatory against Travellers

Ground of discrimination: race/ ethnic origin (Traveller Community)

Field: Education

Decision of the Court: A Co Tipperary secondary school successfully appealed against an Equality Tribunal ruling that it indirectly discriminated against Travellers when it refused a Traveller child admission.

Judge Tom Teehan allowed the appeal by the CBS High School, Secondary School, Clonmel against the decision of the Equality Tribunal that it should offer John Stokes

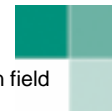
⁵⁶ Interview with Irish Traveller Movement in 2009.

⁵⁷ Evidence of Equality Authority to the High-Level Group on Travellers 2006.

<http://www.justice.ie/en/JELR/HLGReport.pdf/Files/HLGReport.pdf> p36.

⁵⁸ Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee*.

⁵⁹ Equality Tribunal, DEC-S2007-003 *Mrs A (on behalf of her son B) -v- A Primary School*.



a place and review its admission policy to ensure that it did not indirectly discriminate against any child.

John (13), through his mother Mary and instructed by the Irish Traveller Movement Independent Law Centre, lodged the complaint against the school on the grounds that it had breached the Equal Status Act. The court had earlier heard that John had applied in November 2009 to attend CBS High School, having attended a local primary school in Clonmel, but there was over-subscription with 174 applications for 140 available places. The school selected students on the basis of its admission policy based on three criteria – that the child's father or an older sibling had attended the school, that he was Catholic and that he had attended a local primary school. John met the last two criteria, but, as he was the oldest in his family and his father had not attended the school, he was not admitted and instead had to go to school in a neighbouring town.

Ms Stokes unsuccessfully appealed the school's refusal to the Department of Education before appealing to the Equality Tribunal which found that requiring a parent to have previously attended the school disproportionately affected Travellers. The Clonmel Circuit Court judge allowed the appeal and set aside the order of the equality officer.

Judge Teehan said he looked at the issue in terms of whether the parental rule whereby preference is given to the children whose father or older sibling had attended the school was discriminatory against Travellers.

Judge Teehan said that he was satisfied that the parental rule was discriminatory against Travellers and new immigrants such as Polish and Nigerian applicants whose parents were unlikely to have attended the school previously. In such circumstances, it fell to the school to show that its admissions policy could be justified by some legitimate aim and he found that one of its stated goals of supporting the family ethos within education amounted to such a legitimate aim. He also found the policy was appropriate in that applicant numbers exceeded available places in all but two years in recent times and the parental rule helped strike a balance between admission based on academic results and admission based on exceptional circumstances. Judge Teehan also noted that the High School had highlighted the importance of ties between the school and past pupils in terms of meeting funding shortfalls and he ruled that the parental rule was a necessary step to creating a balanced and proportionate admissions policy.

Subsequently the High Court upheld the Circuit court's decision and held that the school's policy "did not place Travellers at a particular disadvantage". This decision represents a step back for Travellers in education. According to figures from the Department of Education and Skills, improvements in the area of Travellers' progression from primary to post primary tripled during the ten-year period 1998 to 2008, but there remains a significant gap between the participation, attainment and outcome of Traveller learners in comparisons to their settled counterparts. According



to the Census of 2006, 63.2% of Traveller children under the age of 15 had left school, as compared to 13.3% nationally. The Department of Education and Science (Skills) Guidelines on Traveller Education in Second Level Schools 2002 states that schools polices should facilitate Traveller enrolment□. It acknowledges that some schools enrolment policies at third level have not been designed with Travellers in mind and can therefore indirectly act as a barrier to access□.

Name of the court: Equality Authority

Date of decision: Casework activity 2008

Name of the parties: A Complainant v A Hotel

Reference number: DEC-E2003-038

Address of the webpage: http://www.equality.ie/en/Publications/Casework-Reports/Casework_Report_2008.html at p 13

Brief summary: This case illustrates the continuing difficulty for members of the Travelling Community to obtain employment in the face of serious discrimination. The complainant contacted the hotel in response to a job advertisement for cleaning staff. The applicant was successful in her application and was given a general upkeeping position on a full-time basis. She was asked to commence work on 12th March 2008 and asked to contact the manager. She was informed that a decision had been made that she would be better suited to working in the bar and a meeting was arranged for her to meet with the bar manager that afternoon.

When the complainant went into the hotel for the meeting she was given a number of forms including a contract offering her the position.

During the course of the meeting the bar manager stated that “itinerants” were not to be served in the bar and that the policy stated that the bar was for residents only. The complainant informed the manager that she was a Traveller and asked if this would be a problem. The manager confirmed that there could be a problem as it was the hotel’s policy not to hire Travellers as well. The manager asked if the claimant’s employment in the bar would attract other Travellers and the complainant stated that it would not as other Travellers tend to stay away as they know how difficult it is for a Traveller to get employment.

The manager asked the complainant if she was served in pubs and shops in her own locality and whether people knew she was a Traveller. The complainant informed him that she had no problem being served. The manager went on to say that the bar served lots of people from her area and that they might object to being served by a Traveller. The manager then stated he would have to consult with the owners and that he would contact her a few days later. On several occasions during the interview the complainant stated that she could not believe the conversation that had taken place and she was reduced to tears. It was made clear to the complainant that the job offer had been withdrawn.

The complainant was subsequently contacted by the general manager and informed that there would be no new staff taken on (despite the fact she had already received

a contract of employment) as the bar would be very busy due to the mid-term break and there would be no time to train her in.

The Equality Authority lodged a claim on behalf of the claimant and also wrote to the hotel. No response was received from the hotel but following the lodgement of the Equality Authority's submission on behalf of the complainant, the matter was subsequently settled. The settlement included a significant sum of money and other terms.

With regard to Traveller accommodation important cases have included *Doherty v South Dublin County Council* in which the High Court established that section 6(6) of the Equal Status Acts 2000 to 2004 cannot be relied on to allow local authorities to afford less favourable treatment in the provision of housing,⁶⁰ and the Supreme Court subsequently established that the Equality Authority has the statutory authority to apply to act, and if permitted by the court, to act as an amicus curiae in court proceedings.⁶¹

A potentially important case was *Lawrence and Others v Mayo County Council*, a case in the High Court concerning the alleged failure of the relevant housing authorities to meet the accommodation needs of a Traveller family, and challenging the Criminal Justice (Public Order) Act, which criminalises in effect the entry into and occupation of lands by Travellers, even where the local authority has failed to meet its statutory accommodation obligations. However, the case was settled without coming to judgment.

Other important cases have included:

- An order in the District Court under the Intoxicating Liquor Act 2003 to install wheelchair accessible toilets in a pub and a hotel, to which the owners of the licensed premises consented;⁶²
- A government decision (in settlement of a claim under the Equal Status Acts on the sexual orientation ground) to pay adult dependent allowance in respect of the same sex partner of a terminally ill gay man;⁶³
- The first District Court finding of discrimination on the sexual orientation ground under the Intoxicating Liquor Act 2003;⁶⁴
- The first case of indirect discrimination on the religion ground where the Equality Tribunal found that Western Union had indirectly discriminated against Mohamed Haji Hassan on the grounds of his Muslim religion when they refused to release money sent through their service.⁶⁵

⁶⁰ High Court *Doherty & Anor -v- Sth Dublin County Council & Ors* [2007] IEHC 4.

⁶¹ Supreme Court [2006] IESC 57.

⁶² *Hayes v Russell Court Hotel and McGowan v Searson's Public House*.

⁶³ *A claimant v The Department of Social and Family Affairs, settlement with Equality Authority 2006*.

⁶⁴ *McGuirk and Twomey v Malone's Public House*, District Court 2006.

⁶⁵ Equality Authority, DEC-S2006-004 *Hassan v Western Union*.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The Constitution, Bunreacht na hEireann, 1937 contains an equality clause, which states:

40.1 All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function. To date the Irish Supreme Court has been disinclined to rigorously enforce the equality provision. Its history has not been a happy one, with inconsistent decisions and unclear reasoning being hallmarks of its interpretation by the courts. This provision has been interpreted by the Irish Supreme Court as not requiring identical treatment of all persons without recognition of differences in relevant circumstances. The provision forbids arbitrary discrimination. The difficulty with the provision is reflected in the broad discretion the Irish Supreme Court has in respect of justifying discrimination. In *Draper v. Attorney General* [1984] IR 277 the Supreme Court held that the failure of the legislature to make it possible for disabled people physically to vote in general elections did not infringe Article 40.1. In *Norris v. Attorney General* [1984] IR 36 the Supreme Court rejected a challenge to legislation which criminalized consensual homosexual conduct between adult males, but did not criminalise similar conduct between females. The Supreme Court upheld the legislation and in respect of the distinction between male and female conduct the court held that the legislature was 'perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as not only different but as posing no such social problems.' In *Murphy v. Attorney General*, [1982] IR 241 the Supreme Court reviewed a taxation law which ensured that married couples were worse off than if they were an unmarried couple living together. This law was deemed unconstitutional but not because of the equality ground, in that regard the Court stated that the inequality was 'justified by the particular social function under the Constitution of married couples living together.'

The Constitution Review Group has stated, the provision 'has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination.'

In *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 the Supreme Court stated 'the forms of discrimination which are, presumptively at least, proscribed



by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.’ It should be noted that it was this case that determined that a requirement on employers to provide reasonable accommodation to disabled workers, providing that accommodation did not give rise to an undue burden was in fact unconstitutional. It seems therefore that the equality provision is far from satisfactory. Although the grounds in that case were taken to extend (beyond the requirements of the Directives) to language and political opinions, it is not clear how the courts would see its application to age, disability and sexual orientation.

The Preamble of the Constitution reflects a religious theme to the Constitution:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, ...Do hereby adopt, enact, and give to ourselves this Constitution.

The preamble has been referred to in several important Constitutional cases, It has been referred to in an interpretative context. The preamble has never formed the sole basis for any Constitutional case. Article 44 of the Irish Constitution specifically addresses religion and the free practice of religion. This provision states:

44.1 The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence, and shall respect and honour religion.

44.2.1 Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

44.2.2 The State guarantees not to endow any religion.

44.2.3 The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

44.2.4 Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

44.2.5 Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

44.2.6 The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

Article 44 is focused on the free practice of religion.



Prior to the fifth amendment the Irish Constitution did grant special privilege to particular religious denominations. The Constitution Review Group stated of this provision that:

Broadly speaking, the existing provisions of Article 44 are satisfactory and have worked well. The key aspects of Article 44 – the guarantees of free practice of religion and the twin prohibitions of non-endowment and non-discrimination – are far-reaching and comprehensive. The Review Group is of course, aware that it has been frequently suggested that the State has a confessional ethos which tends to favour the majority religion at the expense of religious minorities. If this is so the fault lies elsewhere than with these provisions.

b) Are constitutional anti-discrimination provisions directly applicable?

Citizens can invoke their constitutional rights before the courts

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

Yes in principle. The Irish Supreme Court established this in two famous cases . Justice Budd pointed out in *Educational Company of Ireland Ltd v. Fitzpatrick*, “if one citizen has a right under the Constitution there exists a correlative duty on the party of other citizens to respect that right and not to interfere with it”. As a result, the Court would act so as not to permit a person to be deprived of his/her constitutional rights and would seek to it that those rights were protected. The Supreme Court gave some further indications that this is possible in the decision *Murtagh Properties Ltd V. Cleary* . However, in practice judges are reluctant to admit this possibility and it is not clear whether the equality guarantee may be enforced in actions between private parties.



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The Employment Equality Act 1998-2008 and Equal Status Act 2000-2008 both prohibit discrimination on nine grounds: Marital Status, Family Status, Sexual Orientation, Religious Belief (including no religious belief), Age, Disability, Gender, Race (including nationality and ethnic origin) and Membership of the Traveller Community.⁶⁶ It is possible to take cases on the basis of multiple/double discrimination, under both of the anti-discrimination statutes: In *Nyamphosa v. Boss Worldwide Promotions*,⁶⁷ it was held that the complainant was discriminated against on the grounds of both gender and race; in *Golovan -v-Porturlin Shellfish Ltd*,⁶⁸ where the complainant claimed discrimination on the grounds of gender and race, the Equality Officer found discrimination on the basis of race only.

Protection from discriminatory dismissal is also guaranteed by the Unfair Dismissals Acts 1977 to 2007. This protection is governed by section 6(2) and prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, race, colour sexual orientation, age or membership of the Traveller community. These terms are not defined within the legislation.⁶⁹ The Prohibition of Incitement to Hatred Act of 1989 prohibits incitement to hatred on account of a person's race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. These terms are not defined within the legislation.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

⁶⁶ Section 3(2)(a-j) Equal Status Act 2000-2008 and section 6(2)(a-i) Employment Equality Act 1998-2008.

⁶⁷ DEC-E2007-072.

⁶⁸ DEC-E2008-032.

⁶⁹ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.



The Employment Equality Act 1998-2008 and the Equal Status Act 2000-2008 contain broadly similar definitions:

Racial or ethnic origin - The ground of race relates to people who are of a different race, colour, nationality or ethnic or national origin.⁷⁰ In a recent case, the High Court dismissed an appeal from Circuit Court and Employment Appeals Tribunal holding that membership of farming community did not constitute a “race” for the purposes of the Equal Status Acts.⁷¹

Also relevant here is the definition of the Membership of the Traveller Community which is defined as a separate ground in Section 2(1) of the Employment Equality Act, 1998 as amended by the Equal Status Act :“ ‘Traveller community’ means the community of people commonly known and identified (both by themselves and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland.” Neither the legislation nor case law has determined whether members of the Traveller community are a racial or ethnic minority.⁷² This would be important in respect of applicability to the Traveller community of the protections guaranteed by international conventions, but with regard to EU directives, the Traveller community is defined as a separate protected ground under Irish equality legislation. However, while the Government has not recognised Travellers as a separate ethnic group, Ireland does report on developments concerning the Traveller community within the framework of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Framework Convention for National Minorities (FCNM).

Religion - Section 2(1) defines religion as “‘religious belief,’ includes religious background or outlook.” This is further defined at section 6(2)(e) as prohibiting discrimination with respect to people of different religious beliefs and includes discrimination where someone has no religious belief. It is not clear whether or not the protection extends to philosophical beliefs; in a 2004 case before the Equality Tribunal the Equality Officer maintained that it was not clear that humanism can be

⁷⁰ Section 6(2)(h) Employment Equality Act 1998-2007. Although there have been no cases on the issue, it is possible that anti-semitism could be treated under the grounds both of religion and ethnic origin.

⁷¹ Fitzgerald -v- Minister for Community, Equality and Gaeltacht Affairs [2011] IEHC 180 (5 May 2011) <http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/ec76855e27f339ba802578b1004ac770?OpenDocument>.

⁷² It has been contended by a number of groups, e.g. the Equality Authority and the National Consultative Committee on Racism and Interculturalism) that Ireland should recognise Travellers as members of a distinct ethnic group. See e.g. Traveller Ethnicity- An Equality Authority Report (<http://www.equality.ie/index.asp?docID=556>), and The Importance of Recognising Travellers as an Ethnic Group - Submission to the Joint Oireachtas Committee on Human Rights March 2004 (<http://www.nccri.ie/submissions/04MarTravellerEthnicity.pdf>). The Equality Tribunal has accepted a person’s self identification as a Member of the Traveller Community as evidence of such membership. Membership of the Traveller community is both individual and communal in nature, and membership does not cease on a person ceasing to have a nomadic way of life. However, the Government’s position remains negative on this issue, for reasons that are not clear.

counted as a religion.⁷³ However, in a more recent case both the Equality Tribunal and the Labour Court (on appeal) seemed implicitly to accept that humanist beliefs may be covered, even though it was ruled in that case that the action complained of was not discriminatory.⁷⁴ The Equality Authority considers the protection to apply to different religious belief, background, outlook or none.⁷⁵

Disability - Section 2(1) defines disability as:

- 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.

The Irish definition of disability is broader than that set out by the European Court of Justice in the *Chacón Navas*⁷⁶ case. The Irish definition does cover those who in the words of that case could have a "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".⁷⁷

The *Chacón Navas* case also holds that for a limitation to be regarded as a disability it must be probable that it will last for a long time,⁷⁸ in addition a disability is deemed to be different from a sickness.⁷⁹ The Irish definition of disability does not contain such distinctions, requiring neither the necessity for a condition lasting a long time, or making the distinction between disability and sickness/illness. The Irish definition includes those that come within the *Chacón Navas*, and also covers those that have

⁷³ DEC-S2004-015 Mr. Brendan Sheeran, Dublin V Office of Public Works
<http://www.equalitytribunal.ie/index.asp?locID=91&docID=520>.

⁷⁴ Department of Defence and Barrett (ADE/09/39, Labour Court No EDA1017 30th September, 2010
<http://www.labourcourt.ie/labour/labcourtweb.nsf/7a18f8963dd5836380256a01005bb358/80256a770034a2ab802577a4004e8a97?OpenDocument>.

⁷⁵ "What are the nine grounds of discrimination?" <http://www.equality.ie/index.asp?docID=48-q2>.

⁷⁶ Case C-13/05.

⁷⁷ Case C-13/05 paragraph 43.

⁷⁸ Case C-13/05 paragraph 45.

⁷⁹ Case C-13/05 paragraph 44.

a disability at present, a history of a disability, a future disability or an imputed disability.⁸⁰

Age - The age ground as set out in section 6(f) refers to people of different ages.

Sexual Orientation - Section 2(1) states that 'sexual orientation' means heterosexual, homosexual or bisexual orientation.

Neither the Unfair Dismissals Act 1977 to 2007, nor the Prohibition on the Incitement to Hatred Act 1989 defines the terms set out within the parameters of those Acts.

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

As stated above, Irish legislation defines disability. The courts have provided further interpretation of these terms.

The Labour Court in *Customer Perception Ltd. v. Leydon*,⁸¹ held that a temporary injury constituted a disability within the meaning of the Employment Equality Act 1998. The injury in question resulted from a road traffic accident and the complainant sustained injuries that resulted in pain and reduced movement in her shoulder, back and neck. The Labour Court held that this came under subsection (c) above, stating: 'Taking the ordinary and natural meaning of the term malfunction (connoting a failure to function in a normal manner), the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. It thus constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.'

In *A Civil Servant v. The Office of the Civil Service and Local Appointments Commissioners*,⁸² the Equality Tribunal accepted that illness could amount to a disability within the terms of the Employment Equality Act 1998-2008. The Tribunal was required to determine whether the complainant's illnesses amounted to a disability. The complainant suffered from asthma and irritable bowel syndrome.

The Tribunal held that having regard to paragraph (c) of the definition of disability, "both asthma and irritable bowel syndrome are malfunctions of the airways of the

⁸⁰ See *Health Service Employee v The Health Service Executive*, DEC-E2006-013 discussed at 0.3 above.

⁸¹ ED/02/1.

⁸² DEC-E2004-029.

lungs and the intestinal tract respectively I therefore accept that both conditions amount to disabilities within the meaning of the Act.”

The Irish courts have interpreted the definition of disability in an inclusive manner, with most people who claim to have a disability being found to be within the protected group. Disability as defined and interpreted in Irish law has ensured that the purpose of the equality legislation has not been undermined by using the ground of disability as a gate-keeper preventing access to the Equality Tribunal.

Alcoholism,⁸³ obesity,⁸⁴ depression, stress and anxiety⁸⁵ have all been found to constitute disability under the equality acts.

However, in a recent case the Equality Tribunal required evidence that the employee was disabled within the statutory definition. The case concerned the discriminatory dismissal of an employee who was profoundly deaf and who had worked for a building firm for 30 years.

He refused to work on roofs after a fall, having produced a general doctor’s certificate claiming he had “psychological scarring”. The doctor did not attend the hearing and the employee could not vouch for the doctor’s knowledge of mental health. The case failed because the Equality Officer had no evidence that “psychological scarring” is a disability as defined under the Acts.⁸⁶

To date there have been few cases concerning religion. An Employee (Mr M) v A State⁸⁷ was the first case of indirect discrimination on the religion ground, where the Equality Tribunal found that Western Union had indirectly discriminated against Mohamed Haji Hassan on the grounds of his Muslim religion when they refused to release money sent through their money transfer service. In Mr A v a State Authority,⁸⁸ the Equality Officer held that section 6(2) (e) of the Acts must be read in conjunction with the definition of “religious belief” at section 2 of those Acts.

He held that discrimination on grounds of religion can only occur where a person is treated less favourably than another because he has a different belief from that person or none at all. A prison chaplain brought proceedings under the Employment

⁸³ DEC-S2003-024 *A Complainant -v- Cafe Kylemore*.

⁸⁴ At least in one case where obesity was considered an imputed disability: Equality Tribunal DEC-E2006-013, *Health Service Employee v. The Health Service Executive*, see above 0.3 Case-law p 10.

⁸⁵ DEC-E2007-025 *A Prison Officer -v- The Minister for Justice, Equality and Law Reform*

⁸⁶ Equality Tribunal DEC - E2010 – 140 *Moloney v MJ Clarke and Sons Ltd*, 19th July 2010
<http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-140-Full-Case-Report.html>.

⁸⁷ Equality Authority, DEC-S2006-004 *Hassan v Western Union*
<http://www.equalitytribunal.ie/Database-of-Decisions/2006/Equal-Status-Decisions/DEC-S2006-004-Full-Case-Report.html>.

⁸⁸ Mr A v a State Authority DEC-E2006-015 <http://www.equalitytribunal.ie/Database-of-Decisions/2006/Employment-Equality-Decisions/DEC-E2006-015-Full-Case-Report.html>.



Equality Acts alleging less favourable treatment than other prison officers in relation to access to promotion and the terms of termination of his appointment. He submitted that this less favourable treatment related to the religious belief ground in the legislation, namely his religious background as a priest. The Court rejected this interesting argument, pointing out that the difference in treatment was grounded on the office or position which the complainant held rather than the religion he professed or practised.⁸⁹

As noted above, in a 2004 case before the Equality Tribunal the Equality Officer maintained that it was not clear whether humanism can be counted as a religion. Recital 17 of Directive 2000/78 is reflected in Section 16(1)(b) and 16(3).⁹⁰

In a recent case⁹¹ the complainant, a Ms McKeever, complained of discriminatory treatment on grounds of religion by the Board of Management of Knocktemple National School and the Minister for Education and Science in relation to access to employment in terms of section 8(1)(a) of the Acts. She had applied for and had been offered a permanent teaching post but when it was revealed that she was a non-Catholic, the offer was effectively withdrawn and re-advertised. The Equality Officer concluded that the Board of Management was influenced by the fact that the complainant did not have a Catholic Religious Certificate and awarded the maximum payment of €12,697.

c) *Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

The Employment Equality Acts 1998 to 2008 apply to all ages above the maximum age at which a person is statutorily obliged to attend school, which is 16, and persons under the age of 16 are excluded from protection against discriminatory dismissal under the Unfair Dismissals Act; an employer may set a minimum age for recruitment not exceeding 18; it is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment. The Equal Status Acts 2000 to 2008 apply to people over the age of 18 except for car insurance to licensed drivers under that age.

The Equality Authority has referred to the need to remove the lower age limit to the age ground in the Equal Status Act to allow the Authority to challenge harassment of or discrimination against young people in the provision of goods and services, accommodation and education.

⁸⁹ *Irish Prison Service and Morris* (ADE/06/10, Determination No 074, 28th February, 2007) and *Irish Prison Service and Morris* (FTC/06/10 Determination No 073, March 2nd 2007).

⁹⁰ See para 2.6 below on reasonable accommodation.

⁹¹ DEC-E2010 -189 A Complainant -v A Respondent and A Government Department, 1.10.2010 <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-189-Full-Case-Report.html>.

- d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are no legal rules that deal with the situation of multiple-discrimination, but there are many cases taken on multiple grounds.

The figures produced by the Equality Tribunal for 2009⁹² show that more than one in four claimants allege multiple discrimination. The Equality Authority commissioned a background paper in 2007 on women and multiple discrimination (transsexual women, single parents, women carers, women travellers, lesbian and bisexual women, those from different religious backgrounds, Black and minority ethnic women, young women and older women.⁹³ However the Authority has now published a new study on multiple disadvantage which maintains that membership of two disadvantaged groups (e.g. being a woman and having a disability) will not always result in significantly worse outcomes.⁹⁴ The National Disability Authority has focused on women with disability and older people with disabilities.⁹⁵

Legislation at EU level would be useful in order to highlight the fact that multiple discrimination places people in a complex condition needing better recognition and vindication under the law. Too often cases are treated on a ground-by-ground basis rather than holistically as a particular and complex phenomenon.

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

In *O'Brien v. ComputerScope Limited*,⁹⁶ the complainant alleged age and gender discrimination and the Equality Tribunal dealt with the grounds of discrimination as a collective issue.

⁹² Annual Report 2009 <http://www.equalitytribunal.ie/Publications/Annual-Reports/> (Most recent figures available on multiple discrimination).

⁹³ Equality Authority Annual Report 2007 P 87

<http://www.equality.ie/index.asp?locID=136&docID=732>.

⁹⁴ *Multiple Disadvantage in Ireland - an equality analysis of Census 2006*, Equality Authority, <http://www.equality.ie/en/Publications/Research-Publications/Multiple-Disadvantage-in-Ireland-an-equality-analysis-of-Census-2006.html>.

⁹⁵ Equality Authority Annual Report 2007 P87 <http://www.equality.ie/index.asp?locID=136&docID=732>.

⁹⁶ DEC-E2006-030; see section 2.3 below for a further discussion of this case.



In a recent case the Equality Tribunal accepted the complainant's complaint of discriminatory treatment and dismissal on grounds of both gender and disability, and awarded her €35,422.71.⁹⁷ In another recent case the complainant argued discrimination, bullying and harassment on grounds of gender and age. The Equality Officer found that the that the discrimination on the grounds of gender was compounded by discrimination on the grounds of age and awarded her €50,000.⁹⁸ However, the usual practice is to examine each ground separately.⁹⁹

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Both the Employment Equality Act and the Equal Status Act prohibit discrimination on the basis of a discriminatory ground that is imputed to an individual.

In *Ms X v An Electronic Component Company*,¹⁰⁰ the Equality Officer found that the respondent imputed a disability to the complainant, and that the complainant's imputed disability was a significant factor in the respondent's decision to dismiss her. The issue of imputation is a significant one, for instance in the area of racial discrimination, given the malleability of concepts like ethnicity.

The Equality Tribunal has accepted that a person may make a complaint of discrimination based on race even if he no longer pursues a nomadic way of life and does not regard himself as a Traveller, where other people do regard him as a Traveller.¹⁰¹

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

⁹⁷ Equality Tribunal DEC-E2011-066-Hannon (Represented by the Equality Authority)V First Direct Logistics Ltd, 29 March 2011 <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-066-Full-Caase-Report.html>.

⁹⁸ DEC-E2011-147- Full Case Report - Eithne McDermott -v- Connacht Gold Co-Operative Society <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-147-Full-Case-Report.html>.

⁹⁹ E.g. Equality Tribunal DEC-S2007-089-A student v City of Dublin Vocational Education Committee – race and age-race discrimination only upheld -€3000.

¹⁰⁰ DEC-E2006-042.

¹⁰¹ *O'Brien v. Killarney Ryan Hotel* (DEC-S2001-008) (2001/08/20). The complaint was dismissed on other grounds.



Both Acts prohibit discrimination by association. The Equal Status Act has covered discrimination by association since the inception of the Act in 2000. In the case of *Six Complainants v. a Public House*,¹⁰² a group of six were refused admittance to a premises because of one individual's disability. The premises failed to give reasons for their refusal of admittance and this amounted to a failure to reasonably accommodate that individual, and by association all six complainants, who were also refused admittance (it is not clear why the Equality Officer decided the case on the basis of reasonable accommodation rather than simply direct discrimination). A similar outcome was found in *Kiernan v. The Newbury Hotel*,¹⁰³ where the hotel refused to serve a group on a work night out as some of the members of the group were members of the Traveller Community, the tribunal found discrimination by association.

In *McDonnell v. Dolan's Bar*,¹⁰⁴ a doorman refused a member of the settled community, who was married to a member of the Traveller Community, access to a public house.

When questioned about the reasons for refusal, the doorman pointed to his wife and stated that the problem was his 'excess baggage.' The husband succeeded in proving discrimination by association; the association was with his wife who was a member of the Traveller community.

A recent Labour Court case concerned a claim of discrimination by association in access to employment, in which a man alleged that the refusal of a company from which he had earlier resigned to look after his disabled wife to rehire him was due to discrimination by association. The claim failed on the facts however¹⁰⁵. While neither act defines how close the relationship must be to establish an association, some cases indicate that it need not be very close; in one case the complainant did not enter the pub with the other people with whom she was subsequently asked to leave, but only became involved with them during the evening. Harassment or sexual harassment by association, which arose in the *Attridge* case, is not referred to in the Irish legislation and has not yet arisen in caselaw.

2.2 Direct discrimination (Article 2(2)(a))

a) *How is direct discrimination defined in national law?*

Section 6 of the Employment Equality Act 1998-2008 prohibits direct discrimination in employment. This section prohibits treating a person 'less favourably than another is, has been or would be treated' on any of the nine grounds, in a comparable situation

¹⁰² DEC-S2004-009-014.

¹⁰³ DEC-S2006-080.

¹⁰⁴ DEC-S2006-058.

¹⁰⁵ A Worker And Two Respondents - E/11/16, Determination No.EDA1129, 2nd November, 2011, <http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/HomeRecommendations>.



which exists, existed or may exist in the future. The legislation does not specify how a comparison is to be made in the context of any of the nine grounds. Direct Discrimination under section 3 of the Equal Status Act 2000-2008 is defined in the same way. There is no necessity for a complainant to show that there was an intention to discriminate, it is sufficient if the actions do in fact discriminate against a person on any of the discriminatory grounds.¹⁰⁶

b) *Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).*

Yes. Section 10 of the Employment Equality Acts 1998 to 2008 and Section 12 of the Equal Status Acts 2000 to 2008 prohibit discriminatory advertisements or statements. However, complaints about discriminatory advertisements or statements can only be brought before the Equality Tribunal by the Equality Authority.¹⁰⁷ This seems to unduly curtail an individual's right to access an effective remedy for a directly or indirectly discriminatory act.

c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The provision has been interpreted as incorporating the CJEU decision of *Finanzamt Koeln-Alstadt v. Roland Schumacker*,¹⁰⁸ and *Gillespie & ors v. Northern Health and Social Services Board*.¹⁰⁹ These decisions initially related to discrimination based on nationality, and gender respectively, the Equality Courts have extended them to cover all nine protected grounds covered by the Irish Acts.

Although the legislation does not provide for any general justification of direct discrimination, there are some broad general exemptions. The Employment Equality Act does not require an employer to employ someone who is not fully competent or capable of doing the job, although if this is because of disability, there is a requirement to provide reasonable accommodation¹¹⁰ (this requirement does not apply to any of the other grounds).

The Equal Status Act contains broad general exemptions which apply to all grounds. Art 14(1) for example provides a sweeping general exception stipulating that no act is discriminatory where it is mandated by any other legislation. Others are section 14(2) positive action, and section 15 where a bona fide belief exists of the likelihood of criminal conduct ensuing or breach of licensing laws.

¹⁰⁶ *St. James Hospital v. Eng* EDA023, July 2002.

¹⁰⁷ Equality Tribunal, DEC 2003-024 *GTS Reprographics*, and DEC E2004 – 016 *Burke v FÁS*.

¹⁰⁸ Case C-279/93 [1995] ECR-I-225.

¹⁰⁹ [1996] ECJ C342/93 See section 0.3 above.

¹¹⁰ EEA Sections 16 (1) and 16 (3).

In Section 16(2), treating a person differently does not constitute discrimination where the person “is so treated solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment...” A case on this last point, *Mr Pat Hallinan v Dr Luke O’Donnell*,¹¹¹ concerned the treatment received by a patient while in hospital. The complainant was quadriplegic. During a stay in hospital the complainant stated that he knew his breathing was becoming difficult so he asked for physiotherapy to relieve this. He also asked for x-rays to be undertaken. There was a delay in both of these services being provided to the complainant. The Equality Officer looked at whether or not treatment and x-rays were withheld because the complainant was disabled and whether or not the doctor’s response was delayed because the complainant was disabled. She found that based on section 16 of the Equal Status Act 2000, treating a person differently while exercising clinical judgment in connection with that person’s diagnosis or treatment cannot amount to discrimination. The Equality Officer was also satisfied that the doctor would have treated correspondence from non-disabled persons in similar fashion therefore the complainant failed to establish a prima facie case of discrimination on the disability ground. She stated that had the doctor been found to have discriminated against the complainant in matters other than his clinical decisions the Western Health Board may have been vicariously liable. She also stated that the argument that such doctors operate independently is relevant only to clinical issues and where the issue arises in relation to correspondence or other administrative matters the Board or, as it is now, the Health Service Executive, may be found liable. This was not an issue here however as the complainant failed to establish a prima facie case of discrimination.

d) *In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

The legislation is silent on how a comparison is made in respect of age discrimination.

In *Perry v. Garda Commissioner*¹¹² the case was whether the voluntary retirement scheme benefited those under 60 and therefore discriminated on the basis of age. The complainant in this case was 64 and her comparator was 59. The respondent contended that the differences were designed to compensate the comparator for missing more years’ paid employment. With the use of a hypothetical comparator, one being 60 and a day, and the other being 59 years old and three hundred and sixty four days old, in effect a difference of two days, the difference financially was that the person who was two days younger would gain almost IR£6,000 more.

Therefore in this instance two days of a difference in age was sufficient difference for a comparator, and discrimination on the ground of age was found. In a second case,

¹¹¹ Equality Authority, DEC-S2006-069.

¹¹² *Perry v. Garda Commissioner*, DEC-E2001-029.



that of *Superquinn v. Freeman*¹¹³ the Labour Court held that a difference in age between a 28 year old and a 31 year old was not enough to suggest age discrimination had occurred. In *Reynolds v. Limerick County Council*,¹¹⁴ it was held that a difference of 8 years between the complainant and the comparator was sufficient to maintain a claim of age discrimination. See also the Labour Court decision *Department of Health and Children v. Gillen*, discussed in section 0.3 above.

In *Johnston v Co Louth VEC*,¹¹⁵ an important aspect of the case was the respondent's attempts to rely on an age bracket defence. The complainant was 56 and the successful candidate was 50. The respondent's contention that since both candidates were in the same age bracket, the provisions of age discrimination could not apply, was not accepted by the Director. Conversely she considered age brackets as an "entirely arbitrary construct adopted usually for convenience" and stressed the importance of deciding the exact significance of any difference in age on the merits of the case.

In *McNamee v Donegal County Council*,¹¹⁶ the complainant failed to prove discrimination on grounds of gender and age because they related to events that took place at a time when they were not illegal, namely the situation of women who were obliged to retire from the public service upon their marriage, until this rule was abolished only in 1973. The Irish courts have never accepted the concept of continuing effects of past discrimination which can still impact on older workers, in this case women, in the workplace.

The employer must furnish any information the employee needs in order for a comparison of less favourable treatment to be made.¹¹⁷

2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

National law is silent as to situational testing.

- b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc).*

¹¹³ *Superquinn v. Freeman*, DEE0211, November 2002.

¹¹⁴ *Reynolds v. Limerick County Council*, DEC-E2003-032.

¹¹⁵ DEC-E2006-052.

¹¹⁶ DEC-E2007-074.

¹¹⁷ *Da Silva*, DEC – 2008-043 (race ground, concerning comparators in an equal pay case).

There are no procedural or other rules prohibiting the use of ‘situational testing.’ Situational testing does not occur with any regularity in the Irish context.

Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.¹¹⁸ There is therefore a reluctance to use situational testing. Thus it would appear that for the present developments in other jurisdictions are not impacting on the position at present.

c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There have been some cases where it may be inferred from the facts that a form of situational testing is taking place. In *Delaney v. The Harp Bar*,¹¹⁹ the complainants were members of the Traveller community and were refused entry to the respondent’s premises. During the case the Equality Officer referred to the events of the night in question where the complainants actually visited eight different pubs only one of which was willing to serve them. The complainants litigated against all of the other seven pubs, including the pub subject to the case at hand.

d) *Outline important case law within the national legal system on this issue.*

The study “Discrimination in Recruitment: Evidence from a Field Experiment”,¹²⁰ commissioned by the Equality Authority and conducted by the Economic and Social Research Institute (ESRI), used situational testing to investigate discrimination on grounds of race or ethnic origin .

The experiment directly compared the behaviour of employers faced with applications from candidates who were identical on all relevant characteristics other than their ethnic or national origin.

The research team sent pairs of matched CVs in response to 240 separate job adverts. The two fictitious applicants had equivalent qualifications, skills and experience, all gained in Ireland. The only difference was the name at the top of the CVs. Candidates with Irish names were more than twice as likely to be called to interview as those with minority names. This level of discrimination was found to be consistent across the three minorities tested (African, Asian, German), three occupations (lower administration, lower accountancy, retail sales) and different business sectors. The experiment was carried out between March and October 2008. Compared with similar experiments carried out in other countries, the level of discrimination recorded for Ireland was found to be high.

¹¹⁸ This issue has yet to be addressed in a court action.

¹¹⁹ DEC-S2002-53/56.

¹²⁰ <http://www.equality.ie/index.asp?locID=105&docID=794>.



2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

The Equality Tribunal reviewed this section of the legislation in *O'Brien v. ComputerScope*,¹²¹ see section 0.3 above where it is discussed in detail. Indirect discrimination is deemed to occur where an apparently neutral provision “puts” a person belonging to a “protected group” at a ‘particular disadvantage’ in respect of remuneration compared with other employees of their employer.

This is not the same as the wording in the directives which says “puts or would put”. The European Commission initiated infringement proceedings against Ireland on grounds which include an incorrect definition of indirect discrimination. It sent Ireland a Reasoned Opinion on 27 June 2007 for failure to fully implement the provisions of the Racial Equality Directive 2000/43/EC,¹²² and a further Reasoned Opinion on 31 January 2008 for failure to fully implement the provisions of the Framework Employment Directive 2000/78/EC.¹²³ Both proceedings were closed on 6 April 2011, as the Commission felt that Ireland had now provided explanations and clarifications of its laws transposing the anti-discrimination directives which allowed the Commission to conclude that Irish legislation is now in conformity with the directives.

Statistical evidence may be used to prove indirect discrimination. The provision also ensures that where it can be shown that there has been unequal treatment with regard to remuneration, compliance requires that the complainant should be given the higher remuneration.

Section 22 of the Employment Equality Act 1998-2008 prohibits indirect discrimination in the non-pay context. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to a particular protected group at a ‘particular disadvantage’ in respect of an employment matter as compared with other employees of their employer.¹²⁴

The test to justify indirect discrimination is that the discriminatory provision must be objectively ‘justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.¹²⁵ It is possible to use statistics in determining whether or not indirect discrimination has occurred.¹²⁶ In a recent case, a complainant maintained that one of the questions on an application form to be promoted to Professor in a University was discriminatory on grounds of age. The question asked the applicant to “indicate the strategy, trajectory and goals you plan to achieve during

¹²¹ DEC-E2006-030 – See also section 0.2 above.

¹²² http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_43_en.pdf.

¹²³ http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_43_en.pdf.

¹²⁴ Section 22 refers to gender but section 31 extends its provisions to other protected grounds.

¹²⁵ Section 22 (1)(b) Employment Equality Act 1998-2008.

¹²⁶ Section 22(1A) Employment Equality Act 1998-2008.

the next five years and/or the balance of your career at UCD". The complainant had only 4 years left to retirement and considered the requirement to set out a five year plan discriminatory on the age ground. The Equality Officer after analysing the statistical and other evidence decided otherwise.¹²⁷

The Equality Act of 2004 also amended the definition of indirect discrimination in the provision of goods and services. Indirect discrimination in the Equal Status Act 2000-2008 is now defined in an identical manner to the Employment Equality Act.

Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to one of the protected grounds at a "particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".¹²⁸ In relation to age discrimination, the legislation does not specify how a comparison is to be made. The cases of *Perry v. Garda Commissioner*, *Superquinn v. Freeman* and *Reynolds v. Limerick County Council*, discussed in section 2.2 above would be instructive as to how comparisons on the age ground will be determined.

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

The test to justify indirect discrimination is that the discriminatory provision must be objectively 'justified by a legitimate aim and the means of achieving the aim are appropriate and necessary'.¹²⁹ In one case the Equality Tribunal accepted that the national railway company's policy was motivated by a legitimate goal of tackling fraud, but that the measures went beyond what was appropriate and necessary, and imposed disproportionate restrictions on passengers aged over 66 years, rather than being a targeted solution to a specific problem.¹³⁰

c) *Is this compatible with the Directives?*

The test is compatible with the Directives.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

¹²⁷ DEC-E2010-004 *An Employee -v- A University*.

¹²⁸ Section 3(1)(c) Equal Status Act 2000-2008.

¹²⁹ Section 19 (4) b) Employment Equality Act 1998-2008.

¹³⁰ Equality Tribunal DEC-S2010-048, *O'Connor v Iarnod Eireann (Irish Railways)*, 29 October 2010.



The legislation does not specify how a comparison is to be made, but guidance can be gleaned from two cases decided under the pre-amended provisions.

In *Martin v. Concern*,¹³¹ the claimant alleged both gender and age discrimination. There were 148 applications for the job, 13 of whom were interviewed. To determine the comparator group the Equality Officer referred to those that were short-listed for the position and those that were not. The group of 148 people were considered by the reference to age groups, that is how many were aged between 20-29, how many between 30-39, how many between 40-49 and how many were over 50.

In *O'Connor v. Lidl Ireland*,¹³² the claimant alleged indirect age discrimination. The claimant had responded to an advertisement for the position of District Manager.

The advertisement stated that the ideal candidate should be a graduate with 2 – 3 years experience. The complainant had 31 years experience but was not called for interview. The Equality Officer in this case sought to rely on the applications for the job in question and make the relevant comparisons and rely on the relevant statistics from the case in question. That information had been destroyed. As a result the Equality Officer sought the same information for a different time period with a view to reviewing the general if not the specific practice of the company. The Equality Officer when reviewing the statistics that were available referred to the comparison between those called for interview that were under 40 and those that were over 40 and over 50.

e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

Differences in treatment based on language have not been perceived as indirect discrimination as such, but cases have shown that in order to avoid a finding of discrimination, employers must take into account the fact that many non-national workers encounter special difficulties in employment arising inter alia from differences of language and culture, and have a positive duty to ensure that all workers fully understand their situation at work.

Special measures may be necessary and non-national workers may need to be given appropriate facilities and guidance in certain circumstances.¹³³

There are very low numbers of foreign employees in the Irish public service, suggesting the possibility of indirect discrimination against candidates on grounds of

¹³¹ DEC-E2005/029; this decision was overturned in the Labour Court, EDA0518 but not on this point.

¹³² DEC-E2005/012, also see *Gillen* Labour Court EDA 041, above para 0.3.

¹³³ Labour Court, EDA0812/2008 Ice Group Business Services Ltd -and - Borzena Czerski (the case was successfully appealed but the point stands). Also DEC-E2008-020 58 Named Complainants -v- A Company where compensation was awarded for discriminatory dismissal and better information for non-national workers was ordered.



different language and culture. There is a further complication in that the two official languages of the Irish State are English and Irish. The Employment Equality Act 1998-2008 provides at section 36 that it is permissible to impose requirements in relation to proficiency in the Irish language for public service jobs.

The positions that can impose those requirements are officer holders in the service of the State, including the Garda Síochána, the Defence Forces, civil servants, teachers, officers of local authorities, harbour authorities, health boards or vocational education committees.

In relation to access to goods and services, Irish Sign Language (ISL) is the first language of the Deaf community and used in everyday life with their families.

Previously the Irish Government had rejected all efforts to have it recognised formally. As a result ISL is not included in the Irish education curriculum and official government documentation is rarely distributed in ISL. This could be seen as discrimination against the Irish Deaf community. However, the programme for the current government in 2011 stated that it will examine various mechanisms to promote the recognition of Irish sign language.

2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Statistics may be used to establish indirect discrimination and are admissible in court.¹³⁴

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

It is not widespread but there is no reluctance to use statistical data. There is a tendency to assert that it is not always necessary to use statistical evidence.

- c) *Please illustrate the most important case law in this area.*

In *Toner v Department of Communications, Marine and Natural Resources*¹³⁵ the complainant alleged that she had been discriminated against on the ground of age when she was unsuccessful in a promotional competition. Her claim was unsuccessful. Age profiles of successful and unsuccessful candidates were carefully

¹³⁴ Employment Equality Acts 1998 - 2008, Sections 19(4)(c) and 22(1A).

¹³⁵ DEC-E2007-056 <http://www.equalitytribunal.ie/Database-of-Decisions/2007/Employment-Equality-Decisions/DEC-E2007-056-Full-Case-Report.html>.



studied. At para 4.12 the Equality Officer stated "It will be seen that, statistically, the changes of promotion decline as the candidate ages, until the age group 51 to 55 years is reached, when it improves dramatically. Given the exceedingly small numbers of candidates in the older age groups, I am unable to attach statistical significance to the data. In all of the circumstances of this case, I find that the complainant has failed to establish a prima facie case of discrimination." An earlier paragraph (para 4.10) is instructive : "It appears to me that finding the simple failure of any particular age group to be successful in any particular competition to automatically demonstrate discrimination would have the effect of imposing unnecessary difficulties on interview boards.

The result may be that boards would feel constrained to match the percentage of successful candidates of any particular age group with the percentage of applicants in that age group. While the Acts provide at section 33 that positive action may be permitted in certain circumstances, this is clearly not what was intended."

In a recent equality tribunal case¹³⁶ the complainant submitted that she was discriminated against by the respondent when she applied for a job as a Bus Driver. The complainant submitted that she passed the theory test, passed the practical driving test and was called to interview. From the interview, the complainant was referred for a medical examination. At the medical, she was informed that the respondent had a minimum height restriction and that she did not satisfy that height limit. The complainant submitted that a height restriction affects a greater proportion of women than men. Furthermore, the complainant submitted that the respondent employs persons of a similar height to her who are male, white and Irish.

The respondent accepted most of what the complainant said but submitted that the complainant submitted no evidence to substantiate her allegation that the company employs persons of equal height to her who are male, white and Irish. The respondent also submitted that the minimum recommended height for a professional Bus Driver is 165cm and that the complainant, at 157cm, falls well short of this minimum requirement. The respondent further submitted that this medical recommendation is based on the relationship of the ergonomics of a back injury and the assessment of the driver's cab.

The respondent accepted the disproportionate argument in relation to the impact on women applicants. The Equality Officer referred to the Labour Court decision in the case of NBK Designs Ltd. and Marie Inoue (ED/02/34), which found that it was not necessary to produce statistical evidence to support its contention and stated, inter alia, that:

"The procedures of this Court are intended to facilitate parties whether they appear

¹³⁶ DEC-E2010 -150 An Employee -v- An Employer <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Employment-Equality-Decisions/DEC-E2010-150-Full-Case-Report.html>.

represented by Solicitor or Counsel, Industrial Relations Practitioners or unrepresented, alike. It would be alien to the ethos of this Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience."

The EO came to the conclusion that a prima facie case had been made out (of discrimination on the gender ground) without the need for statistical evidence and awarded €6000. He also recommended that that the respondent clearly establish what height range amounts to a genuine and determining occupational requirement for the post of Bus Driver, and that they take steps to inform applicants for the position of that information at the earliest possible opportunity in the recruitment process.

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

National law does permit the use of statistical evidence to establish indirect discrimination in respect of all five grounds.¹³⁷ Where statistical evidence is available its use is common, both in equality litigation and designing positive action measures. There are no clear rules on how statistics should be collected. In litigation, the Equality Officers tend to rely on statistics put forward by the litigant.¹³⁸ Where none were available in a particular case, reliance was placed on an employer's statistics.¹³⁹ In *Sweeney v. Saehan Media*,¹⁴⁰ concerning discrimination on the basis of membership of the Traveller Community, the complainant sought to rely on Government statistics, from the Census and the Central Statistics Office to highlight the fact that members of the Traveller Community were seven times less likely to achieve the Leaving Certificate when compared with the settled community. The Equality Officer stated that it is for the complainant to show, in the first instance that the requirement (in this instance the Leaving Certificate) operated to the disadvantage of one person over another and that in practice can be complied with by a substantially smaller number of people who are members of the Traveller community than those who are not.

¹³⁷ Section 19(4)(c) and 22(1A) Employment Equality Act 1998-2007. See particularly *Department of Health and Children v Gillen*, EDA041.

¹³⁸ *Martin v. Concern*, DEC-E2005/029.

¹³⁹ *O'Connor v. Lidl Ireland* DEC-E2005/012, the Equality Officer did express her concern in relation to the value of such statistics.

¹⁴⁰ DEC-E2003/017.



The Equality Officer noted that the complainant had submitted data from a number of sources,¹⁴¹ and stated 'I note that there is a serious lack of data on Travellers and their lifestyle in general and that the complainant has sought to use a range of research from a number of sources which, when combined, yields the aforementioned results. In light of the absence of any clearer data I am inclined to accept the scenario set out by the complainant represents as accurate a picture of the situation as is possible in the circumstances'.

The Equality Officer did not find for the complainant because she could show that the employer had in fact interviewed a number of people, including the complainant, who did not have the Leaving Certificate, and in fact hired people who had not attained that educational standard, therefore the complainant could not show that the requirement operated to their disadvantage.

The Equality Officer did suggest that the company review their job specifications for each post, and stated: 'it might also take steps to ensure that newspaper advertisements do not contain references to educational requirements that a category of individuals covered by the Act is substantially less likely to have attained, unless that level of education can be objectively justified or reasonable in the circumstances, as the case requires'.

The Equality Tribunal reviewed this section of the legislation in Noonan v. Accountancy Connections, see section 0.3 above where it is discussed in detail.

The Data Protection Act 1988-2003 permits employers, education providers, health authorities and other public bodies to keep records of their workforce in respect of their ethnic or racial origin, disability, religion or belief or sexual orientation of their workers. Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.¹⁴² The primary purpose of amending the Data Protection Act of 1988 by means of the Data Protection (amendment) Act 2003 was to give effect to the Provisions of Directive 95/46/EC of the European Parliament and of the Council. Therefore European provisions clearly influence the content of the Data Protection Laws. On a national level, there is a periodic census of population whereby data is gathered every five years. The last census took place in 2011. It collected data in respect of nationality, religion, age, marital status and ethnic origin, including membership of the Irish Traveller Community. A question on disability was included..There were no questions on the issue of sexual orientation. These questions require the individual to self-identify their characteristics.

¹⁴¹ The complainant relied on information from a variety of sources including the Traveller Health and National Strategy 2002-2005, CSO, Department of Education.

¹⁴² Section 2(b) Data Protection Act 1988-2003.



2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The Employment Equality Act 1998-2007 prohibits harassment by means of section 14A. The legislative provision states that harassment can occur at the place of employment or otherwise in the course of employment. The provision prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.¹⁴³ The employer may be held vicariously liable for the harassment of the victim, if the harassment is by a person other than the employer.¹⁴⁴ There is a statutory defence for the employer and that is that he or she took such steps as are reasonably practicable to prevent the harassment in question, or the person being treated differently as a result of harassment.

The Equality Officer awarded an employee in one case a total of nearly €50,000 for harassment, victimisation and discriminatory dismissal on grounds of sexual orientation.¹⁴⁵ Harassment is defined as ‘any unwanted conducted’ relating to a discriminatory ground, ‘being conduct which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person’.¹⁴⁶ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The Equal Status Act 2000-2008 also prohibits harassment by means of section 11. The legislative provision relates to the provision of goods and services, including the provision of accommodation and education.¹⁴⁷ The person responsible for the provision of education, goods, services or accommodation may be vicariously responsible for the harassment by another person in the provision of such service.¹⁴⁸ There is a statutory defence available for such a person, which is that he or she took such steps as are reasonably practicable to prevent harassment.¹⁴⁹ Harassment is defined as ‘unwanted conduct’ relating to any discriminatory grounds and that conduct has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the

¹⁴³ Section 14A(1)(a) Employment Equality Act 1998-2008.

¹⁴⁴ Section 15 Employment Equality Act 1998-2008.

¹⁴⁵ Equality Tribunal, DEC-E2008-048, *A Construction Worker v A Construction company*. In a recent case €25,000 was awarded by way of compensation for distress suffered as a result of discrimination and harassment on race grounds (DEC-E2011-016, *Chasi v J & I Security* <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-016-Full-Case-Report.html>).

¹⁴⁶ Section 14A(7)(a) Employment Equality Act 1998-2008.

¹⁴⁷ Section 11(1)(a)-(c) Equal Status Act 2000-2008.

¹⁴⁸ Section 42 Equal Status Act 2000-2008.

¹⁴⁹ Section 11 (3) Equal Status Act 2000-2008.



person'.¹⁵⁰ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The Prohibition on the Incitement to Hatred Act, 1989 was introduced to prohibit hate speech on the basis of a persons' race, religion, nationality or sexual orientation. Hatred is defined in the Act as hatred against a group on account of their race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation.

This legislation creates a criminal offence incitement to hatred, that involves publishing, distributing, displaying material or behaviour that is threatening, abusive or insulting and is intended or is likely to stir up hatred.

The difficulty with this provision relates to the fact that it requires an intention to stir hatred. This has proven to be an exceptionally difficult evidential barrier to overcome. An action taken against a 27-year old Kerry man for comments made on Facebook about Travellers under the Prohibition of Incitement to Hatred Act 1989 (Act) was dismissed by Killarney District court when the judge ruled that there was a reasonable doubt that there was an intent to incite hatred towards members of the Traveller community. The case was the first prosecution dealing with online material under the Act.¹⁵¹

b) Is harassment prohibited as a form of discrimination?

Harassment constitutes discrimination within the terms of the Employment Equality Act.¹⁵² In two cases, claims of discriminatory dismissal on grounds of race were not upheld but sums were awarded for racial harassment (Paskauskas¹⁵³ and Odion¹⁵⁴), €7000 and €7500 respectively).

Harassment is not defined as discrimination within the terms of the Equal Status Act 2000-2004.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

A Code of Practice was also developed; this is the Employment Equality Act, 1998 (Code of Practice) (Harassment) Order, 2002 (S.I. no. 78 of 2002).

¹⁵⁰ Section 11 (5)(a) Equal Status Act 2000-2008.

¹⁵¹ 30.6.2011, unreported judgment, <http://www.pila.ie/bulletin/2011/october/5-october-2011/irish-district-court-dismisses-traveller-facebook-hate-speech-case/>.

¹⁵² Section 14A Employment Equality Act 1998-2008.

¹⁵³ DEC 2007-062.

¹⁵⁴ DEC2000-018.



2.5 Instructions to discriminate (Article 2(4))

Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

Section 14 of the Employment Equality Act, 1998-2007 prohibits what is termed the procuring of discrimination or victimisation. The provision criminalises the conduct of anyone who 'procures or attempts to procure' another person to discriminate or victimise within the terms of the provision. Section 2(a) of the Employment Equality Act, 1998-2007 states that "'discrimination' includes the issue of an instruction to discriminate and, in Parts V and VI, includes prohibited conduct within the meaning of the Equal Status Act 2000, and cognate words shall be construed accordingly.' This implies that an instruction to discriminate is also prohibited under the terms of the Equal Status Act, i.e., beyond the employment field, although the Act itself contains no specific provision on this point. The Equal Status Act, 2000-2004 prohibits the procurement of another person to engage in prohibited discriminatory conduct under the Act. This is a criminal offence and is actionable both in the Equality Tribunal and the Circuit Court.¹⁵⁵ In a recent case the Labour Court held that where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction was accepted without question. The Court found that under the terms of Section 8 of the Act, which provides that an employer shall not discriminate against an employee or prospective employee and that a provider of agency work shall not discriminate against an agency worker, both the agency and the instructing company could potentially be held liable as 'concurrent wrongdoers'.¹⁵⁶

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

¹⁵⁵ Section 13 Equal Status Act 2000-2008 and section 77 Employment Equality Act.

¹⁵⁶ A Worker And Two Respondents - E/11/16, Determination No.EDA1129, 2nd November, 2011.



Both the Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004 impose the obligation to provide reasonable accommodation.

In 1996 the Irish Supreme Court held that the requirement to provide reasonable accommodation as set out in the Employment Equality Bill 1996 and the Equal Status Bill 1996 was unconstitutional.¹⁵⁷

As a consequence, when the original Employment Equality Act 1998 and the Equal Status Act 2000 were finally introduced the legislature had little choice but to introduce a more restrictive provision on reasonable accommodation (accommodation only required if it would not amount to more than a nominal cost).

The introduction of the Framework Employment Directive allowed the Irish legislature to overcome the restrictive Supreme Court decision and amend section 16 of the Employment Equality Act 1998 by means of the Equality Act 2004, to introduce the test of disproportionate burden.

The definition of reasonable accommodation provided within the Equal Status Act 2000 (must not amount to more than a nominal cost) remains unchanged, as the Framework Employment Directive does not relate to the provision of goods and services.

The position now with regard to reasonable accommodation in employment equality legislation is that where a person who has a disability can perform the duties of the post with or without the assistance of 'appropriate measures' they will be deemed competent under the Act.

The employer has an obligation to take 'appropriate measures' to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a 'disproportionate burden' on the employer. To determine what amounts to a disproportionate burden, the legislation specifies that, account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance.¹⁵⁸

¹⁵⁷ The core definition of reasonable accommodation provision under the 1996 Bills was contained in Section 16(3) which stated: "subject to *Section 35(4)* an employer shall do all that is reasonable to accommodate the person's needs, in particular, by allowing or, as the case may require, making provision for, such treatment or facilities, or by providing such treatment or facilities." This obligation was bounded by section 35(4) which stated: "Section 35(4) Nothing in this Part or Part II applies to discrimination against a person on the disability ground if; (a) that person needs treatment or facilities in order satisfactorily to take part in a selection process or to undertake that employment, and (b) the employer does all that is reasonable to accommodate the needs of that person." The defence contained in the act was that the obligation should not give rise to an 'undue hardship.'

¹⁵⁸ Section 16 (3)(c)(i),(ii) and (iii) Employment Equality Act 1998-2008.



A Hotel and A Worker¹⁵⁹ involved an appeal by the respondent hotel against an Equality Officer finding that it had discriminated against and dismissed the complainant on grounds of disability. The Equality Officer awarded €15,000 for the effects of this discrimination. The complainant, who suffered from mild osteoarthritis of the left knee, worked as a Sales Executive for only three days for the respondent before her employment ended.

The hotel argued that installing a lift to her office would have imposed a disproportionate financial burden upon it. In addition, it did not have an alternative office available. The complainant said that office accommodation with lift access elsewhere in the hotel could have been made available and that the hotel did not wish to explore the options. The Court ultimately found that the complainant's disability was more than a trivial influence in the ending of her employment and that had special facilities been made available, she would have been capable of doing the job. However, there was no evidence that management made appropriate enquiries as to what measures might be taken to continue her employment. The Court reduced the award of €15,000 to €10,000 as there was evidence that the complainant at the time of the hearing was working in another first floor office with no lift access.

Nonetheless, this case reminded employers that the obligation to provide reasonable accommodation to persons with a disability must involve a real attempt to find a viable solution with a thorough assessment of available options.

In *Mcroy Scaffolding (N.I.) –and- A Worker*,¹⁶⁰ the Complainant was a scaffolder who was summarily and arbitrarily dismissed after two unexplained seizures while at work and without waiting for any explanation. The Court found that the company had discriminated against him because of his disability.

It pointed out that Subsection (3) imposes a clear duty on the employer to make enquiries as to whether, with special treatment and facilities, an employee suffering from a disability can continue in his employment.

The Respondent had made no attempt to make any kind of reasonable accommodation as required by Section 16(3) of the Act for the Complainant's problem or to offer him any suitable alternative work. It awarded the Complainant €13,600, to include €3600 for economic loss and €10,000 compensation for the effects of the discrimination.

In *The Alzheimer Society – and – A Worker*,¹⁶¹ the Complainant had been on sick leave suffering from a depressive illness and was advised on medical grounds to return to work initially on a part-time basis. The employer refused to provide reasonable accommodation for her to return to her position as a nurse-manager on

¹⁵⁹ Labour Court 2007, Determination No.EDA072.

¹⁶⁰ Labour Court, 2005, Determination No. EED055.

¹⁶¹ Labour Court, 2007 Determination No. EDA075.



this basis. The Labour Court found that there had been discrimination on grounds of disability without provision of reasonable accommodation and ordered that the complainant be re-employed as a nurse manager on the terms and conditions of her contract without loss of service from such date as she was medically certified to return to work. The Court awarded compensation of €35,000.

Both the Equality Tribunal and the Labour Court interpreted the provision contained in the Employment Equality Act 1998. Some of those cases, although based on the older law, are instructive. The Labour Court in *A Worker v. An Employer*¹⁶² in 2005 said of reasonable accommodation that the 'proscription of discrimination on the grounds of disability is not absolute. If a person is, by reason of a disability, unable to fully undertake the duties of a position they may, in accordance with section 16(1) of the Act, be lawfully refused employment or promotion into that position. The applicability of that qualification is itself restricted by the provision of Section 16(3) of the Act.' The Labour Court went on to state that Section 16 of the Act imposes a duty on employers to accommodate the needs of an employee with a disability. This provision means that special treatment or facilities are not an end in itself, but a means to an end.

The end is achieved when the person with a disability is placed in a position where they can have access to, or as the case may be, participate in or advance in employment.

The effect of an employer's failure to fulfil the duty imposed by Section 16(3)(b) of the Act is to negate any defence they might otherwise have under Section 16(1) in a claim of discrimination on the disability ground.

The Labour Court and Tribunal clearly provided that the duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability.

The fullest explanation of the duty to provide reasonable accommodation under the 1998 Act was set out by the Labour Court in *A Health and Fitness Club v. A Worker*. The Labour Court held that the burden was on the employer to ensure that an employee is not fully capable of performing the duties for which they are employed by making 'adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.'

The Labour Court held that 'in practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the

¹⁶² 16 [2005] ELR 159.



employer either from the employee's doctors or obtained independently. Secondly, if it is apparent that the employee is not fully capable, Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. ... Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.'

In *A Worker and A Manufacturing Company*,¹⁶³ the Equality Tribunal summarized the existing jurisprudence with regard to reasonable accommodation. It recalled that "the duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability. [...] The scope of an employer's duty is determined by what is necessary and reasonable in the circumstances. It may, as in the instant case, involve relieving the person with a disability from the requirement to undertake certain work which is beyond his or her capacity..." Furthermore, adjusting the person's attendance hours or to allow them to work partially from home may be part of the provision of reasonable accommodation, in addition to the relieving of the disabled employee of certain tasks which others doing similar work are expected to perform.

"The duty placed on an employer by section 16(3) includes, by implication, a requirement to make a proper and adequate assessment of the situation before decisions are taken which may be to the detriment of the disabled employee. [...] This necessarily involves discussing the matter with the employee or their medical advisors".

The earlier statute, the Employment Equality Act 1998, held that there was a requirement to provide reasonable accommodation as long as it did not give rise to more than a nominal cost. In *An Employee v. A Local Authority*,¹⁶⁴ the Equality Officer had had to determine the meaning of 'nominal cost' and gave an expansive interpretation of the term. The decision reached by the Equality Officer held that the reasonable accommodation did not give rise to more than a 'nominal cost.' In reaching that decision he considered the size and resources of the employer, whether it was public or private sector employment and also noted the availability of state financial aid available under the Employment Support Scheme. Based on these criteria the Equality Officer held that the 'nominal cost' threshold had not been reached.

The Employment Equality Act 1998-2008 defines an appropriate measure as an effective and practical measure that is needed in a specific case to adapt a place of

¹⁶³ Equality Tribunal, DEC - E2010 – 229, 17 November 2010.

¹⁶⁴ DEC-E2002-004, this case was not referring to the concept of 'disproportionate burden' but the limiting concept of 'nominal cost' contained in the Employment Equality Act 1998, prior to amendment in 2004.

business, provide equipment, alter patterns of working, training, distribution of tasks or the integration of resources. An appropriate measure does not include ‘any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.’ The Employment Equality Act 1998-2008 does not distinguish between the major or essential functions and the marginal or ancillary functions of a job.

A person is qualified for a position where they are in a position to undertake ‘any duties’ of the job. While neither the amended version of reasonable accommodation, nor the older version of reasonable accommodation distinguished between ‘essential functions’ and ancillary functions, the Labour Court have made that distinction.

In *A Computer Component Company v. A Worker*,¹⁶⁵ the Labour Court held that the operation of some machinery was a minor part of the production system and as such it appeared to the court that arrangements could have been put in place to ensure that she would not be required to operate it.

This effectively endorses the view that it is the essential functions of the job as opposed to the ancillary functions that are relevant. Section 16 does not refer to the term essential functions, which is a phrase used in paragraph 17 of the preamble of the Framework Directive. Compliance with the Directive is dependent on future interpretation by the courts. However, the interpretation here suggests that the courts will incorporate the concept of ‘essential functions’ into the obligation to reasonably accommodate.

The definition of disability for purposes of reasonable accommodation has the same scope as under the general prohibition of discrimination on grounds of disability.

b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

The Equal Status Act 2000-2008 specifies that the failure to provide reasonable accommodation is a form of discrimination, in contrast to the Employment Equality Act 1998-2008. In the Equal Status Act reasonable accommodation is defined as the provision of a special treatment or facility, where without such special treatment or facility it would be impossible or unduly difficult for the person to avail of the service. A refusal to provide such a treatment or facility will not amount to discrimination where it gives rise to more than a nominal cost. In *Roche v. Alabaster Associates Limited t/a Madigans*¹⁶⁶, it was held that refusing access to a premises to a person

¹⁶⁵ ED/00/8.

¹⁶⁶ DEC-S2002-086.

accompanied by a guide dog amounted to discrimination for a failure to provide reasonable accommodation. In *Forrestal v. Hearn's Hotel, Clonmel*,¹⁶⁷ it was held to be discrimination not to allow a wheelchair user access to a nightclub. In *Six Complainants v. a Public House*,¹⁶⁸ only one of the six complainants was disabled, the other five complainants claimed discrimination by association. The six complainants were successful in raising a case of prima facie discrimination arguing and that the respondent failed to reasonably accommodate all six complainants.

Another noteworthy case is that of *Hennessy v. Dublin Bus*,¹⁶⁹ here the complainant alleged direct discrimination, victimisation and a failure to provide reasonable accommodation. On the reasonable accommodation element, he claimed that the bus service failed to reasonably accommodate him by ensuring that a functioning accessible bus was provided on the route. The limiting factor within the reasonable accommodation provisions are that the accommodation in question does not give rise to more than a 'nominal cost;' or that the refusal of such treatment does not constitute discrimination, if that failure is by virtue of another requirement of the Equal Status Act. The Equality Officer held that the failure to provide reasonable accommodation did not amount to discrimination in this context, as there was 'no statutory/legal requirement that the buses be wheelchair accessible.' The Equality Officer went on to hold that the issue of road passenger services is regarded as something that requires separate and specific treatment under the Act. The Equality Officer also reviewed the 'nominal cost' threshold, and held that the making of public buses accessible gave rise to more than a nominal cost. It was shown in the case in question that each wheelchair accessible bus cost in the region of €150,000 and that this could not be regarded as nominal.

In *McMahon and five others v. McGowan's Pub*¹⁷⁰ the complainant alleged that he was directly discriminated against and that there had been a failure to reasonably accommodate him. The complainant has an intellectual disability which can affect his balance, speech and communication. He went with five members of his family to the respondent's premises to celebrate his mother's 50th birthday. The doorman refused the complainant access having determined that he was under the influence of alcohol, and refused the entire group access because of this. The complainant was upset and distressed as he believed he spoiled a family night out, equally the family were upset at the embarrassment caused to him and the effect this even had on his self-confidence. The Tribunal accepted that he raised a prima facie case of direct discrimination and found that the complainant had been discriminated against on the grounds of his disability and the remainder of the family had been discriminated against based on their association with the complainant. The Tribunal further found that the service provider had failed to provide a reasonable accommodation. The

¹⁶⁷ DEC-S2001-018.

¹⁶⁸ DEC-S2004-009-014.

¹⁶⁹ DEC-S2003 – 046.

¹⁷⁰ DEC-S2004-009/014, appealed to the Circuit Court. A discussion of the Circuit Court decision is available in the Equality Authorities, Annual Review 2005.



accommodation required by the Tribunal was that a licensed premises should be aware of the possibility for reasons other than drunkenness that may affect a person's demeanour. The Tribunal held that the complainant group were refused admission to the premises without the provision of the normal accommodation afforded to patrons, which was for the doorman to engage in conversation with the patrons to ascertain whether they were intoxicated, he did not do so with the complainant.

Had the doorman engaged the complainant in such a conversation it would have been apparent that he was not in fact intoxicated. This decision was appealed to the Circuit Court, the respondent sought to have this case heard in private but was not successful.

Judge Delahunt of the Circuit Court held that the appellant had acted in good faith and was not guilty of discrimination. The Judge held that where a person seeks reasonable accommodation under the Equal Status Act 2000 he must first prove that the 'service provider had actual or implied knowledge of the disability and disregarded such knowledge either intentionally or unintentionally in order to succeed in a claim.'

c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

The Employment Equality Act 1998 to 2008 does not state that a failure to meet the duty to reasonably accommodate amounts to discrimination; however, case law holds that a failure to provide reasonable accommodation amounted to discrimination.¹⁷¹ The case law does not state whether it is a form of direct or indirect discrimination.

As regards justification, Section 16 (1) offers employers a defence in relation to disabilities when it states: "Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual –

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be performed, or

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position,

¹⁷¹ *A Complainant v. Bus Éireann* DEC E2003-04.



having regard to the conditions under which those duties are, or may be required to be, performed.”

However, section 16 (3) (a) of the Employment Equality Acts 1998 – 2008 tempers that defence: “For the purposes of this Act a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as “appropriate measures”) being provided by the person’s employer.”

The Labour Court in *A Health and Fitness Club v A Worker* (EED037) set out an approach that should be taken in order that a respondent can rely on this defence“if it can be shown that the employer formed the bona fide belief that the complainant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.”

The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer, should ensure that he or she is in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision.

In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable, Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The Section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes a disproportionate burden will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.¹⁷²

¹⁷² DEC-E2008-026 An Employee -v- A Co-operative.



There has been a notably high level of awards issued by both the Equality Tribunal and the Labour Court under the Employment Equality Acts in cases where a dismissal can be linked to discrimination on grounds of disability and failure to provide reasonable accommodation.

An example of this is the case of Vincent Kavanagh –v- Aviance, Equality Authority E2007-where the employee was awarded €125,000. In another case the Labour Court found that the respondent had failed to provide reasonable accommodation in a job interview to compensate for the complainant's inability to work from paper in the interview process because of a visual impairment, and hence his disability was a factor in the respondent's decision not to appoint him to the position and allowed the complainant's appeal.¹⁷³

The Court awarded the complainant €12,000 for the effects of the failure to provide reasonable accommodation at interview, to include the €4,000 already awarded by the Equality Officer .

In *A Government Department- And -A Worker*,¹⁷⁴ the Labour Court held that requiring the Complainant to attend for interview at a time when he was physically incapable of so doing because of his disability constituted an act of discrimination contrary to section 8 of the Act and a failure to reasonably accommodate him by deferring the interview. It awarded him compensation of €20,000.

In *A Worker -v- A Government Department*,¹⁷⁵ the complainant worked for a government department in a senior technical/professional role. In May 2006 he suffered an accident in which he fractured his spine. This resulted in a disablement which prevented the complainant from sitting uninterruptedly for more than an hour, and from undertaking long journeys by car. The Equality Tribunal found that the respondent did provide reasonable accommodation to the complainant with regard to his return to full-time work, but nevertheless failed in its statutory duty to assess the complainant's situation in a timely and pro-active manner, and to explore a full range of options, including teleworking, to accommodate the complainant's disability and facilitate his return to work in a timely manner. It awarded him €25,000.

The Equal Status Act 2000-2008 specifies that the failure to provide reasonable accommodation is a form of discrimination. In *A Complainant-v- A Local Authority*,¹⁷⁶ a mother claimed that a local authority had discriminated against her son, who suffered from a disability, by refusing her request to either (a) extend and adapt the present house or (b) move the family to more spacious accommodation. The Complainant, Ms. C., stated that the respondent discriminated against her son by:

¹⁷³ Labour Court 2007, EDA0714, *A Technology Company –and-A Worker*. See also *O'Keeffe -v- Walsh t/a By Pass Stores*, (DEC-E2007-033).

¹⁷⁴ Labour Court 2006, EDA0612.

¹⁷⁵ DEC-E2008-023.

¹⁷⁶ Equality Authority DEC2007-049.

- comparing his disability less favourably with other disabilities.
- failing to provide reasonable accommodation to her son in accordance with the terms of Section 4 of the Equal Status Acts 2000-2004.
- lack of transparency in the decision making process.
- the application of a general policy which does not allow the specific needs of applicants to be properly considered• delay in the process, lack of consultation, lack of knowledge of her son's disability, failure to properly investigate the needs of her son and his family, and failure to provide alternative accommodation at an early stage.

The respondent indicated at the hearing that it had fundamentally misinterpreted the reasonable accommodation requirements of Section 4 of the Equal Status Acts to mean the provision of physical accommodation. The Equality Officer held while some confusion is entirely understandable in the context of the instant case, the requirement to provide reasonable accommodation has been clearly interpreted in numerous decisions of the Tribunal to mean the provision, by any service provider, of any/all reasonable treatment or facilities without which it would be unduly difficult or impossible for a disabled person to avail of the service in question. The Local Authority was liable for having had no system in place for assessing disability and reasonable accommodation. The Tribunal ordered the respondent to pay to the complainant the sum of €6,350 for the distress and hardship caused to her by the discrimination, the maximum amount which can be awarded under the Equal Status Acts 2000-2004. It said that if it were not constrained by this, and taking all of the evidence in this matter into consideration, it would have awarded a higher amount to the complainant.

In *Elizabeth Golden v Just Beds*,¹⁷⁷ compensation was awarded to a customer in a furniture shop as there was no reasonable accommodation for a wheelchair-using customer in shopping in the store.

In *Mrs. X (on behalf of her son, Mr. Y) And A Post-Primary School*,¹⁷⁸ the Equality Tribunal found that a school had discriminated against the complainant on the disability ground in terms of section 3(2)(g) and 7(2) of the Equal Status Acts by failing to provide reasonable accommodation in accordance with section 4(1) of the Acts. The complainant's son had access to a full-time Special Needs Assistant at the school and one to one tuition in a number of different subjects, but the school failed to utilise a further range of existing structures and supports that were available (including the services of the Educational Welfare Officer and the NEPS psychologist), nor did it put in place an Individual Education Plan (IEP) and a behaviour management plan. The Tribunal found that reasonable accommodation

¹⁷⁷ Equality Tribunal DEC 2007-064.

¹⁷⁸ Equality Tribunal DEC-S2010-009, 2 February, 2010 <http://www.equalitytribunal.ie/Database-of-Decisions/2010/Equal-Status-Decisions/DEC-S2010-009-Full-Case-Report.html>.

had not been provided and awarded the maximum amount of compensation allowable (€6,349).

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

Reasonable accommodation only applies explicitly in the context of people with disabilities, although caselaw has established in relation to some other grounds that the employer may be obliged to make special arrangements for employees, such as providing translated contracts for foreign nationals.¹⁷⁹ Legislation does not provide for reasonable accommodation in any other areas, and there have been no cases concerning religion on this point.

- e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

Yes. In *O'Keeffe -v- Walsh t/a By Pass Stores*,¹⁸⁰ the complainant was found to have been dismissed by the respondent in circumstances amounting to discrimination on grounds of disability in February, 2005. The respondent had stated that her dismissal was lawful because of her poor performance, in particular her failure to carry out instructions when requested. The Equality Officer noted that the respondent was aware of the complainant's hearing impairment before she commenced employment with it and was satisfied that it did not adversely impact on her ability to perform her duties, as she wore hearing aids. He further noted that the complainant's hearing aids were away for repair for several days preceding her dismissal and she did not have a substitute set.

He was satisfied therefore that any alleged failure on the complainant's part to carry out the respondent's instructions - the sole reason advanced by the respondent for her dismissal - could be attributed to the fact that she was unable to understand the person communicating with her unless they were positioned so that she could lip read. He was therefore satisfied, on balance, that the respondent was disposed to attributing any alleged rudeness by the complainant to customers to her hearing impairment and therefore her disability. He noted the Labour Court decision in *A Government Department v An Employee* which required that the respondent's decision to terminate the complainant's employment could not be influenced in any way whatsoever by her disability and that the respondent must produce cogent evidence to support its assertion that the dismissal was lawful. He held that the respondent had failed to discharge that burden and the complainant was entitled to succeed in her claim. He commented that the respondent had given no consideration whatsoever to providing the complainant with appropriate measures which might

¹⁷⁹ Equality Tribunal DEC – E2006 – 050 *Five Complainants v Hannon's Poultry Export Ltd, Roscommon*, see *Ireland Country Report 2008 p 12*.

¹⁸⁰ Equality Tribunal DEC-E2007-033.

overcome the perceived difficulties it felt impeded her performing her job and it would not therefore, have been entitled to avail of the protection provided at section 16(3) of the Acts in that regard. He ordered the respondent to pay her €17,000 - €7,000 of which related to loss of earnings and the balance for the effects of the discrimination.

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

The Equality legislation does not require buildings and infrastructure to be designed and built in a disability-accessible way. There are two relevant provisions dealing with access.

First, Part M of the Building Regulations 1997 – 2005¹⁸¹ requires that as regards public buildings adequate provision shall be made to enable people with disabilities to safely and independently access and use a building.

If sanitary conveniences are provided in a building, adequate provision shall be made for people with disabilities. If a building contains fixed seating for audience or spectators, adequate provision shall be made for people with disabilities.

As regards dwellings, or residential buildings, new dwellings come within Part M of the building regulations. The regulations address issue relating to the approach to new dwellings, circulations within new dwellings and sanitary provision within new dwellings. 'People with disabilities' are defined as people who have an impairment of hearing or sight or an impairment which limits their ability to walk, or which restricts them to a wheelchair.

Part M applies to new buildings only .not to works in connection with extensions to and the material alteration of existing dwellings. The primary responsibility for compliance rests with the designers, builders and owners. Building control authorities have powers to inspect design documents and buildings, and powers of enforcement and prosecution where breaches of the regulations occur. A public consultation was initiated in March 2006 on revising Part M of the Building Code. A final round of consultations was completed in October 2009. The final revised regulations¹⁸² were adopted in July 2010 but will not come into effect until 1 January 2012.

The second provision that is applicable in this context is the Disability Act 2005,¹⁸³ which at Part 3 requires access to buildings and services. The Act refers only to

¹⁸¹ Available at Department of the Environment website www.environ.ie.

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<http://www.environ.ie/en/Legislation/DevelopmentandHousing/BuildingStandards/FileDownload,24775,en.pdf>.

¹⁸³ <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=l>.



public buildings and public services. The Disability Act 2005 introduces a requirement to ensure that public buildings are made compliant with the relevant building regulations: Part M 1997-2005, by 2015. The commitments contained within the Act are enforced via a complaints mechanism set out in the Act and enforced by the Ombudsman. The Ombudsman charged with the enforcement of the Act has stated that the wording of the Act may not be robust enough to ensure public bodies take sufficient steps to improve access for disabled people to buildings and services.¹⁸⁴

g) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

Sections 26, 27 and 28 of the Disability Act 2005 place obligations on public bodies to make their services and information accessible to people with disabilities.

A Code of Practice gives guidance to public bodies to meet those obligations.

An individual with a disability can make a complaint about any failure by a public body to provide access as required by sections 26, 27 and 28 to an inquiry officer appointed by the body under section 39. If the complainant is not satisfied with the outcome of their complaint they can appeal to the Ombudsman as provided under section 40.

The Act is designed to improve access to public services for persons with disabilities. The term “disability” for the purposes of the Act means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.

The Code covers a wide range of services and facilities provided by public bodies that are available to the public generally or a particular section of the public. This includes: the use of any place or amenity owned, managed or controlled by a public body; the provision of information or an information resource or a scheme or an allowance or other benefit administered by a public body; any cultural or heritage services provided by such a body; and any service provided by a court or other tribunal. The Code applies to a wide range of public bodies, including Departments of State; the Office of the President; the Office of the Attorney General; the Office of the Comptroller and Auditor General; the Office of the Houses of the Oireachtas; a local authority; the Health Service Executive; bodies, other than the Defence Forces, such as the Broadcasting Commission of Ireland; the Central Statistics Office; the National

¹⁸⁴ ‘O’Reilly warns of Flaws in Disability Legislation’ *Irish Times*, 30 November 2005.



Disability Authority; the Courts Service; the Legal Aid Board; the bus companies and the railways.

The Code gives guidance as to the kind of action “that is appropriate and can be delivered where practicable”, as well as examples of obstacles to accessibility for people with disabilities including, for example: communication, where presented in inaccessible formats; lack of awareness of the needs of people with disabilities; the physical environment e.g. design, layout, signage, lighting etc.; service design e.g. where systems, procedures and practices can present obstacles.

Information and services can be made accessible when they are provided in a manner that is consistent with the needs of those individuals for whom they are intended. The Code says that in general, this can be facilitated by adopting a proactive and consultative approach to information and service design and delivery.

In summary, it seems that the duty in Ireland is individualised and can not be said to be anticipatory in practice. It is only envisaged that action will be taken “that is appropriate and can be delivered where practicable”, which must be activated by the individual, and is so vague as to be unenforceable.

Building regulations require all new buildings including houses to be accessible, but all public buildings, public spaces and state services to be accessible only by year 2015 and only “where possible/ practicable”. The interaction between the disability and equality legislation here is not clear.

h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

The principal statute is the Disability Act 2005 which is part of a framework of Government legislative measures addressing disability and social inclusion.

Other essential elements in the Government legislative framework are:

- the Employment Equality Act 1998 to 2008
- the Equal Status Act 2000 and 2008
- the Education for Persons with Special Educational Needs Act 2008
- the Citizens Information Act 2007.

Main provisions in the Act

The Act establishes a basis for:

- an independent assessment of individual needs, a related service statement and independent redress and enforcement for persons with disabilities;
- access to public buildings, services and information;



- Sectoral Plans for six key Departments which will ensure that access for people with disabilities will become an integral part of service planning and provision
- an obligation on public bodies to be pro-active in employing people with disabilities
- restricting the use of information from genetic testing for employment, mortgage and insurance purposes
- a Centre for Excellence in Universal Design.

The Act is couched in the language of rights, but although it establishes the right to an individual assessment of needs and a statement of the services proposed for the disabled person, the service statement takes into account:

- the practicability of providing the service
- the financial resources available.

In practice the services provided will vary from individual to individual and between different areas of the country where financial resources have not been provided and facilities have not been put in place.

These are much weaker rights than those guaranteed under equality legislation.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Traditionally, sheltered or semi-sheltered services were part of general health provision, funded via the Department of Health, rather than part of the employment or welfare function of government. The Department of Health acted directly with voluntary agencies (direct funded) or through the Health Board.

Generally the Health Board used voluntary organisations as service providers and all services were seen as part of the general health service delivery.

The Government began to rectify this anomaly when it transferred responsibility for vocational training and sheltered employment to the Department of Enterprise Trade and Employment (DETE). There are widespread calls for all sheltered work/employment to be transferred to the DETE but the decision taken was to transfer responsibility for vocational training and employment of people with disabilities to that department, with responsibility for rehabilitative training and sheltered work remaining with the Department of Health and Children.

- b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*



The definition of employment, employee, employer and vocational training all lend themselves to the contention that sheltered and semi-sheltered employment is regarded as employment under the Employment Equality Act 1998-2008 .

To that end a draft Code of Practice in respect of sheltered and semi-sheltered employment was drafted by the Equality Authority, which clearly sees such employment as coming within its ambit.

This draft Code of Practice requires the assent of the Minister for Justice, Equality and Law Reform to sign confirm it as a legal code, an action the Minister has chosen not to take. There has been no litigation in this area to date, but there have been a number of out of court settlements under the Equality legislation.

The Irish Congress of Trade Unions (ICTU) has asked for an investigation under section 58 of the Equality Act into the current situation where people with an intellectual disability are doing real work, which is productive and profit-making, but are not being paid the minimum wage and do not have employment rights.¹⁸⁵ However, in view of very significant cuts to the Equality Authority's budget in recent years, this investigation has never taken place.

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<http://www.inclusionireland.ie/InclusionIrelandwelcomesICTUcallforInvestigationintoShelteredWorkshops.asp>.



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are two distinctions made on the basis of nationality in the Equal Status Act 2000-2008. The first relates to educational establishments in section 7 of that Act where a subsection has been added by virtue of the Equality Act 2004. That subsection permits the Minister for Education and Science to differentiate between nationals, and members of the European Union and others in relation to the provision of educational grants.¹⁸⁶ A further distinction is made in section 14 of the amended Equal Status Act 2000-2008 permitting distinctions based on nationality in relation to the enforcement of the Immigration Act, or in respect of other residency requirements. In these sections a non-national has the same meaning as that used in the Immigration Act of 1999. This exception comes within the provisions contained in the Racial Equality Directive.

The Employment Equality Act 1998-2008 provides at section 36 that it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language, for public service jobs. The positions that can impose those requirements are officer holders in the service of the State, including the Garda Síochána (police service), the Defence Forces, Civil Servants, Officers of local authorities, harbour authorities, health boards or vocational education committees. While it is permitted under Irish law to impose requirements in respect of residency, citizenship and proficiency in the Irish language, not all of the above mentioned positions impose such restrictions. An Garda Síochána recently removed the requirement for proficiency in the Irish language, instead requiring proficiency in two languages at least one of which is Irish or English. Equally An Garda Síochána allow applications from a number of nationalities: EU nationals; EEA nationals; Swiss confederation; refugees under the Refugee Act, 1996; or those with a period of one year's continuous legal residence in the State prior to an appointed date, and in the preceding eight years have a total legal residence that amount to four years (the asylum process does not count towards the qualifying five year period). The Public Service Management (Recruitment and Appointments) Act 2004 is also relevant; it governs how appointments are made to the civil and public service. Section 24 of that Act refers to the requirements for appointment. Section 24(12) states that 'nothing in this section shall be read as affecting the application of the Employment Equality Act 1998 in circumstances where the Act applies.'

¹⁸⁶ Section 7(5)(b) Equal Status Act 2000-2008



3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

Section 8(1) of the Employment Equality Act 1998-2008 prohibits discrimination by employers and employment agencies. Most of the prohibitions contained within the legislation are aimed at the employer and no clear provision is made to enable actions against the person(s) who actually discriminated. There are a few exceptions to this provision; section 14 of the Act refers to liability being imposed on the person responsible for procuring or attempting to procure discrimination. Equally section 10 refers to liability being imposed on the person who displays discriminatory advertising.

The Equal Status Act 2000-2008 is much clearer on this point; it defines the term person at section 2(1) of that Act as including 'an organisation, public body or other entity.' The terms of this Act clearly prohibit discrimination by both natural persons and legal persons.

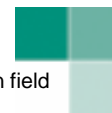
3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Both the Employment Equality Act 1998-2008¹⁸⁷ and the Equal Status Act 2000-2008¹⁸⁸ contain identical provisions on vicarious liability. These provisions set out that the employer/service provider is the addressee of the prohibition of discrimination. No distinctions are made on the basis of the size of the employer/service provider. Effectively these provisions ensure that the employer/service provider is liable for the actions of the employee and that the person with authority is liable for the actions of their agents for anything done in the course of employment. A statutory defence is available and that is that the employer/authority took such steps as were reasonably practicable to prevent the employee from doing that act. In practice this defence can be availed of where an employer has a work place policy on harassment/equality within the work place.

¹⁸⁷ Section 15, Employment Equality Act 1998-2008.

¹⁸⁸ Section 42, Equal Status Act 2000-2008.



As well as the provisions on vicarious liability consideration must be given to the provisions on harassment.¹⁸⁹

Section 14A of the Employment Equality Act 1998-2008 prohibits harassment by the employer, it also provides that the employer may be responsible for harassment by fellow workers, clients, customers and others that a person may reasonably be expected to come into contact with. Again there is a statutory defence available to the employer and that is that they took such steps as were necessary to prevent the harassment in question. The Employment Equality Act 1998-2008 is silent on the issue of whether a trade union or other professional association may be held liable for the actions of their members. The provision does state that the reference to 'other business contact' in the provision refers to any person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment. Based on this provision it seems possible to infer a potential liability for the employer in respect of members of the trade union or professional associations.

The provisions in relation to harassment do make it clear that the term 'employee' covers agency workers, and anyone seeking a service from an agency, as well as anyone in vocational training.

Equally it is clear that where the employer is a trade union or professional association then that union, or association may be liable for the actions of their employees.

Section 11 of the Equal Status Act 2000-2008 also prohibits harassment. The responsibility for harassment remains with what is deemed to be the 'responsible person.' This person may avoid liability if they can come within the statutory defence, which is that they took such steps as were necessary to prevent the harassment in question. As regards the individual harasser being held liable this position is not entirely clear under the Employment Equality Act 1998-2008.¹⁹⁰ The Equal Status Act 2000-2008 clearly provides that an individual may be liable for acts of discrimination or harassment.¹⁹¹

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

¹⁸⁹ See section 2.4 above.

¹⁹⁰ See section 3.1.2 above.

¹⁹¹ Section 2(1) Equal Status Act 2000-2004.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

The Employment Equality Act 1998-2008 does not distinguish between public and private sector employees, equally full-time, part-time and temporary employees are covered.

Section 2(1) of that Act defines a 'contract of employment' and includes within its remit contract of service or apprenticeship, agency workers, and self-employed workers.¹⁹² Section 13A of the Employment Equality Act 1998-2008 ensures that business partnerships come within the terms of the legislation. A second relevant definition is that of 'employee' which covers persons who have 'entered into or works under ... a contract of employment' and includes members of a regulatory body, but does not include the provision of personal services in a private home.¹⁹³ The term 'personal service' is further defined and means services 'provided in a person's home, includes but is not limited to services that are in the nature of services in *loco parentis* or involve caring for those residing in the home'.¹⁹⁴ There is no equivalent exception within the terms of the Framework Directive or the Racial Equality Directive, and it is questionable whether this provision is in compliance.

However, a large award was made recently in favour of a foreign worker in a private household who had been subject to victimization and dismissal which was discriminatory on grounds of race. In the case of a South African nanny who had been recruited to look after a widower's children, paid less than the minimum wage and subsequently dismissed, the Equality Tribunal awarded her €41,486.¹⁹⁵

The legislation specifies different rules in respect of some forms of employment and also includes a category of employees that are excluded from the ambit of the provisions.¹⁹⁶

Section 37 of the Employment Equality Act 1998-2008 sets out rules in relation to organisations that promote certain religious values, and permission is given for more favourable treatment on the religion ground in certain circumstances and also to

¹⁹² The term self-employed is not used in the Act, and there is no case law on this issue. The Employment Equality Act 1998 was amended by the Equality Act 2004 to include the self-employed and it does so by means of the definition of a contract of employment, contained in section 2(1) which includes 'any ... contract whereby – an individual agrees with another person personally to execute any work or service for that person.'

¹⁹³ Section 2(1) Employment Equality Act 1998-2007.

¹⁹⁴ Section 2(1) Employment Equality Act 1998-2007.

¹⁹⁵ DEC-E2011-117: A Domestic Worker -v- An Employer, <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-117-Full-Case-Report.html>.

¹⁹⁶ There are different rules in respect of religious organisations, organisations of certain religious values, emergency services, the Garda Síochána and the Defence Forces.

prevent the undermining of that religious ethos.¹⁹⁷ The legislation does apply to the Garda Síochána (police service), the prison services, and the emergency services, however, the employee must be fully competent and fully capable of undertaking ‘the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved.’ As Irish legislation does not mention the term ‘essential functions’ this provision implies that unless a person with a disability is fully competent (with or without a reasonable accommodation) to perform all the duties of the post, then the Garda Síochána are not obliged to hire that individual. There are also specific derogations from the prohibition on age discrimination within the Garda Síochána or other emergency service where the Minister is of the opinion that the age profile of that service is likely to adversely affect the service in question. The Minister may declare that the age ground shall not apply in relation to recruitment competitions for such services. The obligation not to discriminate on the grounds of age or disability does not apply to the Defence Forces.

In 2008 an Assistant Commissioner of the Garda Síochána (police) began a legal action in the High Court challenging the legality of Regulations issued by the Minister for Justice Equality and Law Reform requiring police officers to retire at age 60. He was assisted in the case by the Equality Authority.¹⁹⁸ The High Court ruled that it was lawful for the assistant garda commissioner to be retired at 60. Mr Donnellan claimed that his retirement was in breach of the terms of the EU directive. The court held that the imposition of a mandatory retirement age was indeed discriminatory under the directive, but found that the policy was objectively justified on the basis that this ensured motivation and dynamism through the increased prospect of promotion due to senior staff being retired. Of particular relevance was the fact that the imposition of retirement was assessed individually and that staff affected could apply to continue their employment, in which event their individual position would be considered.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)). Is the public sector dealt with differently to the private sector?

Section 8(1) Employment Equality Act 1998-2008 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. In short the Act applies to full-time, part-time and temporary employees, public and private sector employment, vocational training bodies, employment agencies, trade unions, professional and trade bodies, the self employed, partnerships and people employed in another person’s home.

¹⁹⁷ Section 37(1) Employment Equality Act 1998-2007.

¹⁹⁸ *Donnellan v Minister for Justice, Equality and Law Reform*, unreported, High Court, McKechnie J., 25 July 2008.



Employee has been redefined to ensure that it is a broader definition, the new definition of employee contains one specific exception in respect of access to employment and that relates to a person employed in another person's home to provide personal services.¹⁹⁹ This limitation applies to access to employment, which impacts on those seeking employment as childcare workers, or other forms of domestic work. The exception has been widely criticised²⁰⁰ and was the subject of an infringement action,²⁰¹ subsequently closed by the Commission.²⁰²

A contract of employment includes a contract of service, or apprenticeship, or any other contract where an individual agrees with another person personally to execute any work or service for that person.²⁰³ This should under Irish law cover many forms of work that would otherwise be classified as self-employment.²⁰⁴

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

Section 8(1) Employment Equality Act 1998-2008 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. This section relates to employers and employees as well as to agencies and agency workers. Section 8(6) states that the employer is prohibited from discriminating against employees or prospective employees in relation to conditions of employment. This relates to terms of employment, working conditions, treatment in relation to

¹⁹⁹ Section 2(1) Employment Equality Act 1998-2007.

²⁰⁰ E.g. by National Women's Council of Ireland, <http://www.nwci.ie/content/download/417/1793/file/Concluding>.

²⁰¹ This is one of the subjects of an infringement action against Ireland in which the Commission sent a Reasoned Opinion on 27 June 2007. Reasoned Opinions are the second stage in the infringement procedure leading, if not addressed in a satisfactory way, to a finding by the Court of Justice that a Member State has breached EU law.

²⁰² On 6 April 2011. http://ec.europa.eu/eu_law/eulaw/decisions/dec_20110406.htm No press release was issued on the closing of the action. In correspondence, the reason given by the Commission for closure was that Ireland had provided explanations and clarifications of its laws transposing the anti-discrimination directives, which allowed the Commission to conclude that Irish legislation is now in conformity with the directives. The legislation is unchanged.

²⁰³ Section 2(1) Employment Equality Act 1998-2008.

²⁰⁴ Sexual orientation Summary of 29 September 2004 by Mark Bell.

overtime, shift work, transfers, lay-offs, short time, redundancies, dismissals and disciplinary measures.

Equal remuneration must be paid for equal work or work of equal value.²⁰⁵ Section 29 contains an entitlement to equal pay, for equal work. Like work is defined as work that is the same, similar or of equal value.²⁰⁶ Where two people are doing like work then they are entitled to equal remuneration. Remuneration is defined as including 'any consideration, whether in cash or in kind, which the employee receives, directly or indirectly from the employer.'²⁰⁷ This definition specifically excludes pensions from its ambit.

The Pensions Act 1990-2008 prohibits discrimination in respect of occupational pensions schemes and other occupational benefits.

Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 amended the Pensions Act 1990. This amendment prohibits discrimination on the grounds of race, religious belief, gender, age, sexual orientation, marital status, family status, disability and membership of the Traveller community. The Act prohibits direct, indirect, instruction and procurement to discriminate, as well as harassment and victimisation, and requires reasonable accommodation in respect of occupational benefit schemes, occupational benefits and occupational pensions.²⁰⁸ Most of the reported cases to date concern the gender and marital status grounds,²⁰⁹ but in a recent case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.²¹⁰

Section 35 of the Employment Equality Act 1998-2008 is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation and that is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000. The difficulty with this section relates to the fact that there is nothing to suggest that the work should be

²⁰⁵ Section 7 Employment Equality Act 1998-2008 defines the concept of like work.

²⁰⁶ Section 7 Employment Equality Act 1998-2008.

²⁰⁷ Section 2(1) Employment Equality Act 1998-2008.

²⁰⁸ Pensions Act 1990-2004 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 available at: www.irg.gov.ie.

²⁰⁹ e.g. DEC –P2008 – 001 Ms Nora Shanahan (Represented by SIPTU union) v HSE West (St Joseph's Hospital) (Represented by HSE – Employers Agency), DEC-E2002-044 An Employee -v- Midland Health Board. These cases did not succeed in establishing prima facie evidence of discrimination.

²¹⁰ DEC-P2011-007- Equality Tribunal, *Michal Czyzycki v Mark Fegan*, <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Pensions-Decisions/DEC-P2011-007-Full-Case-Report.html>.



remunerated at a proportionate level to that of the employee without the disability. The Equality Act 2004 which transposed the directive did not alter this provision, and so less favourable rates of pay may be paid to the disabled worker. See comments of the Irish Human Rights Commission on this point.²¹¹

The Unfair Dismissals Act 1977-2007 prohibits discrimination on a wide number of grounds, namely trade union membership, religious or political opinions, for taking an action against the employer, race, colour, sexual orientation, age or membership of the Traveller community.

The protection also extends to cover a number of statutory protections, interestingly however, disability and religion are not among the protected groups under this statute.²¹² A person claiming an unfair dismissal on the basis of their disability or religion may take a case under the Employment Equality Act 1998-2008.²¹³

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

There is a prohibition on discrimination in relation to access to employment, by virtue of section 8(1). Section 8(7) prohibits discrimination in relation to training or experience for employment. The employer is not permitted to refuse or not to afford the employee the same opportunities on any of the discriminatory grounds when it comes to ‘employment counselling, training (whether on or off the job) and work experience.’

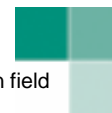
This provision is further reinforced by section 12, which prohibits discrimination in vocational training. Vocational is broadly defined and includes any system of instruction defined as:

‘... any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity.’

²¹¹ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

²¹² The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

²¹³ See section 4.7.4 below.



This definition ensures that where a course is one that is exclusively concerned with training for a particular activity then it is covered by the provisions of the Act. It is accepted that the provisions of the Act cover many University and third level courses; the Act also reiterates this point by stressing that a vocational training body is one which offers a course of vocational training and can include an educational or training body.

There are certain exceptions contained within this provision. The first relates to the age ground, this provision only relates to vocational training courses offered to persons over the maximum age at which those persons are statutorily obliged to attend school.

A second exception relates to the religion ground. The Act provides an exception for hospitals and primary schools ‘which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values.’ It says that “in order to maintain the religious ethos of the hospitals or primary schools, the prohibition of discrimination in *subsection (1)*, in so far as it relates to discrimination on the religion ground, shall not apply.”²¹⁴

Certain hospitals or places of vocational training may protect their religious ethos, in that where the relevant Government Minister certifies that it is necessary, the provisions in respect of religious discrimination will not apply. This provision is not limited by the necessity for this exception to be related to a genuine occupational requirement, nor is there a requirement for legitimacy or proportionality.

It is not permissible to discriminate in the provision of vocational training in relation to the terms on which the course or facility is offered, by refusing or omitting to afford access to any such course or facility, or in the manner in which any such course or facility is provided.²¹⁵

The Equal Status Act 2000-2008 also prohibits discrimination on all nine grounds within educational services, in respect of access to courses or facilities as well as the terms and conditions of how that course is provided. This provision is broadly defined and should cover vocational training.²¹⁶

²¹⁴ Section 12(4) Employment Equality Act 1998-2008.

²¹⁵ Section 12(1) Employment Equality Act 1998-2008.

²¹⁶ See section 3.2.8 below for more on this provision.



3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

Section 13(c) Employment Equality Act 1998-2008 prohibits discrimination in relation to a body that controls entry to or the carrying on of, 'a profession, vocation or occupation.'

This provision relates both to membership of the body in question as well as to any benefits provided by that body, with the exception of pension rights. Section 13A introduces a prohibition on discrimination in respect of business partnerships.

The Unfair Dismissals Act 1977-2008 prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, the race, colour, sexual orientation, age or membership of the Traveller community.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

There is no express prohibition on discrimination in relation to religion or belief, age, disability or sexual orientation in respect of social protection. The Equal Status Act 2000-2008 does prohibit discrimination in relation to goods and services, on all nine grounds. It is not entirely clear whether that prohibition would apply to all State services including social security and healthcare. The interpretation of the Equal Status Act 2000-2008 will be crucial in determining whether Ireland is in compliance with this element of Directive 2000/43.²¹⁷ In *Donovan v. Donnellan*²¹⁸ the Equality Officer interpreted the term service and concluded that 'while State services are not specifically mentioned as being covered they are not specifically excluded either and I believe that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc.'

Compliance with the Racial Equality Directive is dependent on future judicial interpretation.²¹⁹ This situation is further impacted by section 14 of the Equal Status Act. This section provides a statutory exemption to the Equal Status Act 2000-2008,

²¹⁷ Racial Equality Report of November 2002 by Dave Ellis.

²¹⁸ DEC-S2001-011.

²¹⁹ See section 0.3.



where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2008 does not apply. This is an extremely broad exemption to the terms of the Equal Status Act 2000-2004. Pending further judicial interpretation of the various provisions, it is not possible to say definitively whether Ireland is or is not in compliance with the Racial Equality Directive. According to Dave Ellis, in the Racial Equality Report of November 2002, Ireland may comply if the Equal Status Act 2000-2008, the Ombudsman Act 1980²²⁰ and the Constitutional guarantee²²¹ are read together.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

The term ‘social advantage’ is not expressly referred to in any of the Equality legislation. Commentators have contended that the prohibitions on discrimination in relation to ‘social protection’ would apply to ‘social advantages.’²²²

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education are favoured and supported.

The Equal Status Act, 2000 refers to educational establishments at section 7. ‘Educational establishment’ is broadly defined covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on all nine grounds is prohibited in respect of: admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other

²²⁰ Section 4(2), Ombudsman Act 1980.

²²¹ Article 40.1 Irish Constitution.

²²² Racial Equality Report of November 2002 by Dave Ellis.

term or condition of participation in the establishment by a student, or the expulsion of a student from the establishment or any other sanction against the student.

The Traveller community has and still experiences social exclusion and discrimination throughout society: the field of education is no exception. The Education system provides a complaints procedure by virtue of the Education Act 1998. This system is administered by school boards with an appeal to the Department of Education. It addresses issues such as enrolment, suspension or removal of children from a school. Therefore the use of anti-discrimination legislation is not a first option for those who find discrimination in the education system. However, there are a number of cases that are of relevance. In a recent case, a school was found to have discriminated against a child on the Traveller ground when it delayed deciding on his application for admittance for an unreasonable length of time, resulting in his losing a year's schooling. The maximum amount of €6,350 was awarded.²²³

In another case²²⁴ a mother was found to have been discriminated against on the Traveller ground when her son was unable to gain admission to a special needs school to which he had been referred by the psychological services. The Tribunal took a grave view of the injustice done to the mother and her son through the school's discrimination against them and awarded compensation of €4000. (This sum while significant hardly seems to remedy four year's schooling lost through injustice to a 16-year old boy.)

In the *Faulkner* case,²²⁵ a mother on behalf of her son claimed that a school had discriminated against and victimised her son contrary to the Equal Status Act, 2000, on the grounds of a disability from which he suffered and membership of the Traveller community, when it refused to enrol her son in the school. Although she lost on the Traveller and disability grounds she succeeded on the victimisation ground and was awarded €6,350.

One concern in respect of education is the lack of recognition of diverse cultures within the curriculum.²²⁶ As mentioned in the case of *Sweeney v. Saehan Media*,²²⁷ members of the Traveller community are significantly less likely to complete secondary education than members of the dominant population in Ireland.

²²³ DEC-S2011-003 *Mrs. K (on behalf of her son) v A Primary School*

<http://www.equalitytribunal.ie/Database-of-Decisions/2011/Equal-Status-Decisions/DEC-S2011-003-Full-Case-Report.html>.

²²⁴ Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee*.

²²⁵ Equality Tribunal, DEC-S2007-003 *Mrs A (on behalf of her son B) -v- A Primary School*.

²²⁶ Summary of June 2004 by Dave Ellis and Sue Gogan, see also section 41(3)(b) of the Education Act and the Guidelines on Traveller Education in Primary Schools, Department of Education and Science (2002) at 34.

²²⁷ DEC-E2003/017. see above p23.

The Census in 2006 revealed that 63.2% of Traveller children under the age of 15 had left school, compared to 13.3% nationally. Participation of Travellers in Higher Education was 0.8% compared to 30.2% in the national population.²²⁸ Since the 1970's in Ireland there has been a growing awareness of the need to encourage greater participation and inclusion of Travellers in education. As a result a number of resources were provided to increase participation and support Traveller's children's learning. However, most of these are being withdrawn due to Ireland's Troika programme budget cuts. Support measures include:

- Pre-school provision for Travellers.
- Resource Teachers for Travellers (RTT). The role of the RTT is to support and optimise teaching and learning opportunities for Traveller students and to provide learning support for those identified with low achievement or learning difficulties. The RTT service, including additional teaching hours for Traveller pupils, has been discontinued from August 2011.²²⁹
- Visiting teacher for Travellers. These teachers aim to promote education among the Traveller community.²³⁰ This service is being withdrawn; instead an already overstretched School Completion & Home School Programme will be adapted to include Travellers.
- National Education Officer for Traveller Education. The National Education Officer works in conjunction with the Visiting teachers and the national Inspectorate and advises the Department of Education and Science on particular needs in this area.
- Enhanced capitation for Traveller students. Schools receive a capitation sum for all children enrolled. This grant was cut by 50% in the 2008 budget, and free schoolbooks are no longer provided to Traveller children except those attending schools in designated disadvantaged areas
- Senior Traveller training centres (33, plus 3 Outreach centres). This service provides education, work experience, guidance and counselling for members of the Traveller community. Senior Traveller Training Centres are to be phased out by June 2012.
- Youth reach. Youth reach provides an alternative to the formal school structure, and is aimed at early school leavers, it is estimated that over 300 members of the Traveller community participate in youth reach programmes annually.
- Access programmes to third level education.

²²⁸ Results from Census 2011 are not yet available on this point.

²²⁹ Traveller organisations have expressed some concerns with how the RTT works, including: not requesting parental consent prior to sending children to the RTT; children being removed from class for what should be intensive tuition but being assigned 'low level tasks,' such as drawing; due to removal from class, missing out on portions of the curriculum; children who do not require additional learning supports being sent to the RTT because of their ethnic identity. However, the outlook is for loss of educational supports and teaching hours for Traveller children.

²³⁰ There are only 40 such teachers in the school. A freeze on recruitment since 2008 means that retiring visiting teachers will not be replaced.

- In-service education for primary teachers on Traveller education. The delivery of any reform aimed at social inclusion depends on the capacity of the teacher to promote such principles.

The Department of Education published a Report and Recommendations for a 'Traveller Education Strategy' in 2006,²³¹ financed under the National Development Plan 2007 -2013 with provision for funding of €511million over the period. The main objective of the Strategy is to ensure equality of outcomes for Travellers from education.²³² Among the topics prioritised for the development of this strategy are: teacher training; curricular change and interculturalism in curriculum; ethnic identifier, data collection re access (at all levels of education), outcomes; traveller parental role and involvement; school enrolment policies and traveller proofing system for the Department of Education and Science and school policies generally; school retention issues;²³³ nomadism and education.²³⁴ The Employment Equality Act 1998-2008 also has relevance by virtue of section 12 in relation to vocational training.²³⁵

There are a number of exceptions to the general prohibition of discrimination, permitting the existence of single sex schools,²³⁶ the provision of training for religious purposes to one gender only or to those of a particular belief,²³⁷ different fee arrangements for EU members and nationals,²³⁸ different access arrangements to third level institutions for mature students,²³⁹ and also distinctions made in relation to the organisation of sporting events.²⁴⁰ A specific exception in relation to students with disabilities exists. It is permissible to discriminate where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.²⁴¹

There is an exception in the Equal Status Acts 2000 to 2008 regarding the promotion of a religious ethos, allowing a primary or post-primary school with a religious ethos to accept pupils of a particular religious denomination in preference to others, or

²³¹ <http://www.itmtrav.com/education01.html> .See also the Irish Government's Joint Education Committee on Education and Science produced *The Provision of Educational Services in a Multi-Ethnic/Multi-Cultural Society* and the National Council for Curriculum Assessment in May 2005 published guidelines on *Intercultural Education in Primary School*.

²³² see also <http://www.paveepoint.ie/EducationStrategy.html>.

²³³ There is a low retention rate in the education system for members of the Traveller Community. See http://www.education.ie/servlet/blobervlet/pp_traveller_education.pdf.

²³⁴ There are no accurate figures for the size of the Roma Community in Ireland, as the census asks questions in relation to nationality not ethnicity and membership of the Roma community is not referenced. The best estimate is 3,000.

²³⁵ See section 3.2.4 above.

²³⁶ Section 7(3)(a) Equal Status Act 2000-2008.

²³⁷ Section 7(3)(b) Equal Status Act 2000-2008.

²³⁸ Section 7(3)(d) Equal Status Act 2000-2008.

²³⁹ Section 7(3)(e) Equal Status Act 2000-2008.

²⁴⁰ Section 7(4)(a) Equal Status Act 2000-2008.

²⁴¹ Section 7(4)(b) Equal Status Act 2000-2008.



refuse to admit a pupil who is not of that denomination, where it is proved that the refusal is essential to maintain the ethos of the school.²⁴²

This position is reinforced by the Education Act 1998 which requires the school management board to uphold the 'characteristic spirit' of the school as established by its 'cultural educational, moral, religious, social, linguistic and spiritual values and traditions.'²⁴³

All children resident in Ireland have a constitutional entitlement to free primary education, with due regard to parental rights.²⁴⁴ The state also provides free post-primary and third level education. All children are required to remain in school until they are 16 years of age. The Constitution of Ireland provides that a child has the right to attend a school receiving public money without attending religious instruction at that school.²⁴⁵ The majority of Irish schools are denominational in nature, the bulk of those being Roman Catholic.²⁴⁶ Children of different faiths from the majority faith in Ireland will not be required to attend religion class, but will in many cases have to attend a school of a different religious ethos from that which they profess themselves.²⁴⁷ However, there is a growing number of non-denominational schools as well as minority faith schools. In general the religious influence in schools has greatly diminished.

The Education for Persons with Special Educational Needs Act 2004 relates to education needs for children with disabilities.

The purpose of this Act is to provide for the education of people with disabilities and to provide that people with disabilities shall have the same right to avail of, and benefit from, appropriate education. This principle reflects the Constitutional reality; the Constitutional Courts have already stated that children with disabilities are entitled to benefit from the same education as all other children of the state.²⁴⁸ The legislative approach favours inclusive education, that is, education within an inclusive environment with children who do not have special educational needs.

²⁴² Section 7(3)(c) Equal Status Act 2000-2008.

²⁴³ Summary of June 2004 by Dave Ellis and Sue Gogan.

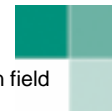
²⁴⁴ Article 42.4 Bunreacht na hÉireann.

²⁴⁵ Article 44.2.4 Bunreacht na hÉireann.

²⁴⁶ The schools are owned by the churches whose ethos they profess.

²⁴⁷ The evidence available is that schools do accept pupils from a wide variety of religions into schools with a particular ethos. It is not clear whether it could be deemed to amount to discrimination not to be able to attend a school reflecting a particular religious faith, or a non-denominational school.

²⁴⁸ *O'Donoghue v. Minister for Health* [1996] 2 IR 20. This position was reiterated in the Supreme Court case *Sinnott v. Minister for Education*, [2001] 2 IR 505, which held that the Constitutional right to education for children with profound disabilities continued until they were eighteen years of age. The *O'Donoghue* case stated that **all** children of the state were entitled to benefit from education, this would include children belonging to the various protected grounds.



However, this will not be required if it would not be in the best interests of the child with special needs or if it would impair the effective provision of education for the children with whom the child is to be educated. According to the Statistical Report of the Department of Education and Science, there were 9,732 students with special needs within mainstream provision in 2011. As well as mainstream provision, students with special needs are also accommodated in a variety of special schools and in special classes attached to mainstream primary and post-primary schools.

The special schools cater for students with mild general learning disability, moderate general learning disability and sever/profound general learning disability; for emotionally disturbed students; for students with autistic spectrum disorders; for students with physical and multiple disabilities; for students with visual and hearing impairment; and students with specific learning disability. Special classes for students in most of these categories are attached to mainstream schools, mainly at primary level. There were 7,178 pupils enrolled in a total of 124 special schools for students with disabilities in 2011.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Equal Status Act 2000-2008 provides that a person shall not discriminate in disposing of goods, or in the provision of services, whether that disposal or provision 'is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.'²⁴⁹ In *Two Complainants v. Department of Education and Science*²⁵⁰ the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance grant was covered by the Act. Section 2 of the Act defines a service as 'a service or facility of any nature which is available to the public generally or a section of the public. To determine what was meant by 'facility' the Equality officer referred to comparable provisions in the United Kingdom equality legislation and referred to a definition of 'facility' as 'a manner, method opportunity for the easy or easier performance of anything ...

²⁴⁹ Section 5(1) Equal Status Act 2000-2008.

²⁵⁰ DEC-S2003-042/043.

The term should cover most instances where a person is not actually providing goods or a service himself, but is providing a means to obtain access to those goods or that service.’ The Equality Officer held that a maintenance grant was a ‘facility’ covered by the Act.²⁵¹

Section 15(1) of the Equal Status Act 2000-2008 provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that ‘the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought or the premises or accommodation are located.’²⁵² Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in ‘good faith’ for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination.²⁵³

The Equal Status Act prohibits clubs from discriminating at section 8, and permits certain exceptions to this rule in section 9, where a club is set up to cater for the needs of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin or membership of the Traveller Community. The Equality Authority challenged the actions of Portmarnock Golf Club, which is a male-only club.²⁵⁴

The case went at first instance to the District Court who made a declaration that Portmarnock was a discriminating club, and ordered the suspension of the certificate of registration and alcohol license of the club. This finding was suspended pending an appeal to the High Court. The High Court interpreted section 9 of the Equal Status Act as permitting male-only golf clubs, and holding that the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. This is a very broad interpretation of the section. The implications of this decision are most obvious in the context of the Racial Equality Directive. The Supreme Court upheld the decision on 4 November 2009.²⁵⁵

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

²⁵¹ This provision was amended in 2004, now section 12 Employment Equality Act 1998-2007, see also *Donovan v. Garda Donnellan* DEC-S2001-011 which supports the contention that the Equal Status Act covers services and now facilities provided by public authorities.

²⁵² Section 15(1) Equal Status Act 2000-2008.

²⁵³ See further under paragraph 4.9.

²⁵⁴ *The Equality Authority v. Portmarnock Golf Club and Ors*, High Court, 10th June, 2005
<http://www.bailii.org/ie/cases/IEHC/2005/H235.html>.

²⁵⁵ <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.



Section 5 (2) of the Equal Status Act 2000 to 2004 states that the prohibition on difference in treatment does not apply in the case of differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk. The assessment of risk must be effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or “other relevant underwriting or commercial Factors”, and must be reasonable having regard to the data or other relevant factors. In 2007, following negotiations with the Equality Authority, the underwriters AIG Insurance undertook to longer underwrite travel insurance which contains an absolute age limit, and to comply with the Equal Status Act 2000 to 2004 in its underwriting business in this jurisdiction .

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Equal Status Act 2000-2008 prohibits discrimination in the disposing of any estate or interest in premises, in respect of terminating any tenancy or other interest in the property, or in the provision of accommodation, or amenities related to such accommodation.²⁵⁶

The provision does contain a number of exceptions, the first is that the prohibition on discrimination does not apply to accommodation that is being provided in a person’s home, “or where that the provision of accommodation affects the person’s private or family life or that of any other person residing in the home.”²⁵⁷ Another such exception relates to accommodation that is reserved for a particular category of people, and this may relate to one of the discriminatory grounds, such as a residential centre for people with disabilities, or a nursing home for the elderly.²⁵⁸

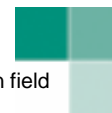
Local authorities in Ireland are obliged to provide housing for older people and people with a disability on broadly the same basis as the rest of the population. Regarding older people, some local authorities provide specific housing for older people or take their specific circumstances into account when assessing need. There are some grants for housing which are particularly relevant to older people or people with disabilities. Some local authorities provide special accommodation for older people.

This is usually communal accommodation with special security features, for example,

²⁵⁶ Section 6(1) Equal Status Act 2000-2008.

²⁵⁷ Section 6(2)(d) Equal Status Act 2000-2008.

²⁵⁸ Section 6(5) Equal Status Act 2000-2008.



wardens, security cameras etc. Persons aged 60 or over and spouses aged 55 or over, or single persons aged 55 or over, are eligible for special housing if otherwise entitled to priority on medical or compassionate grounds. Voluntary housing organisations also provide housing on a somewhat similar basis to local authority housing and are financed to a significant extent by government. Most of these organisations are community-based organisations and have developed in order to meet a recognised special housing need within the community. A large proportion of these approved bodies have been set up to provide housing for older people. To qualify for the various grants and loans they must be approved by the Department of the Environment and Local Government.

Voluntary housing organisations provide two types of housing for older people - group schemes and sheltered housing. Voluntary housing associations have some discretion as to whom they house in accordance with their own policy but the majority of their houses are let in consultation with the local authority. Tenants in sheltered housing pay rent and may qualify for rent supplements.

The Housing Aid for Older People Scheme is for improving living conditions of older people by carrying out minor repairs to the main areas of an older person's home. The type of work which will be grant aided includes structural repairs or improvements, re-wiring, repair or replacement of windows and doors, the provision of water, sanitary services, heating, cleaning and painting. On 1 November 2007, the Housing Aid for Older People Scheme replaced the Essential Repair Grant and Special Housing Aid for the Elderly. From 1 November 2007, the Mobility Aids Grant Scheme provides grants for works designed to address mobility problems in the home, for example, the grant can be used for the purchase and installation of handrails. The grant is primarily for older people but people with disability can also access the scheme. The amount of assistance available under the Mobility Aids Grant Scheme²⁵⁹ is less than under the Housing Aid for Older People Scheme and the Housing Adaptation Grant for People with a Disability, but is useful if minor adaptations or improvement are needed quickly.

Regarding disability, from 1 November 2007 the Housing Adaptation Grant for People with a Disability²⁶⁰ (which is means-tested) has replaced the Disabled Persons Grant (which was not). Housing Adaptation Grants for People with a Disability are available from local authorities. The housing adaptation grant is available where changes need to be made to a home to make it suitable for a person with a physical, sensory or intellectual disability or mental health difficulty to live in. The grant is for making changes and adaptations to a home, for example, making it wheelchair-accessible, extensions to create more space, adding a ground floor bathroom or toilet and stair-

²⁵⁹

http://www.citizensinformation.ie/en/housing/housing_grants_and_schemes/mobility_aids_grant_scheme.html.

²⁶⁰ http://www.citizensinformation.ie/en/housing/housing_grants_and_schemes/housing_adaptation_grant_for_people_with_disability.html.



lifts. In some cases, the provision of heating can be included but only under certain conditions. For less expensive work the Mobility Aids Grant Scheme is available.

The Equal Status Act 2000-2008 at section 6(6) provides that nothing in the Act can be construed as prohibiting housing authorities, pursuant to their functions under both the Housing Acts, 1966-1998 or the Housing (Miscellaneous Provisions) Act, 1992 from providing in respect of housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.

While permitting the difference in treatment, there is no clarification as to how they may be treated differently.²⁶¹ In *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, the High Court clarified that section 6(6) of the Equal Status Acts 2000 to 2008 cannot be relied on to allow local authorities to afford less favourable treatment in the provision of housing.²⁶² The Equal Status Act 2000-2008 at section 6(7) provides that nothing in the Act shall be construed as prohibiting, in relation to housing accommodation provided by or on behalf of the Minister, different treatment to persons on the basis of their nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community.²⁶³ This exception is tempered by virtue of the fact that any difference in treatment is not permitted to amount to a derogation from any of the obligations of the State under the treaties governing the European Communities or any Act adopted by an institution of those Communities. This ensures that the differences of treatment permitted under section 6(7) should be in compliance with the Racial Equality Directive, although no such statement is made in respect of section 6(6).

The Housing (Traveller Accommodation) Act 1998 provides that each major housing authority is to prepare and adopt a five-year programme for the provision of Traveller accommodation in its area. The Act permits those housing authorities to provide loans to members of the Traveller community to support them in obtaining caravans or sites for same.²⁶⁴ A further provision relevant in this context is the Housing (Miscellaneous Provisions) Act, 2002. Section 24 of the 2002 Act, amends the Criminal Justice (Public Order) Act 1994 and criminalizes trespass on public and private land.

While this provision applies equally to all persons it has a disproportionate impact on members of the Traveller community.²⁶⁵ The Act permits the Gardaí to move

²⁶¹ Flash report Racial Equality and religion 02-02-2004.

²⁶² [2007] IEHC 4. see below p 49 for further details of this case.

²⁶³ No reference is made in this section to the ground of race or sexual orientation.

²⁶⁴ Racial Equality Report of November 2002 by Dave Ellis.

²⁶⁵ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006 suggests that some 1,000 families are currently susceptible to criminal prosecution. Also where a family do not move immediately their caravans may be seized; this may have the effect of making them homeless.

Travellers with no notice on the basis of a complaint by the local authority. Equally it means that ‘Travellers will be unable to move from place to place to exercise their right to be nomadic due to the fear of committing a criminal offence.’²⁶⁶

The Equality Authority was granted the right to appear as *amicus curiae*²⁶⁷ in two cases relating to Traveller accommodation.²⁶⁸ The Court retains discretion and may or may not take on board the arguments raised.²⁶⁹ The Irish courts require a body seeking to enter an *amicus curiae* brief to establish proof of a legitimate interest in the case. In the *Lawrence* case the Equality Authority sought to do this by highlighting that they were a specialised body within the meaning of Article 13 of the Racial Equality Directive, and as such they were charged with promoting equality in Ireland. The arguments also referred to Article 7(2), that as a specialised body within the meaning of the Directive they should be in a position to provide assistance or go in and support the case in question, and that the Equality Authority does have a ‘legitimate interest in ensuring that the provisions of the Directive are complied with.’ The Equality Authority also referred to the powers and functions conferred on them by national law, including their right to take actions, assist litigants, and promote equality. The Equality Authority in their role as *amicus curiae* to this case were “given leave to appear as *amicus curiae* in relation to the application and interpretation of the Racial Equality Directive should it arise as part of the case.”

In the *Lawrence* case the family challenged the constitutionality of The Housing (Traveller Accommodation) Act 1998 on the grounds that it has a discriminatory impact on Traveller families.²⁷⁰ If the Act had been found to be unconstitutional it would have ceased to have legal effect. As the case was settled however without coming to judgment, the Act remains in force and the aspect of indirect discrimination was not decided.²⁷¹

²⁶⁶ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006.

²⁶⁷ An *amicus curiae* brief (friend of the court) is an intervention by a disinterested third party, that is not a party to the action, and this third party seeks to use the court as a platform to amplify a point of law that might not otherwise be considered within the factual confines of the court. The procedure adopted is that the third party provide a written brief for the information of the court, in the context of this particular case the Equality Authority are seeking to raise arguments that the provisions of the Racial Equality Directive should be considered when determining the outcome of this case.

²⁶⁸ *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General and Lawrence v. Mayo Country Council and Ors.*

²⁶⁹ The use of *amicus curiae* briefs are relatively new in the Irish context. In this particular case both the Irish Human Rights Commission and the Equality Authority provided such briefs. It should be noted that unlike the Irish Human Rights Commission the Equality Authority do not have a statutory right to intervene, but relied on the inherent discretion of the court and sought and received permission to intervene in this case.

²⁷⁰ *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, Reported in the Irish Times, January 12th 2006, the purpose of the Equality Authorities intervention is to challenge the compliance of this provision with the Racial Equality Directive.

²⁷¹ This case is unreported, and as such there is no judgement available, the information provided in relation to the arguments used is provided by the Equality Authority.



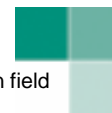
In a second case, that of *Doherty v. South Dublin County Council and Ors*, the High Court had granted the Equality Authority the right to act as an amicus curiae to the court, but a number of the respondents to the action challenged this and appealed this point to the Supreme Court.

That Court held that the Equality Authority had the right to appear as an amicus curiae to the Court.²⁷² Subsequently, in the substantive hearing, the High Court found that the Equal Status Acts 2000 to 2004 were not justiciable outside the framework of compliance established by the Equal Status Acts 2000 to 2004 (i.e. the Equality Tribunal) and therefore could not be relied on by the plaintiffs in their High Court proceedings. The judge went on to say that he did not believe that there had been discrimination or breach of the Racial Equality Directive. There was no analysis of the interaction between the Housing Acts, the Equal Status Act and the Racial Equality Directive, or the implications of the burden of proof provisions in the Equal Status Acts and the Racial Equality Directive. The judge held inter alia that providing a house (instead of a habitable caravan, as requested by the complainants in accordance with their preference) was not a breach of the complainants' rights under the European Convention of Human Rights: "A duty to take into account the sensitivities of members of the Roma communities, whether Gypsies from the neighbouring kingdom, members of the Sinti from Central Europe, or members of our own Irish Traveller Community, can arise (but is) not however, unlimited."²⁷³ The judgement was appealed and was settled on appeal, with the terms of the settlement being confidential. However, in another case, taken in the High Court under the Human Rights Act 2003 and the Housing Acts, the judge, having concluded that the case before her was very unusual if not unique, ruled that the refusal to provide the appropriate caravan constituted a violation of Article 8 of the ECHR, where a second disability-adapted caravan was required for the temporary needs of a Traveller family with three severely disabled children awaiting rehousing.²⁷⁴

²⁷² *Doherty and ors v. South Dublin County Council*, [2006] IESC 57.

²⁷³ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 43, he relied in *Chapman v. United Kingdom* (2001) 33 EHRR 18 and *Codona v. The United Kingdom*, 7th February, 2006 in support of this proposition.

²⁷⁴ *O'Donnell and others v South County Dublin County Council*, http://www.flac.ie/download/pdf/piIn_bulletin_29_june_2007.pdf.



4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

There is an exception to the Employment Equality Act 1998-2008 when a difference in treatment is based on a characteristic which constitutes a genuine and determining occupational requirement, where the objective is legitimate and the requirement proportionate.²⁷⁵ This necessity for legitimacy and proportionality is in line with Article 4 of both the Racial Equality Directive and the Framework Employment Directive. There is also provision for a difference in treatment on the gender, age, disability or race ground that is required for reasons of 'authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.'²⁷⁶

A previous exception was removed as a result of the Equality Act 2004. That exception permitted distinctions on the grounds of gender, race and religion, where the employment duties were performed outside the State, and the relevant characteristic was an occupational qualification having regard to the laws and or customs of that State.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

Section 37(1) of the Employment Equality Act 1998-2008 permits discrimination for the purposes of maintaining, or the reasonable prevention of any undermining of, the religious ethos of an institution. The Act does not refer to the term 'legitimate' or 'proportionate.' It could be argued that Irish case law would ensure that these notions apply, for example, in the Supreme Court decision of *Re Article 26 and the Employment Equality Bill, 1996*,²⁷⁷ the court held that it would 'appear that it is constitutionally permissible to make distinctions or discrimination on grounds of religious profession belief or status insofar but only insofar as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution....'²⁷⁸

²⁷⁵ Section 37(2) Employment Equality Act 1998- 2008.

²⁷⁶ Section 5(2)(i) Equal Status Act 2000-2008.

²⁷⁷ [1997] 2 I.R. 321.

²⁷⁸ Religion report of May 2003 by Dave Ellis.



Equally it can be contended that the concept of legitimacy is also contained in Irish law.²⁷⁹ It would be preferable if the language of the Act expressly required all actions to be 'legitimate' and 'proportionate.' A second point is that the terms of the exception contained in section 37(1) of the Employment Equality Act 1998-2008 are phrased in broader terms than those found in the Directive. The Directive refers to employment in a religious organisation 'where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement.' This suggests that employers should show that a person's religion or belief is relevant to the individual post in question. Whilst this is implicit in the Irish Act it is not express.

The Directive also explicitly limits this exception to discrimination based on the grounds of religion or belief and it cannot be used to justify discrimination on another ground. However, there is no similar restriction found within section 37(1).²⁸⁰

Section 12(4) of the Employment Equality Act 1998-2008 which relates to the provision of vocational training, reflects the exception contained in section 37(1) of that Act. It permits difference in treatment with regard to access to training or vocational courses under the direction of a body established for religious purposes, and in order to maintain the religious ethos of educational or medical institutes.²⁸¹ It has been pointed out that a person who is not, or does not pretend to be, a Christian, can not study at any teacher training college in Ireland.

The Minister of State for Education confirmed in the Dáil (parliament) that "The bachelor of education courses provided by the colleges of education include compulsory modules on religious education . . . There is no separate qualification for primary teaching available in the State which does not include religious education".²⁸²

b) Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).

The few older cases that there have been in this area have been taken under Constitutional provisions. The few precedents that there have been in this area are of increasingly dated vintage and have not been taken under the Equality legislation.

²⁷⁹ *Flynn v. Sr. Power and the Sisters of the Holy Faith*, [1985] ILRM 336, see Ellis Religion Report May 2003.

²⁸⁰ Sexual orientation report of 29 September 2004 by Mark Bell.

²⁸¹ The infringement action initiated against the Irish Government for incorrect implementation of Directive 2000/78 covered this point

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/68&format=HTML&aged=1&language=EN&guiLanguage=en>.

²⁸² <http://www.irishtimes.com/newspaper/opinion/2010/0427/1224269158535.html>.

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

The only exceptions for religious institutions are those related to protection of ethos discussed above at 4.2. No specific cases have come to light but the primary school teachers union has pointed out that the exception relating to protection of religious ethos is unnecessary, is of sweeping scope and makes teachers genuinely fearful of discriminatory dismissal from their posts on grounds of LGBT sexual orientation. They point out that 95% of primary schools in Ireland remain under religious control.²⁸³ The new government programme states that “People of non-faith or minority religious backgrounds and publically identified LGBT people should not be deterred from training or taking up employment as teachers in the State.”²⁸⁴

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

Section 37(5) of the Employment Equality Act 1998-2008 contains such an exception. The section states in ‘relation to discrimination on the age ground or disability ground, nothing in this Part or Part II applies in relation to employment in the Defence Forces.’

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

While there are no longer any blanket exceptions to employment in the police, prison or emergency services the Act does contain some restrictions. Section 37(3) provides that it is an occupational requirement that those employed in the Garda Síochána, prison services or emergency services are competent and capable to undertake the ‘range of functions’ associated with this position. A further exemption from age discrimination is included at section 37(4) which provides that if the Minister is of the opinion that the age profile of members of the Garda Síochána, prison service or other emergency services is such that the occupational capacity is likely to

²⁸³ Irish National Teachers Organisation Submission in Relation to Section 37(1) in 2007
<http://www.into.ie/ROI/InformationforTeachers/TeacherSpecialInterestGroups/LesbianGayBisexualTeachersGroup/Section371/INTOSubmission/>.

²⁸⁴ <http://www.socialjustice.ie/sites/default/files/file/Government Docs etc/2011-03-06 - Programme for Government 2011-2016.pdf>.



be adversely affected, the age ground shall not apply in relation to recruitment to those services.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?)*

The Equality legislation (both the Employment Equality Act, 1998-2008 and the Equal Status Act 2000-2008) defines race as including nationality, or ethnic or national origin.²⁸⁵

Equally the Constitutional Courts have held that some of the protections of the Constitution can be extended to non-citizens.²⁸⁶ The Unfair Dismissals Acts 1973-2007 provides that dismissal of an employee on the ground of race shall be deemed to be an unfair dismissal; the term is not defined so it is unclear whether this would include nationality. The Prohibition of Incitement to Hatred Act 1989 prohibits incitement to hatred on various grounds including race, colour, religion, nationality or ethnic or national origins / membership of the Traveller community. There is no definition of nationality, nor is there case-law, which would shed light on any overlap with ethnicity, nor whether or not statelessness is covered.

- b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

Section 12(7) of the Employment Equality Act 1998-2008 provides for different treatment on the basis of nationality. The exception relates to difference in treatment in relation to fees for admission, or attendance at any vocational or training course, different treatment is permitted for citizens of Ireland or nationals of another Member States of the European Union. It also provides that it is not discrimination to offer assistance to particular categories of persons by way of sponsorships, scholarships, bursaries or other awards, which assistance is reasonably justifiable, having regard to traditional or historical considerations.

²⁸⁵ Section 6(2)(h) Employment Equality Act 1998-2008.

²⁸⁶ *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR 567, Hogan and Whyte, *JM Kelly The Irish Constitution*, 4th Edition, at 1260 contend that there are situations where non-citizens may not be in a position to invoke a particular Constitutional right. See section 3 above.

This exception would appear to comply with the provisions of Article 3(2) of the Racial Equality Directive. Section 17(2) of the Employment Equality Act 1998-2008 provides that in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Act 2003.

The Equal Status Act 2000-2008 also contains some exceptions in relation to nationality, by excluding from the provisions of the legislation differential treatment of persons, on the ground of nationality in relation to housing or accommodation provided by or on behalf of the Minister.

Section 5(2)(f) continues to permit a difference in treatment of persons, on the basis of nationality in relation to the provision or organisation of a sporting facility or event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event. A final distinction made in this area relates to section 9 of the Equal Status Act which provides that a club will not be a discriminating club if it excludes membership by reason only that its principal purpose is to cater for the needs of a particular nationality.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

- a) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

The Employment Equality Act 1998-2007 does provide some specific exceptions in relation to ‘family benefits.’ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 extends the definition of “family” under the equality legislation to include families based on civil partnership.²⁸⁷

- b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

²⁸⁷ <http://www.irishstatutebook.ie/2010/en/act/pub/0024/sec0102.html> - sec102.



Section 34(1) provides an exception from the ban on discrimination where an employer provides: a benefit to an employee in respect of events related to members of the employee's family or any description of those members; a benefit to or in respect of a person as a member of an employee's family; a benefit to an employee on or by reference to an event occasioning a change in the marital status of the employee.

The term 'member of the family' now includes same-sex partners in a registered civil partnership.²⁸⁸

The new civil partnership legislation extends marriage-like benefits to same-sex couples in the areas of property, social welfare, succession, maintenance, pensions and tax.

There are some remaining legislative benefits which do not extend to same-sex couples. The Parental Leave Act 1998 provides a statutory entitlement to unpaid parental leave for men and women.

This leave is in respect of each child of which that person is the natural or adoptive parent. This leave is available separately to both parents.²⁸⁹ Parental leave involves an employee who is the natural or adoptive parent of a child being entitled to 'leave from his or her employment' for a period of 14 weeks to enable him or her to take care of the child.²⁹⁰ This leave is confined to natural or adoptive parents, and partners in a same sex relationship would not be so entitled. Same sex couples may not jointly adopt a child, unlike married couples. Single people regardless of sexual orientation may adopt, and that person is entitled to leave under the legislation, but their partner will not be.

A second issue in respect of the Parental Leave Act relates to *force majeure* leave. This is paid leave for urgent family reasons that relates to an injury or illness of one of the persons specified in the Parental Leave Act 1998.

Section 13 states that leave applies to the following categories of persons: a person of whom the employee is the parent or adoptive parent; the spouse of the employee or a person with whom the employee is living as husband or wife, a person to whom the employee is in *loco parentis*, a brother or sister of the employer, a parent or grandparent of the employee, and persons of such other class or classes as may be prescribed.

²⁸⁸ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
<http://www.irishstatutebook.ie/2010/en/act/pub/0024/print.html>.

²⁸⁹ Section 6 Parental Leave Act 1998.

²⁹⁰ Section 6(1) Parental Leave Act 1998.



The Pensions Act 1990-2008²⁹¹ contains an exception to the principle of non-discrimination on the grounds of sexual orientation. Section 72(3) states that it will not be a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

- a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

In Ireland the main legislative provision in this area is the Safety, Health and Welfare at Work Act 2005.²⁹² This Act imposes a duty on an employer to provide a safe place of work as far as is reasonably practicable a failure to do so may result in criminal liability.

The Safety, Health and Welfare at Work (General Application) Regulations²⁹³ impose civil *and* criminal liability for failure to provide a safe place of work.

The standard imposed by the regulations is at issue but there is an argument that they may impose an absolute standard of care. These regulations cover nine areas of employment: general provisions; workplace regulations, work equipment; personal protective equipment; manual handling of loads; display screen equipment; electricity; first aid; notification of accidents and dangerous occurrences.

Irish legislation doesn't contain specific exemptions in relation to disability and health and safety; however, provisions in certain Acts can be interpreted by employers as exempting them from liability in some situations. The Health and Safety Welfare at Work (General Application) Regulations state that although employers should ergonomically adapt workplaces to the individual, they are entitled to give collective protective measures priority over individual protective measures.

- b) *Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc)?*

²⁹¹ This Act relates to occupational pensions, personal retirement savings accounts, and other occupational benefits.

²⁹² <http://www.oireachtas.ie/documents/bills28/acts/2005/a1005.pdf>.

²⁹³ The Safety Health and Welfare at Work (General Application) Regulations 1993 S.I. 44/93; The Safety Health and Welfare at Work (|General Application) (Amendment) Regulations 2001 S.I. 188/2001; The Safety Health and Welfare at Work (|General Application) (Amendment No. 2) Regulations 2003 S.I. 53 /2003; The Safety Health and Welfare at Work (|General Application) (Revocation) Regulations 2005 S.I. 392/2005 – collectively known as the Safety Health and Welfare at Work (General Application) Regulations.

Equally there are no specific exemptions in relation to any of the other protected grounds, but issues such as dress code are currently dictated by the policy of the individual employer. For example employers who operate manufacturing processes that require a clean room environment generally impose very strict regulations in respect of attire; no case law has arisen from such practices to date.

The Employment Equality Act 1998-2008 at section 33 provides that nothing will render unlawful measures that have been adopted with a view to ensuring equality in practice between employees to protect the health and safety at work of persons with a disability, or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

This provision has yet to be litigated, but the emphasis of the provision is towards integration as opposed towards segregation which is positive.

There are a number of exceptions to the principle of equality on the basis of health and safety concerns. The Equal Status Act 2000-2008 provides that where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.²⁹⁴ This exception was the reason why a claimant suffering from epilepsy failed in his claim against a sailboat training company for lack of reasonable accommodation on a training voyage, where his falling ill on a previous voyage had necessitated a dangerous air-sea rescue.²⁹⁵ Section 7(4)(b) of the same Act excludes the provisions of the Act in respect of the provision of education where compliance with the non-discrimination provisions would make it impossible or have a seriously detrimental effect on the provision of education to other students. What is unclear in respect of both provisions relates to who makes the decision as to whether a person is a harm to themselves or others, whether it be made by professionals or lay people and what is the standard to be imposed in such a decision.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold?*

²⁹⁴ Section 4(4) Equal Status Act 2000-2008.

²⁹⁵ Equality Tribunal DEC S2006-034 *Connery v Coiste an Asgard*.



The Employment Equality Act 1998-2008 permits employers to set a maximum age for recruitment, as long as that considers the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job.²⁹⁶ This complies with the test in Article 6 paragraph (c) of Directive 2000/78.

b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

There are a number of exemptions contained in the Employment Equality Act 1998-2008 to the age ground. Besides the power to set a maximum recruitment age as mentioned, it is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory.²⁹⁷ Section 34(7) also permits employers to provide for different rates of remuneration or different terms and conditions of employment, on the age ground, where that difference is based on their seniority or length of service within the post. These provisions may not be in conformity with EU law.

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?*

Section 34 refers to an occupational benefits scheme, and provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to such a scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; to provide different rates for severance payment for different employees these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground.²⁹⁸ Occupational benefit schemes are defined as schemes which provide for benefits to employees or categories of employees on their becoming ‘ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.’²⁹⁹

²⁹⁶ Section 34(5) Employment Equality Act 1998-2008.

²⁹⁷ Section 34(4) Employment Equality Act 1998-2008: “(4) 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.”

²⁹⁸ Section 34 Employment Equality Act 1998-2008.

²⁹⁹ Section 34(3A) Employment Equality Act 1998-2008.



4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The Protection of Young Persons (Employment) Act 1996³⁰⁰ limits the employment of young persons, young persons are over sixteen but not yet eighteen. This Act also restricts the employment of children; children are under sixteen. The Act prohibits children under the age of 13 from working, unless they have received a licence from the Minister for State at the Department of Trade Enterprise and Employment.

The Minister may not grant a licence without first considering the education and the safety and health of the child. The employer must also have written permission from the parent or guardian before the child is permitted to work.

If an employer hires young workers then they must keep a register of young workers, this register should set out the hours worked, the rate of pay and the total amount in wages paid. A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations, 1998. Under these regulations an employer must carry out a risk assessment, assessing the risks to the child or young person by the type of employment required. This assessment should consider the safety and health of the child or young person and also consideration should be given to the physical and mental growth. Where the assessment shows that the employment could cause harm to the child or young person then they may not be employed in that employment. Where the assessment shows a risk to the mental and physical growth of the child then the employer must make health surveillance available to them. Parents or guardians should be informed of the outcome of the assessments, and the precautions and preventative measures being put in place to protect the child or young person. The Employment Equality Act 1998-2008 prohibits discrimination on the grounds of age for everyone above 16, but employers are still allowed to set minimum recruitment ages of 18.

The Employment Equality Act 1998-2008 prohibits discrimination on the grounds of a person's family status. This includes a parent or a person in loco parentis to a person who has yet to attain the age of 18, it also includes a resident primary carer to a person who has a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis. This is a somewhat narrow definition and will cover some but not all carers as many carers are not resident. All the protections granted by the Employment Equality Act are provided for those with a family status as defined by the Act.

³⁰⁰ <http://acts.oireachtas.ie/zza16y1996.1.html>.



The introduction of the Carer's Leave Act, 2001 entitles employees to unpaid leave to provide full time care for a dependant. The maximum leave entitlement is 65 weeks and the minimum is 13 weeks. The Carer's Benefit is payable for up to 65 weeks for a carer who gives up work under the Act.

The national agreement Sustaining Progress established the National Framework committee for Work-Life Balance and the Special Initiative on Care. The Work Life Balance Committee is convened by the Department of Enterprise, Trade and Employment. The committee advises on work life balance practices, organises information seminars, offers financial assistance to firms to develop work-life balance initiatives.³⁰¹ The Special Initiative on Care includes issues such as childcare, care for the people with disabilities and the elderly. The Equality Authority has published a number of documents in respect of carers, see particularly: Implementing Equality for Carers, which highlights the difficulties for carers in Irish society and makes a number of recommendations for change.³⁰²

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The Employment Equality Act 1998-2008 prohibits age discrimination for everyone over the age of 16. Employers are still permitted to set a minimum recruitment age of 18 or under and to set retirement ages in employment contracts. If the age of retirement is not specified in the employment contract then it may be implied by practice, this means that if the practice in the particular employment is for people to retire at 65 then it may be assumed that employees, will in the normal course of events retire at this age. If a person is employed after their 65th birthday and no retirement age is specified then the employer cannot impose a retirement age unless they can show that the employee is no longer capable of doing the job or is a danger to either themselves or other employees.³⁰³ There are maximum age requirements for access to certain types of training, particularly access to the Garda Síochána and the defence forces. Among those upper age limits are the following:

- Army and Air Corps under the age of twenty five at the time of enlistment
- Naval Service under the age of twenty seven at the time of enlistment
- Air Corp Apprenticeship under the age of nineteen at the time of apprenticeship
- An Garda Síochána under the age of thirty five to commence training.

³⁰¹ For more information <http://www.worklifebalance.ie/>.

³⁰² Available at www.equality.ie.

³⁰³ Information provided by Age Action Ireland.



4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

The State Pension (Transition) is paid to people aged 65 who have retired from work and who have enough social insurance contributions. It is not means-tested. In general, you must have been an employee and paying full-rate social insurance contributions, but a small number of self-employed people also qualify. At age 66, you will transfer to the State Pension (Contributory).

You cannot work and get a State Pension (Transition). However, when you transfer to the State Pension (Contributory), at age 66, you can work and get your pension. Where a person is in receipt of a State Pension (Contributory) there is no limit on what may be earned. There is no potential to increase the contributory state pension after the age of 65 therefore there is no benefit to deferring that payment. Those in receipt of the non-contributory pension may only earn up to €100 per week prior to deductions being made from the actual pension. The state pension age applies equally to men and women.

- b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

This is subject to individual contract and deferral of pension is also subject to the terms of the employment contract.

Some contracts of employment have a mandatory retirement age but make provision for earlier retirement, generally on the grounds of illness.

It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment.³⁰⁴ Most people in Ireland retire at age 65. There is no set retirement age for the self-employed. Occupational pension schemes are private agreements and they are completely dependent on the individual agreement.

Some jobs existing under a statutory framework set a maximum age of staff.

The mandatory retirement age for those in the public sector who joined before April 2004 is 65 years. Those who joined after April 2004 have a minimum retirement age of 65, this means they can continue to work subject to health requirements. There are different age periods for certain occupations such as the Gardaí, fire-fighters and the Defence Forces. The Gardaí and Fire Service have a minimum retirement age of 55 and the compulsory retirement age for Gardaí is 60. Members of the judiciary have a statutory retirement age of 70, however, some judges may remain in office until the age of 72. Medical general practitioners must retire at the age of 70. An employer may offer a fixed term contract to a person over the compulsory retirement age.³⁰⁵ This is of questionable legality now in view of the decision of the CJEU in the *Mangold* case.³⁰⁶

- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

Ireland does not have a state-imposed mandatory retirement age. In general the retirement age is provided for in the contract of employment. *CJEU*

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment, under the Employment Equality Acts.³⁰⁷ This was challenged as discriminatory in the case of *Eileen McEvoy v Mount Temple School* in 2007.³⁰⁸ Ms McEvoy was forced to retire from her position with the school on her 65th birthday. She argued before the

³⁰⁴ Section 34(4) Employment Equality Act 1998-2008, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory.

³⁰⁵ Section 6 (3) (c) Employment Equality Acts 1998 – 2008.

³⁰⁶ Case C-144/04 *Mangold v Rüdiger Helm*, Judgment of 22 November 2005, OJ C 36, 11.02.2006, p. 10.

³⁰⁷ Section 34(4) Employment Equality Act 1998-2004, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory.

³⁰⁸ Labour Court 2007, Determination No. EDA0716.



Equality Tribunal and later the Labour Court that new legislation introduced in 2004 should have allowed her to reapply for her position. That legislation provided that all public servants recruited after 2004 can go on working past the age of 65. Her claim did not succeed.

The issue of age discrimination was also addressed by the CJEU in October 2007 in the Spanish Palacios case, where the Court held that a mandatory retirement clause may be unlawful unless it can be objectively justified in the context of national labour policies. This case has raised the possibility that mandatory retirement clauses fixed at the discretion of employers may be recognised as not in conformity with Directive 2000/78, notwithstanding their compliance with national employment equality legislation.

The most recent case to appear before the higher Irish courts was *McCarthy v HSE* (unreported) in March 2011.³⁰⁹ Mr Justice Hedigan rejected Ms McCarthy's challenge to the HSE's decision to dismiss her at 65. Unlike previous decisions the Judge addressed, albeit briefly, the EU law point and stated the CJEU in *Palacios de la Villa* had affirmed that "a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect". The Judge made no reference to the need for objectively justifiable reasons for having a mandatory retirement age and, as such, the issue of compatibility of mandatory retirement ages with EU law remains to be decided authoritatively.

However, a different outcome was reached in *Kiernan v Longford County Council*.³¹⁰ Here the complainant worked for the respondent as a General Services Supervisor. The general retirement age was 66 for outdoor workers but they were allowed to work beyond 66 and in some cases into their 70s, up to 73. The complainant wanted to work beyond 66 in order to give himself more service towards his pension, but the respondent forced him to retire at age 67, thus refusing him the same retirement age as others had been permitted. The respondent contended that their policy was implemented for legitimate aims, namely financial and manpower planning. The Equality Officer found that at the time the complainant reached sixty six it was custom and practice within the employment that there was no retirement age, in that working beyond 66 was at the discretion of the employee and up till then nobody who asked to work on had been refused. He therefore concluded that making the complainant retire before his legitimate expectation did not satisfy a legitimate aim and that the complainant's enforced retirement was discriminatory on the grounds of his age.

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in*

³⁰⁹ see above, paras 0.2 and 0.3.

³¹⁰ DEC-E2011-067, <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-067-Full-Case-Report.html>.



employment, or are these rights lost on attaining pensionable age or another age (please specify)?

To be covered by the Unfair Dismissals Act 1977-2007 a number of basic requirements must be satisfied, including the necessity to have one year's continuous service with the employer; and employees must not have reached the normal retirement age for the employment in question.³¹¹ The legislation defines unfair dismissals as dismissals relating to:

- membership of a trade union, or
- union activity,
- by reason of a persons religious or political opinions,
- by reason of race,
- colour,
- sexual orientation,
- age,
- membership of the Traveller community
- Unfair dismissals also occur where a person is dismissed for seeking to enforce their rights under the: Parental leave Act, Maternity Protection Act, or Adoptive Leave Act

or for

- instigating or proposing to take either civil or criminal proceedings against the employer
- acting as a witness, or
- being party to such proceedings.

However, It seems that the Employment Appeals Tribunal (EAT) may find that the dismissal was unfair and unlawful if the issue of retirement is not dealt with consistently by employers. In *Cole v Pressometric Ltd* (unreported) the EAT held that an employee who was forced to retire at 65 had been unfairly dismissed in circumstances where his request to continue working past this age was rejected "on the spot in colourful terms", whereas a similar request from another employee had been granted.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

No.

³¹¹ Section 2(1) Unfair Dismissals Act 1977-2007.



b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

In Ireland redundancy occurs where you lose your job as a result of the closure of the business or a reduction in the number of staff. The Redundancy Acts 1967-2007 governs this area of law.

The law sets down minimum entitlements to redundancy payments; the employer and employee may agree redundancy payments in excess of the statutory minimum. To be eligible for a payment under the Redundancy Acts, you must satisfy a number of criteria. The employee must be over 16 years of age, they must be in insurable employment under the Social Welfare Acts, the employee must have worked continuously for the employer for at least 104 weeks.

Where there is a redundancy, the employer must use fair criteria for selecting employees. A number of different approaches are taken. They can include: 'Last in First Out;' use of a selection process or process which have been used before; the custom in the particular trade or occupation; the contract of employment sets out a selection process; the employer wants another employee to do the work of the employee being made redundant, and that employee is not trained or qualified to do both types of work. As a result of the Employment Equality Act 1998-2008 the employer may not select a person for redundancy on any of the discriminatory grounds prohibited by the Act including age.³¹² The under - 66 limit for claiming statutory redundancy payments has now been removed³¹³ meaning that there is now no limit.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

Section 16 (5) of the Employment Equality Acts 1998 to 2008 does not require an employer to recruit, retain or promote a person if he is aware on the basis of a criminal conviction or other reliable information that the individual engages or has a propensity to engage in any form of unlawful sexual activity, particularly where the employment involves access to minors or other vulnerable persons (subsection (6)).

Section 15 of the Equal Status Act 2000-2008 does not require a person who provides goods or services to deal with a customer in circumstances 'which would lead a reasonable individual having the responsibility, knowledge and experience of

³¹² <http://www.redcalc.entemp.ie/> Online redundancy calculator.

³¹³ Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 <http://www.entemp.ie/publications/employment/2007/excollredact.pdf>.



the person to the belief, on grounds other than discriminatory grounds,' that to deal with the customer would produce 'a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located.'³¹⁴ This section then provides that any action taken in 'good faith' by or on behalf of a 'publican/hotel'³¹⁵ for the purpose of complying with the Licensing Acts 'shall not constitute discrimination.'³¹⁶

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

In this section, the exceptions referred to are those not already mentioned in the report. The Employment Equality Act 1998-2008 at section 36 permits the use of certain requirements in the context of certain posts, such as holding office under, or in the service of the State, this includes the Defence Forces, Garda Síochána, and civil servants, or officers of a local authority, a health board, or a vocational education committee. The requirements relate to residence, citizenship and proficiency in the Irish language. As regards proficiency in the Irish language it is also permissible under the Act to require such proficiency from teachers in both primary and post primary schools. Finally this section permits the imposition of certain educational requirements for certain posts, professions, or vocations.

Under Section 35(1) it is not discriminatory to pay a disabled person a lesser rate of remuneration if their output is less than a non-disabled person. This seems to negate the principle of equal pay where disabled employees are concerned.

The Equal Status Act 2000-2008 also contains a number of exceptions and exemptions to the non-discrimination rule. The principal and most problematic exception is contained in section 14 of that Act which provides that nothing in the Act can be construed as prohibiting the taking of any action required by order of a court, enactments, any measure adopted by the European Union, or any international convention.

In effect this ensures that the Equal Status Act 2000-2008 is subordinate to those enactments set out in this section. For, example the introduction of the Social Welfare (Miscellaneous Provisions) Act 2004 and the Residential Tenancies Act 2004 both introduced provisions that discriminated against cohabiting same sex couples by limiting the definition of cohabitation to heterosexual couples. Section 14 of the Equal Status Act 2000-2008 denies co-habiting couples in this context to

³¹⁴ Section 15(1) Equal Status Act 2000-2008.

³¹⁵ The term used in the legislation is the 'holder of a licence or other authorisation which permits the sale of intoxicating liquor.'

³¹⁶ Section 15(2) Equal Status Act 2000-2008.



challenge the provisions under that Act. These provisions may, however, be in breach of the European Convention on Human Rights Act 2003. The amendments to the Equal Status Act in 2004 added a further exclusion, that being any action taken by a public authority in relation to non-nationals, who are unlawfully within the State or outside the State when the action was taken. Equally the provisions of the Equal Status Act do not apply to any statutory or non-statutory schemes covering persons who are not nationals and their entry to and residence in the State.

The Equal Status Act 2000-2008 contains a general prohibition on discrimination in the disposing of goods to the public, there are a number of exceptions to that general rule where it will not amount to discrimination, including:

- Differences in treatment are permitted in relation to ‘annuities, pensions, insurance policies’ or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.³¹⁷
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.³¹⁸
- Difference in treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in the organisation of sporting events.³¹⁹
- Having an age requirement for persons to be either an adoptive or foster parent.³²⁰
- Differences in the treatment not otherwise specifically provided for in the treatment, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.³²¹

Section 46 provides that the provisions of this Act do apply in respect of ships and aircraft registered in the State. Actions done in respect of such a ship or aircraft while subject to the jurisdiction of a country outside of the State and that is required by the law of that State shall not constitute discrimination under the Equal Status Act 2000-2008. Section 7 refers to education and there is one further exception that is not mentioned in the section above on education and that is that it will not amount to age discrimination to allocate places at third level institutes for ‘mature students’ within the meaning of Local Authorities (Higher Education Grants) Acts, 1968 to 1992).³²²

Section 16 of the Equal Status Act 2000-2008 permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of

³¹⁷ Section 5(2)(d) Equal Status Act 2000-2008.

³¹⁸ Section 5(2)(e) Equal Status Act 2000-2008.

³¹⁹ Section 5(2)(f) Equal Status Act 2000-2008.

³²⁰ Section 5(2)(k) Equal Status Act 2000-2008.

³²¹ Section 5(2)(j) Equal Status Act 2000-2008.

³²² Section 7(3)(e) Equal Status Act 2000-2008 – Mature students refers to students that are over the age of 23.

persons with their children, married couples, persons in a specific age group, or persons with a disability. The section also permits different treatment where a person is treated differently solely 'in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment,' or 'is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.'³²³

Section 15(1) of the Equal Status Act 2000-2008 provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that 'the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought or the premises or accommodation are located.'³²⁴ The Equality Tribunal has extensively considered this section.³²⁵ This provision was amended in 2003 by the Intoxicating Liquor Act 2003, which provided that cases involving discrimination in respect of licensed premises should be heard in the District Court as opposed to at the Equality Tribunal. This has a significant impact on the cost of such litigation for both the complainant and the respondent.

A second point to note is that the Equality Authority is not afforded a statutory function to provide information to the public on the operation of Section 19 of the Intoxicating Liquor Act, 2003. This means that no body has been charged with disseminating information about the legal protection against discrimination contained in this Act, such dissemination is required by both Article 10 of Directive 2000/43, and Article 12 of Directive 2000/78. The Intoxicating Liquor Act is not therefore in compliance with the Directives. The statistics for the end of year for 2003 establish that members of the Traveller community took 52% less cases post the introduction of the Intoxicating Liquor Act 2003. This provision applies to all the protected grounds, but would appear to have had a disproportionate impact on members of the Traveller community.³²⁶

Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in 'good faith' for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination.

³²³ Section 16(2)(a) and (b) Equal Status Act 2000-2004.

³²⁴ Section 15(1) Equal Status Act 2000-2004.

³²⁵ See statistics for 2001, 2002 and 2003 http://www.equalitytribunal.ie/html/about_us/statistics.htm which show that the majority of cases under the Equal Status Act related to the provision of services in Pubs/Hotels and Night Clubs. See as example *Collins v. Owner Club Sarah* DEC-S2002-014 and *Ward v. The Boathouse Pub*, DEC-S2001-01.

³²⁶ Please see sections 0.2 above and 6.1 and 6.5 below for a discussion on effective sanctions, and section 7 below on the functions of the equality body.



This exception has been relied on in numerous cases.³²⁷

The position taken by the Equality Tribunal in respect of this provision is that the meaning of 'in good faith' means the actions must be done honestly and without prejudice.³²⁸ In *Conroy v. Costello* the Equality Officer stated that in 'order to take an action in good faith it has to be free from any discriminatory motivation.'³²⁹ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.³³⁰

The Licensing laws require publicans to run orderly houses, avoiding drunkenness, violent or riotous behaviour, and impose various legal obligations on publicans in respect of health and safety law.

³²⁷ *Delaney v. The Harp Bar*, DEC-S2002-53/56, *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014, *Moorehouse v. Ayleswood* DEC-S2001-009, *Maughan v. The Glimmer Man* DEC-S2001-020, *Conroy v. Costello* DEC-S2001-014, *McDonagh v. The Castle Inn* DEC-S2001-022 to name but some of the cases.

³²⁸ *Delaney v. The Harp Bar*, DEC-S2002-53/56.

³²⁹ DEC-S2001-014.

³³⁰ *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014.



5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.*

Section 33 of the Employment Equality Act 1998-2008 states that nothing in the Act shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees. Those measures should aim to prevent or compensate for disadvantages linked to any of the discriminatory grounds; to protect the health and safety at work of a person with a disability; to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision has yet to be litigated. The pre-amended Employment Equality Act was litigated and contained the following provision: nothing in the Act prevented the taking of measures to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of: persons who have attained the age of 50 years; persons with a disability or any class or description of such persons; or members of the traveller community. Any measures taken under this section must have been intended to reduce or eliminate the effects of discrimination against any of the persons protected by this section.

In *Gillen v. Department of Health*,³³¹ the complainant attempted to rely on the provision which permitted positive action to facilitate the integration into employment of persons aged over 50. He contended that the failure of the respondent to take such positive action was suggestive that it discriminated on the age ground. The Equality Officer held that this was not the position, section 33 was permissive of positive action but did not oblige the respondent to take such action. Therefore a failure to do so was not discriminatory. The Equality Officer also noted that section 33 referred to measures to integrate persons into employment, while the complainant's case was about access for existing employment, and the complainant's case referred to promotion. Equally the Equality Officer stated that 'as section 33 is an exception to the 1998 Act, it must be strictly construed.'

The Equal Status Act 2000-2008 also permits positive actions. Section 14 provides that nothing within the Act shall prohibit preferential treatment or the taking of positive measures which are bona fide intended to promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons; to cater for the special needs of persons, or category of persons, who,

³³¹ DEC-E2003/035, this was appealed to the Labour Court, decision EDA0412, this decision did not address this element of the case. See also *Glennon v. St. Clare's Comprehensive School*, DEC-E2003/30 which related to positive action in respect of gender, here the Equality Officer held that the ECJ decision of *Abrahamsson & Andersson v. Fogelqvist*, ECJ, C-407/98 applied.



because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

The Equal Status Act also permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of 'family size, family status, marital status, disability, age or membership of the Traveller community.'³³²

The Equal Status Act, 2000-2008 also provides that in respect of educational establishments differences of treatment are permitted on the grounds of religion³³³ and age.³³⁴ Section 16 also permits preferential fee charges in respect of goods and services in respect of persons with a disability or in specific age groups.

The attainment of a 3% quota for the employment of people with disabilities has long been a government policy in respect of both the civil and public service.³³⁵ This policy holds that the civil and public service should aim to ensure that 3% of its work force are people with disabilities.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

The National Disability Authority by virtue of Part V of the Disability Act 2005 is the monitoring body for ensuring that the civil and public sector comply with positive action for people with disabilities in the civil and public service.³³⁶ In 2006, the National Disability Authority published a 'Code of Practice on Accessibility of Public Services and Information provided by Public Bodies', to provide guidance and support for public bodies in meeting their obligations under Sections 26, 27 and 28 of the Disability Act 2005.

The most recent social partnership agreement 'Towards 2016 – Ten-Year Framework Social Partnership Agreement' provided that:

³³² Section 6(6) Equal Status Act 2000-2004, race and ethnicity are not mentioned in this section.

³³³ Section 7 (3)(b) and (c) Equal Status Act 2000-2004.

³³⁴ Section 7 (3)(e) Equal Status Act 2000-2004.

³³⁵ In 1973 a draft Bill on the Employment of People with Disabilities was proposed there was widespread opposition to the Bill and as a result it never proceeded. The Government at that time set up a working group to research the issue and in 1977 they reported. One of their recommendations was a 3% quota in the civil and public service and in March of that year the then Government introduced the policy, but not on a statutory footing.

³³⁶ This part of the Act was given force of law on the 31st of December 2005.



'Policies and procedures will be reviewed to ensure that they support appropriate steps for improvement in the delivery of more accessible services, and that the provision of services and facilities are disability-proofed. Procedures will remain in place to monitor, record and report compliance with the 3% target for the employment of people with disabilities.

Effective implementation of the strategy will depend upon meaningful consultation and liaison arrangements with other relevant bodies and representative organisations to facilitate access by people with disabilities.³³⁷

The status of social partnership is currently uncertain following a breakdown of the formal relationship between social partners and the previous government in 2010, and delivery of the last agreement has been affected by the economic recession.

The most recent figures for employment of people with disabilities are 4.1% % in Government departments and 3.7% in local authorities.³³⁸ Overall the number of people with disabilities as a percentage of those employed in the public sector as a whole declined from 2.9% in 2009 to 2.7% in 2010. The NDA reports that people with disabilities are being affected disproportionately by the decline in public sector employment since the introduction of the moratorium on recruitment into the public sector in 2009. The figure for Government Departments was 2.7% and 59% of public bodies had reached the 3% quota.³³⁹

There are an estimated 3,000 Roma people in Ireland but currently almost no positive action measures in Ireland specifically for Roma.

One measure is the Equal Community Initiative Roma Cultural Mediation Project (RCMP) whose aims are to give Roma people greater equality of access to health, social, educational and probation services, and more benefits from their utilisation of them, as well as to develop appropriate professional skills and intercultural competence among service providers. The funding for this project ran out last year but it is attempting to continue with its work of providing interpreters and mediators to Roma people needing to access services in Ireland.³⁴⁰ There was also a project to establish a Roma Employment Agency, which was a project under the EU EQUAL programme which ran until 2006.

There is a wide range of positive action measures for Travellers, in addition to general programmes to target disadvantaged groups which benefit Travellers. It

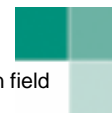
³³⁷ para 32.16 in 'Towards 2016 – Ten-Year Framework Social Partnership Agreement 2006-2015' available at: <http://www.taoiseach.gov.ie/index.asp?locID=181&docID=2755>.

³³⁸ National Disability Authority 2008

<http://www.nda.ie/cntmgmtnew.nsf/0/584C604587AEE6BE8025768D00574AFE?OpenDocument>.

³³⁹ [http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/3DEC8437DD0A27B580257961003AE480/\\$File/2010partvreporthtml_03.htm](http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/3DEC8437DD0A27B580257961003AE480/$File/2010partvreporthtml_03.htm).

³⁴⁰ <http://www.irishtimes.com/newspaper/health/2011/0628/1224299676826.html>.



appears that to date no such range of specific supports have been provided for the Roma community.

Note: It is important to note that many of the measures described in this section have been affected by Government budget cutbacks of October 2008, and the subsequent measures taken under Ireland's austerity programme which have curtailed social and public spending. Some measures continue in existence, but in many cases funding has been reduced.

The budget reductions in social and public expenditure appear under broad headings within each Government Department; it is difficult to give precise details of the situation.

POSITIVE ACTION MEASURE	TYPE
Measures for Roma	
Roma Cultural Mediation Equal Project	Preferential treatment Roma - expired
Roma Employment Agency pilot project	Preferential treatment Roma - expired
Structures	
High-Level Group on Travellers	Preferential treatment Travellers
Education	
Home/School Community Liaison Scheme (loss of posts)	Broad social policy (these school support programmes are now all amalgamated under the National Education Welfare Board)
School Completion Programme	
DEIS (scheme for schools in disadvantaged areas)	
Visiting Teacher Service (withdrawn)	Preferential treatment Travellers (now amalgamated under the National Education Welfare Board)
Increased capitation grants to schools (halved)	Preferential treatment Travellers
Resource teachers for Travellers in primary schools (withdrawn)	Preferential treatment Travellers
Additional teaching hours per week for each Traveller student enrolled (discontinued)	Preferential treatment Travellers
Third level education access programmes	Broad social policy, minority groups
Employment	
Community Employment schemes incl 5 for	Broad social policy, +

Travellers (Senior Traveller schemes being phased out)	preferential treatment Travellers
Social Economy Programme	Broad social policy
HSE/Pavee Point primary health care/employment project	Preferential treatment Travellers
Civil Service work/placement initiatives	Preferential treatment Travellers
Integrated projects employment/accommodation etc	
Galway City pilot project	Preferential treatment Travellers
Local authority Integrated pilot projects Clare and South Dublin	Preferential treatment Travellers

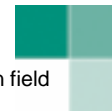
A High-Level Group of officials was set up to replace earlier structures to monitor implementation of the influential 1995 Report of the Task Force on Travellers. However the monitoring body did not include Traveller organisations, social partner organisations or relevant statutory bodies such as the Equality Authority. It is not known when the last meeting of this body took place.

Regarding the following 2 paragraphs, the status of these measures in 2011 is not known.

In Third level education, the National Office for Equity of Access to Higher Education published its "Achieving Equity of Access to Higher Education in Ireland – Action Plan 2005 – 2007". The National Office develops and agrees national and institutional targets for each under-represented group; Travellers are a target of this plan. In adult and further education.

All Adult Literacy Programmes are open to Travellers and of the 33 Vocational Education Committees, 19 have specific adult literacy programmes for Travellers.

In employment, the Youthreach training programmes include a significant number of young travellers (funding reduced). The Health Service Executive /Pavee Point Primary health care project trains Traveller women to work as health care workers in their own communities. Currently 40 Primary Health Care for Travellers Projects are run nationally, with 15 participants in each programme. There are also Community Employment Schemes focused exclusively on the needs of Members of the Traveller Community, and small number of Travellers are also employed under the Social Economy Programme. (Note: community schemes have been targets of funding cuts in 2009 -2011 and many have closed). A number of pilot projects were established by the social inclusion units in local authorities, involving traveller organisations, community, voluntary and statutory organisations. In recent years, the Civil Service has been involved in a number of initiatives relating to recruitment/work placement opportunities for Travellers in the Civil Service.



6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

The Employment Equality Act 1998-2008 provides for a range of remedies, combining compensation awards with orders for employers to take specific actions, and includes the possibility of mediation. The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of the Defence Forces.³⁴¹ The Employment Equality Act 1998-2008 provides a different redress process for members of the Defence Forces, which excludes direct access to the Equality Tribunal or Labour Court.³⁴² The government indicated in 2003 that it intended to amend the Act in order to allow access for the Defence Forces to the general redress procedures on all grounds (except age and disability).³⁴³

A second exception relates to section 77(7) of the Employment Equality Act 1998-2008 which requires certain public sector employees to exhaust internal complaints procedures prior to taking a case to the Equality Tribunal.

Complaints under either the Employment Equality Act 1998-2008 or the Equal Status Act 2000-2008 may be brought before the Equality Tribunal.³⁴⁴ The Equality Tribunal assumes an investigative role in the hearing of complaints, complainants may represent themselves, costs may not be awarded against either the complainant or the respondent, and the procedure is informal. In 2004 the jurisdiction for dismissal cases was transferred to the Equality Tribunal, which now has the power to award remedies including the specific power to order a reinstatement.³⁴⁵ Prior to this the Labour Court dealt with dismissal cases.

³⁴¹ Section 77(9) and 104 of the Employment Equality Act 1998-2008.

³⁴² Section 104, Employment Equality Act 1998-2008.

³⁴³ Department of Justice, Equality and Law Reform, 2003.

³⁴⁴ http://www.equalitytribunal.ie/php/database_previous_cases.php Equality Tribunal cases database.

³⁴⁵ Section 46 Equality Act 2004.

The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2008.

A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.³⁴⁶ The Equality Authority may provide assistance in the enforcement procedures.³⁴⁷

The Labour Court³⁴⁸ is an industrial relations tribunal operating on a tripartite basis, consisting of a panel, having a full-time chair and one representative each of employers and workers. The Labour Court is empowered to hear appeals from the Equality Tribunal.³⁴⁹ Recommendations from the Labour Court are binding on the parties. Where it is acting as an appellate body in cases from the Equality Tribunal, its determinations can be appealed on a point of law to the High Court.³⁵⁰

The District Court is a court of local and limited jurisdiction,³⁵¹ with jurisdiction over a range of criminal and civil matters. The Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination against a licensed premises to the District Court. The Circuit Court is a court of local and limited jurisdiction,³⁵² with jurisdiction over a range of criminal and civil matters.³⁵³ Gender discrimination cases falling under the Employment Equality Act 1998-2007 may be brought directly to the Circuit Court and this forum offers superior remedies for complainants. The Circuit Court has an unlimited financial jurisdiction when dealing with gender discrimination cases under the Employment Equality Act. Appeals on a point of law lie to the High Court.³⁵⁴ Final decisions of the Equality Tribunal and the Labour Court can be enforced through the Circuit Court.³⁵⁵

Complaints of dismissal due to discrimination³⁵⁶ may also be brought under the Unfair Dismissals Acts 1977 and 2007. These complaints are considered first by a Rights Commissioner, whose recommendations are not legally binding. The Employment Appeals Tribunal makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

Claims are brought before the relevant body by way of application using standard forms. Hearings are in private before the Equality Tribunal and Labour Court and are

³⁴⁶ Section 91(2), Employment Equality Act 1998-2008.

³⁴⁷ Section 67(1)(b)(iii) Employment Equality Act 1998-2008.

³⁴⁸ <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> Labour Court database.

³⁴⁹ Section 83(1), Employment Equality Act 1998-2008.

³⁵⁰ Section 90(3), Employment Equality Act 1998-2008.

³⁵¹ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³⁵² Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³⁵³ Hogan and Whyte, *JM Kelly: The Irish Constitution*, 4th Edition, 2003 at 921.

³⁵⁴ S. 90(2) Employment Equality Act, 1998-2008.

³⁵⁵ S. 91 Employment Equality Act, 1998-2008.

³⁵⁶ Not all the grounds are covered, see section 2.1 above.



normally in public before the Employment Appeals Tribunal. The decisions of each of the bodies are available for public inspection, with both the Equality Tribunal and the Labour Court publishing their decisions on their respective websites. Both District and Circuit Court Cases are heard in public; it is rare for decisions of either court to be published.

Both the Employment Equality Act 1998 – 2008 and the Equal Status Act 2000-2008 impose time limits for bringing complaints to the appropriate body. These time limits are quite strict; the Equal Status Act 2000-2008 requires a complainant to initiate his/her complaint by notifying, in writing, the respondent within two months of the date of the occurrence (or the date of the last occurrence if relevant) of the nature of the complaint and the intention to pursue the matter to the Equality Tribunal.³⁵⁷ This may present difficulties for complainants, for example, a complainant who has been the victim of harassment may be extremely concerned about commencing his/her complaint with an initial notice to the alleged perpetrator of the harassment.

There are also very real concerns in respect of people with literacy difficulties, and individuals who may not have an adequate command of the English language. The Director of the Equality Tribunal may extend this period for a further two months, if satisfied that reasonable cause³⁵⁸ prevented the complainant from sending the notification within the normal time period.

An amendment to the Equal Status Act 2000-2004 required complaints under that Act involving licensed premises to be brought to the District Court. The District Court may provide for an order for compensation, an order that the holder of the licence specified take a course of action, or an order for temporary closure of the licensed premises. The major impact of this amendment is the cost implications for complainants. Under the previous system it was possible to represent oneself at the Equality Tribunal, and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court.³⁵⁹ This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.³⁶⁰ A further and significant concern relates to the fact that the Equality Authority was not granted a function to provide information to the public in relation to the operation of section 19 of the Intoxicating Liquor Act 2003. In practice this means that no body disseminates information about the legal protection against discrimination contained within this Act, nor collects the case law. This does not appear to comply with either Article 10 of Directive 2000/43, or Article 12 of Directive 2000/78.

³⁵⁷ Equal Status Acts 2000 to 2007, section 21 (2).

³⁵⁸ Section 21 (3), Equal Status Act 2000-2007.

³⁵⁹ Intoxicating Liquor Act 2003.

³⁶⁰ Irish Times, 28th May 2003.



Litigating is fraught with difficulties, and the Equality Authority through its case work and work with the public has highlighted a number of relevant concerns.³⁶¹ These concerns include the cost of litigation, which can act as a substantial disincentive to potential claimants.

While there is no potential for awards of costs against either party in the Equality Tribunal or the Labour Court, this is not the position with regard to appeals in the District Court,³⁶² or the Circuit Court.³⁶³

A second issue relates to concerns about the right to privacy; cases in the Equality Tribunal and the Labour Court are private, whereas hearings in the District and Circuit Court are in public, and this is of particular importance for the grounds of sexual orientation and disability.

A third issue raised relates to delay. Backlogs of cases in the Equality Tribunal can mean parties experiencing considerable delay prior to cases being heard, on occasion up to as much as seven or eight years in respect of Equal Status cases.³⁶⁴ It is estimated that it can take up to one year for an Equality Officer to be appointed to a case, there are delays in scheduling, hearing and further delays in the delivery of the recommendation of the Equality Officer. This delay impacts on the potential remedies that can be granted.

Where a case takes three or more years from filing to hearing it is improbable that the remedy of reinstatement will be ordered.

There is no up to date information on the current situation regarding delays. The Tribunal states that it takes an average of 18 months for a case to be completed after it has been assigned to an Equality Officer, and that it is working to reduce “any delays which there may be” in relation to assignment of cases.³⁶⁵

Another issue relates to the size of awards, the financial ceilings on compensation awards impact negatively on the size of awards granted. The level of potential award is so low that this acts as a disincentive for people taking actions. There have been difficulties in getting awards enforced.

Section 21 of the Equal Status Act 2000-2008 requires potential claimants to notify the potential respondent within two months of the incident of the nature of the allegation and also the claimant’s intention to seek redress under the Act. The short

³⁶¹ Equality Authority, Annual Report 2006, <http://www.equality.ie/index.asp?locID=136&docID=380>.

³⁶² Equal Status Cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

³⁶³ Appeals from the Labour Court, Gender Cases and enforcement orders may be heard in the Circuit Court.

³⁶⁴ Equality Authority, 2006 see “Issues of concern”, <http://www.equality.ie/index.asp?locID=136&docID=380>.

³⁶⁵ Equality Tribunal, FAQ <http://www.equalitytribunal.ie/index.asp?locID=49&docID=-1> - 15.



time frame involved means that in practice the first contact with the respondent involves a threat of litigation; this is unhelpful and decreases the potential for matters to be resolved by means other than litigation.

The Equality Authority says that their experience has been that agreeing to mediation can be used as a delaying tactic; they suggest a process be introduced to tackle this. Section 79(4) permits the Minister to specify procedures to be followed in carrying out investigations by Equality Officers, currently different procedures are operated by different Equality Officers and there is a necessity to harmonise practice.

A final concern relates to the Equality Authority's ability to assist in the bringing of proceedings, or to represent claimants. The Equality Authority provides assistance in a limited number of cases. For the Equality legislation to be truly effective, employers and service providers need to believe that cases will be taken against them. There is therefore a necessity for the Equality Authority to be in a position to take more than just the exceptional case, but to have a steady run of cases and there is currently no capacity for the Authority to deal with the workload they have, let alone take on more cases.

There is no provision under the legislation for a body to instigate procedures on their own behalf, there must always be an individual plaintiff; this does limit the potential of the Equality legislation.

b) Are these binding or non-binding?

Decisions of the Equality Tribunal, Employment Appeals Tribunal, Labour Court and civil courts are binding.

c) What is the time limit within which a procedure must be initiated?

The Employment Equality Act 1998-2008 requires cases to be brought within six months of the matter complained of occurring, or as the case may be the last occurrence.

d) Can a person bring a case after the employment relationship has ended?

The Employment Equality Act 1998-2008 provides for an extension of time where there is 'reasonable cause'.³⁶⁶

³⁶⁶ Section 77, Employment Equality Act 1998-2008.



6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

- a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

The Equality Authority may engage in judicial or other procedures in support of a claimant (before the Equality Tribunal or in civil courts, or by making representations to employers or service providers).

Other bodies such as trade unions or employer bodies do not have formal standing before civil courts, but at the discretion of the court may support parties at the Equality Tribunal or in the Labour Court.

- b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

There are no specific requirements relating to representation before the Equality Tribunal or Labour Court. Parties may represent themselves or be represented by a trade union, trade or professional body or a lawyer or any other person. Associations do not have formal standing before civil courts.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

There are no formal requirements relating to authorization.

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

Action is discretionary.



- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

Associations may engage in civil proceedings before the Equality Tribunal or Labour Court only. Associations do not have standing in other types of proceedings or other courts.

- f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

There are no differences in associations' standing compared to actual victims.

- g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

No

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

No

- i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Class actions are not allowed in Irish law. The Equality Authority may take actions on its own behalf, in certain circumstances, and on behalf of an individual. This is governed by section 67 of the Employment Equality Act 1998-2008, which provides that a person who considers that he or she has been discriminated against in the terms of the Equality Acts³⁶⁷ may request assistance from the Equality Authority. The Equality Authority has set out criteria to assist in determining who will receive assistance from it. Those criteria include whether the case is of strategic importance,

³⁶⁷ The enforcement provisions contained in the Employment Equality Act 1998-2007 also include within their scope the Equal Status Act 2000-2004, which covers the provision of goods and services as well as education and housing.

the capacity of the complainant to represent him/herself or get representation whether it be via a lawyer, trade union or professional body; the complexity of the case, the nature of the claim (here the focus is on the actual complainant and the impact of the case on that individual), finally the resources available to the Equality Authority. As regards the issue of resources, the Authority will review its workload, the backlog of cases, the resources available to it, the cost of the proceedings, the duration of the proceedings and the likely award or order.³⁶⁸

Section 77(4) of the Employment Equality Act 1998-2008 sets out who may be a complainant to an action, that is, the person who is impacted by the alleged discrimination or, where they lack capacity (by reason of an intellectual or a psychological disability), a parent or guardian or other person acting in that role may instigate the action on their behalf. Section 77(11) of that Act provides that 'A party to any proceedings under this Act before the Director or Labour Court may be represented by an individual or body authorised by the party in that behalf.' This permits associations to represent complainants where the complainants agree to this representation. There is no reference to these bodies being permitted to take a case before either the District or Circuit Court. There is no provision for class actions, nor is there provision for an association (other than the Equality Authority) to instigate actions in their own right. In practice it is common for both trade unions and employers organisations to represent parties to an action.³⁶⁹

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The Employment Equality Act 1998 initially only explicitly provided for a shift in the burden of proof in respect of gender discrimination cases.

This is now explicitly provided for for all grounds in the Employment Equality Act 1998-2008 in section 85(A),³⁷⁰ which provides: 'Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to

³⁶⁸ Guidelines are available at: <http://www.equality.ie/index.asp?locID=14&docID=9>.

³⁶⁹ For example see: *McGrane* (represented by PSEU (the Public Services Executive Union)) v. The Department of Finance & the Department of Foreign Affairs (represented by the Chief State Solicitor's Office) - DEC-E2005/011; *Murray* (represented by INTO (Irish National Teachers Organisation)) v. *Schoil Mhuire* (legally represented) & *The Department of Education and Science*, DEC-E2005/015; *Devereux* (represented by SIPTU (Services, Industrial, Professional and Technical Union)) v. *Bausch & Lomb* (represented by IBEC (Irish Business and Employer's Confederation), DEC-E2005/020.

³⁷⁰ The enforcement provisions in the Employment Equality Act 1998-2008 also govern the enforcement of the Equal Status Act 2000-2008, therefore there is now an explicit shifting of the burden of proof in these cases also.



prove the contrary.’ This also applies in cases brought by the Equality Authority, and expressly includes proceedings relating to indirect discrimination, victimisation and harassment. The section is silent as to its applicability in the context of reasonable accommodation.

The Pensions Acts 1990 and 2008 also provide for a shifting of the burden of proof : ‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be reasonably inferred that there has been a breach of the principle of equal pension treatment in relation to him, it is for the respondent to prove the contrary.’

Under the Unfair Dismissal Act 1977 to 2008 section 6(1) a dismissal is deemed to be unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Section 6(2) states specifically that a dismissal arising wholly or mainly from an employee’s race, colour, sexual orientation, age, religious opinions, or membership of the Traveller community shall be deemed unfair.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

The Employment Equality Act 1998-2008 prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an intention to take any of the preceding activities.³⁷¹ Sanctions, compensation, ordering a course of action to be taken, re-instatement and reengagement, are all available for victimisation cases.

There are two instances where victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination³⁷² or where the victimisation amounts to dismissal then it is an offence.³⁷³ There are no financial limits on compensation awards for victimisation. This signifies how seriously the legislature takes the issue of victimisation and this is also reflected in the Equality Tribunal’s attitude. Successful victimisation cases have resulted in significant compensation awards.³⁷⁴ In *A Complainant v A Department*

³⁷¹ Section 74 (2).

³⁷² Section 14 Employment Equality Act 1998-2008.

³⁷³ Section 98 Employment Equality Act 1998-2008.

³⁷⁴ See *Dublin City Council v McCarthy*, EDS022.

*Store*³⁷⁵ victimisation was found to have occurred. In this instance the complainant had contacted the Equality Authority alleging disability discrimination against the employer, these allegations were not substantiated by the Equality Officer.

After failing to gain employment the employer wrote to the complainant stating: ‘in view of the untrue and unfounded allegations you have made to the Employment Equality Authority [sic] we are not for the foreseeable future going to accept any application from you for employment in our store, or indeed any other branch.’ It was held that the letter amounted to victimisation in this instance, and the complainant was awarded €12,700 in compensation. A reminder of the potency of the remedy for victimisation under the Equality Acts was provided in *McGinn v St Anthony’s BNS*³⁷⁶ where the Equality Officer awarded the maximum amount of two years salary (€117,362) for victimisation and €10,000 for stress. In some cases the award of compensation for victimisation can be higher than the amount given for the initial act of discrimination. It must also be noted that a finding of victimisation can be made in situations where the claimant is no longer employed by the alleged offender. Examples of post-employment victimisation include a refusal to give a reference or an adverse reference.

Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.³⁷⁷ This may be extended to a maximum of twelve months in certain circumstances.³⁷⁸

Victimisation is also prohibited in the Equal Status Act 2000-2008 (section 3(2)(j)) where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions. This provision has been litigated and in a 2004 case on victimisation on the grounds of disability discrimination, *Salmon v. Para Equestrian Ireland*³⁷⁹ the Equality Officer set out what was necessary to show that victimisation had occurred. The Equality Officer stated:

- (a) that the complainant has in good faith taken any of the actions listed in section 3(2)(j) (i) to (v)
- (b) that the respondent has treated the complainant in a particular way as a result of that action
- (c) that the treatment is less favourable than the way the respondent treats or would treat a person who had not opposed the alleged discriminatory conduct in the manner the complainant did or the way the respondent would treat the complainant herself, had she not done so.

³⁷⁵ DEC-E2002-017.

³⁷⁶ DEC-E2004-032.

³⁷⁷ Section 77(5), Employment Equality Act 1998 - 2008.

³⁷⁸ Section 77(6)(a), Employment Equality Act 1998-2008.

³⁷⁹ DEC-S2004-002.



If these elements are established, the burden of proof shifts.

This case was appealed all the way to the Circuit Court with the assistance of the Equality Authority, and the complainant succeeded in establishing victimisation.

The statement of the Equality Officer provides useful guidance as to how the Equality Tribunal determines when victimisation has occurred.³⁸⁰ See also *Collins v. Campion's Public House*, and *Department of Defence and Barrett*, both referred to in section 0.3 above.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The Employment Equality Act 1998-2008 provides for a broad range of remedies in both private or public employment.: compensation awards, orders for employers to take specific courses of action, re-instatement and re-engagement.

All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination.³⁸¹

All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.³⁸²

The Equal Status Acts 2000 to 2008 provide for orders for compensation, or for a certain course of action to be followed.

- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

There are maximum limits on financial awards by the Equality Tribunal and also by the Labour Court.

Those limits in the context of employment are a maximum of two years' pay, this is calculated on the basis of the complainant's weekly pay at the time the case was referred.³⁸³ Where the complainant was not an employee (discriminatory interview for

³⁸⁰ Circuit Court decisions are not published, information is available on this decision from the Equality Authority's annual report for 2004 - <http://www.equality.ie/index.asp?locID=136&docID=-1>.

³⁸¹ Section 30 Employment Equality Act 1998-2008.

³⁸² Section 9 Employment Equality Act 1998-2008.

³⁸³ Section 82(4) Employment Equality Act 1998-2008.

example) then the maximum award is €12,697.³⁸⁴ In unequal pay cases, the Equality Tribunal can award compensation in the mode of arrears of pay, where this pay loss is a result of discrimination. This can cover a period of a maximum of three years prior to the referral of the case.³⁸⁵ There is no provision for the payment of interest in cases like this. The situation with respect of gender discrimination is interesting in comparison.

Gender cases may be brought to the Circuit Court and here there is no monetary limit on the amount of compensation that can be awarded.³⁸⁶ In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,³⁸⁷ and interest may be paid on compensation in gender discrimination cases.³⁸⁸ The more dissuasive sanctions that are available in the context of gender discrimination appear to reflect previous case law of the European Court of Justice.³⁸⁹

It is questionable whether the remedies available in the context of non-gender discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions.³⁹⁰ The Employment Equality Act 1998-2008 also provides for non-financial sanctions. Section 82(1)(e) provides for the Equality Tribunal or the Labour Court to make 'an order that a person or persons specified in the order take a course of action which is so specified.'³⁹¹ The potential of this remedy should not be underestimated; it has been used as a means of ensuring employers create an equal opportunities policy,³⁹² re-training of staff,³⁹³ reviewing recruitment procedures.³⁹⁴

As regards dismissal cases, the Labour Court,³⁹⁵ and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.³⁹⁶ Unfair dismissal legislation also provides for a maximum of two years salary or re-instatement / re-engagement.

The Employment Equality Act 1998-2008 is not a criminal statute, and does not in general provide for penal sanctions for unlawful discrimination, there are a number of situations that can give rise to criminal offences. Where a person procures another to do anything that could be considered victimisation or discrimination,³⁹⁷ or where the

³⁸⁴ Section 82(4) Employment Equality Act 1998-2008.

³⁸⁵ Section 82(1)(a) Employment Equality Act 1998-2008.

³⁸⁶ Section 82(3) Employment Equality Act 1998-2008.

³⁸⁷ Section 82(3)(a) Employment Equality Act 1998-2008.

³⁸⁸ Section 82(5) Employment Equality Act 1998-2008.

³⁸⁹ Case C-271/91 *Marshall No. 2*, ECJ.

³⁹⁰ Article 17 General Framework Directive.

³⁹¹ Section 82(1)(e) Employment Equality Act 1998-2008.

³⁹² *Nevin v. Plaza Hotel*, DEC-E2001-033.

³⁹³ *Mr. O v. A Named Company* DEC-E2003-052.

³⁹⁴ *Equality Authority v. Ryanair*, DEC-E2000-014.

³⁹⁵ Prior to the amendments of jurisdiction.

³⁹⁶ Section 82(2)(b) Employment Equality Act 1998-2008.

³⁹⁷ Section 14 Employment Equality Act 1998-2008.

victimisation amounts to dismissal, or the giving of a false statement in response to an Equality Authority inquiry,³⁹⁸ these actions can amount to a criminal offence.

The Equality Authority is the only independent body permitted to instigate litigation under the Acts,³⁹⁹ however section 82(6)(7) provides that compensation orders may not be made in favour of the Authority. The Equality Authority is dependent on the State for funding, this unwillingness to permit the Equality Authority to receive compensation would appear to stifle its ability to litigate.

The Equal Status Act 2000-2008 also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and the current limit is €6,348.69.⁴⁰⁰ The Equality Tribunal may also order a course of action to be taken where discrimination has been found this remedy has been used extensively under this Act.

- c) *Is there any information available concerning:*
- *the average amount of compensation available to victims?*
 - *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

The Equality Authority in its annual report for 2004 stated that: 'It was expected that the implementation of the Racial Equality Directive and the Framework Employment Directive would bring about the removal of the financial ceilings that exist in relation to the maximum compensation that can be paid under the Employment Equality Act 1998 and the Equal Status Act 2000. This removal of ceilings was not provided for in the Equality Act 2004. Low awards can serve as a barrier to pursuing a case ... Concern has already been expressed about the low levels of award in cases involving licensed premises. This is the second year where the Equality Officers have stated that they have felt constrained by the maximum compensation that they can be awarded under the Employment Equality Act 1998. The level of potential award that may be available if a claimant is on low wages often means that it is not an effective and dissuasive remedy.'⁴⁰¹ These criticisms were reiterated in subsequent Annual Reports of the Equality Authority.

The average award before the Equality Tribunal in 2010⁴⁰² was €17,775 compared to €12,350 in 2009. The highest award was €100,000. The average award in Equal Status cases was €2,128, an increase a decrease compared to 2009 (€2,198). The highest award was €5,000. The level of award is low, and in the context of the Equal Status cases it is staggeringly low. These awards also suggest that in practice

³⁹⁸ Section 60(3) Employment Equality Act 1998-2008.

³⁹⁹ Section 85, Employment Equality Act 1998-2008.

⁴⁰⁰ The Courts and Courts Officers Act of 2002 suggested this limit would be raised, but has not been enacted.

⁴⁰¹ The Equality Authority Annual Report 2004, p. 54 www.equality.ie.

⁴⁰² Figures for 2011 are not yet available.



discrimination in the non-employment context is not regarded as serious. The level of award and the fact that it can take three years for Equal Status cases to be heard, can hardly be regarded as an effective or dissuasive remedy.



7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The Employment Equality Act 1998-2008 established two permanent national institutions with enforcement functions under the Equality legislation: The Equality Authority and The Equality Tribunal. Both of these bodies are involved in the promotion of equal treatment irrespective of racial or ethnic origin (including membership of the Traveller Community), as well as gender, disability, age, sexual orientation, religion, marital status and family status.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

The Equality Authority is a statutory body charged with working towards the elimination of discrimination, the promotion of equality, the provision of information to the public, and assisting litigants.⁴⁰³ It has a Board of Directors appointed by the Minister for Justice, Equality and Law Reform, comprising 12 members. Board members come from employer organisations, employee organisations and organisations with knowledge or, or experience in, equality issues relating to any of the nine protected grounds. Board members serve a four-year term. The Equality Authority has 38 permanent staff members, headed up by the Chief Executive Officer. (Staff numbers were reduced from 53 to 38 posts following the reduction of the Authority's budget by 43% in 2008). As staff are a part of the civil service they may apply for any promotional post throughout the civil service. In practice this means that when the staff have been trained up and are performing well within their job they move on to another sector of the civil service. It is not within the competence of the Chief Executive Officer to promote staff within the Authority, thus retaining a corporate memory is very difficult. The Chief Executive Officer of the Equality

⁴⁰³ The introduction of the Equal Status Act in 2000 extended the Equality Authorities remit to encompass the provisions of the Equal Status Act.



Authority, on receipt of the agreement of the Board, submits estimates of income and expenditure to the Minister for Justice, Equality and Law Reform on an annual basis.

The Budget of the Department of Justice, Equality and Law Reform is determined annually by the Finance Act of the particular year, and supplied by the national exchequer; the Minister submits the estimate for the specialised body in question. The estimated budget for 2008 was €5,897,000. In October 2008, the budget was cut by 43% to €3.3m. The budget remained the same in 2009 and 2010, and was reduced to €3,057,000 in 2011 (a further decrease of 4%).

The Board of the Equality Authority is accountable to the Minister for Justice, Equality and Law Reform who must lay its annual report before the Oireachtas (houses of parliament). The Chief Executive Officer is separately accountable when required by the parliamentary public finance committee for financial transactions and effective use of resources.

An independent review of the effect of the 2008 budget cuts on the Equality Authority and the Irish Human Rights Commission respectively was published in November 2009.⁴⁰⁴ The report concluded: “ The perceptions of those observing the work of the of the two bodies is one of a greater awareness of a diminished capacity on the part of the Equality Authority than the Irish Human Rights Commission. This is seen to be evident in four areas in particular:

- Decline in media coverage
- Fewer significant case outcomes
- A much reduced engagement with the NGO community
- A sharp falling off of the equality agenda in the business and enterprise community.”⁴⁰⁵

The budget estimates for 2010 provide for a budget of €2,354,000 for the other specialised body, the Equality Tribunal, indicating a reduction of 8% over the previous year.⁴⁰⁶

The equality legislation does not stipulate the Equality Authority’s independence in general, but does state that it has the power to carry out specific functions independently (e.g. reviews, inquiries etc.). However its independence in practice is substantially compromised in other respects, as pointed out by Harvey and Walsh:

- the legislation was amended to give the Minister responsible new powers to appoint additional members;

⁴⁰⁴ B.Harvey and K.Walsh, “Downgrading Equality and Human Rights: Assessing the Impact” http://www.equineteurope.org/downgrading_equality__human_right_assessing_the_impact.pdf.

⁴⁰⁵ *ibid* p 80.

⁴⁰⁶ <http://www.budget.gov.ie/budgets/2010/Documents/Estimates Book 2010.pdf>.

- it reports to a departmental minister, rather than to Parliament;
 - as the budget cuts of 2008 illustrate,⁴⁰⁷ there is no insulation or protection of budgets from ministerial intervention. By contrast, a level of insulation is evident for other state agencies with sensitive functions (for example, the Ombudsman and the Health & Safety Authority);
 - staffing, for the most part, comprises civil servants seconded from the department;
 - although there are selection criteria for the appointment of the board of both bodies, they are operated in an opaque, non-transparent manner, giving the Minister disproportionate authority to select and de-select board members or proposals thereto. The process can therefore be seen to be open to political favouritism and imbalances;
 - the appointment of a departmental representative to the board of the Equality Authority compromises its independence and is contrary to the Paris Principles;
 - the government made (in 2008) and subsequently implemented a series of decisions about the premises and staffing levels of the Equality Authority that were contrary to the wishes and preference of the Equality Authority board members.⁴⁰⁸
- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The Equality Authority's functions include functions by means of research, awareness-raising,⁴⁰⁹ review of the legislation⁴¹⁰ and the drafting of statutory Codes of Practice.⁴¹¹

The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant.⁴¹² The Equality Authority's in-house legal service may, at its discretion, where the case has strategic importance, provide free legal assistance to those making complaints of discrimination under the Equality Acts.⁴¹³ The Equality Authority provides assistance only in a small percentage of cases based on criteria set down by the Board of the Authority. These criteria include whether the case is of strategic importance, the capacity of the complainant to represent themselves or be represented by a lawyer, trade unions or other body, the complexity of the case, the nature of the claimant (this is a focus on the actual complainant and the impact of the case on that individual), and finally the available resources .

⁴⁰⁷ see 0.2 Overview Both Acts, p.6 above.

⁴⁰⁸ B. Harvey and K.Walsh, op.cit.

⁴⁰⁹ Section 57 Employment Equality Act 1998-2008.

⁴¹⁰ Sections 39 and 73 Employment Equality Act 1998-2008.

⁴¹¹ Section 56 Employment Equality Act 1998-2008.

⁴¹² Section 67 Employment Equality Act 1998-2008.

⁴¹³ Section 67 Employment Equality Act 1998-2008.



To that end the Authority will review its workload, the backlog of cases, the resources available, the cost of the proceedings, the duration of the proceedings and the likely award or order.⁴¹⁴

The Equality Tribunal's principal role is the investigation and mediation of complaints of discrimination in relation to employment and in relation to access to goods and services, disposal of property and certain aspects of education. This protection against discrimination applies to gender, race, disability, age, family status, marital status, sexual orientation, religion or belief, and membership of the Traveller community. Where a complaint of discrimination is upheld, redress can be awarded. The Tribunal may also investigate complaints of discrimination on the grounds of gender under the Pensions Act, 1990-2008, where an employer has failed to comply with the principle of equal treatment in relation to occupational benefit or pensions schemes. The Tribunal has jurisdiction in all areas covered by the equality legislation with the exception of service in licensed premises and registered clubs, which are now dealt with by the District Court.

Human rights are dealt with by a different statutory body, the Irish Human Rights Commission.

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

Yes. The Equality Authority provides independent assistance to victims; it also carries out independent surveys, and publishes independent reports. These are independent publications, although the Minister for Justice, Equality and Law Reform in 2008 appeared to criticise the Authority in parliament for its expenditure on publications.⁴¹⁵

The Authority does not carry out systematic reviews of discrimination, but does carry out independent reports on thematic issues and makes recommendations in respect of those issues. The Equality Authority liaises with the Central Statistics Office and other relevant bodies on a range of equality data issues.

According to a report published by the Economic and Social Research Institute and the Equality Authority in May 2008,⁴¹⁶ just over 12% of Irish adults felt that they had been discriminated against in the preceding two years.

⁴¹⁴ www.equality.ie.

⁴¹⁵ In the course of debate over the Government's budgetary cut to the Equality Authority, see Parliamentary debates

<http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081218.xml&Node=H14&Page=11>.

⁴¹⁶ <http://www.equality.ie/index.asp?locID=135&docID=724>.



Rates of reported discrimination rise to 23% among lone parents, 31% among those of Black, Asian or Other ethnicity, 24% among non-Irish nationals, 20% among people with disabilities and 29% amongst the unemployed.

Overall, men and women were equally likely to record discrimination but their experiences are concentrated in different settings. Women are more likely to report discrimination in the workplace and accessing health services, while men are more likely to report discrimination while looking for work and accessing financial services. Women were more likely to report that they had been discriminated against because of their marital status, family status or gender, while men were more likely to feel discriminated against on the grounds of their age or nationality/ethnicity.

The results are based on an analysis of the CSO's Quarterly National Household Survey: Equality Module 2004, which asked Irish adults about their experience of discrimination in a range of different situations.⁴¹⁷ The results show that the highest rates of reported discrimination occur while looking for work (5.8%) and in the workplace (4.8%). In services, reported discrimination is highest for accessing housing and using financial services such as banks, and insurance services. The lowest rates of subjective discrimination are recorded for transport services, education and 'other public services'.

Setting by setting analysis shows that different groups are at risk of discrimination in different situations. Key findings in relation to services were:

- Housing/Accommodation: 4% of respondents felt discriminated against in this domain. Those with higher than average risk were minority ethnic groups, the unemployed, the economically inactive, those aged 18-44, people with disabilities, lone parents and couples with children.
- Financial Institutions: 3.7% of respondents reported discrimination in this domain. Those at higher risk were young people (18-25), men, those of Black ethnicity. Respondents with higher education were more likely to report experience of discrimination.
- Shops, Restaurants and Pubs: 2.6% of respondents reported such discrimination. Those at higher risk were young people, minority ethnic groups, non-Irish nationals, people with disabilities, the unemployed and economically inactive.

Analysis of work-related discrimination showed that the most vulnerable groups were the unemployed and the disabled. Nationality strongly influenced the likelihood of experiencing discrimination while looking for work: 13% of non-Irish job seekers reported discrimination compared to 5% of Irish job seekers.

⁴¹⁷ A new Quarterly Household equality survey was carried out in 2010, but the Equality Authority has not so far published an updated report on experiences of discrimination.



The Equality Authority may conduct formal inquiries. On completion of an inquiry where the Equality Authority is satisfied that 'any person' is involved in discrimination the Authority may serve a 'non-discrimination notice.'⁴¹⁸ This notice may set out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination. It will be a criminal offence not to comply with a notice for a period of 5 years after its issue.⁴¹⁹ The Authority is also empowered to seek an injunction from the High Court or the Circuit Court during this 5 year period to restrain any further contravention or failure to comply with a notice.⁴²⁰

The Equality Authority may carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry.⁴²¹ Based on this audit, which examines practices, procedures and other relevant factors, an equality plan will be developed. The plan consists of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity.⁴²² Where there are more than 50 employees, the Authority may instigate the review itself and prepare an action plan. If there is a failure to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation.⁴²³ Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.⁴²⁴

The Equality Authority must prepare annual reports; these reports must be presented to the Minister for Justice Equality and Law Reform who will cause a copy of every report to be laid before each House of the Oireachtas (Parliament).⁴²⁵ These reports are also made available to the public.

The Equality Authority responded to a high level of demand for its services during 2010. It dealt with 8,345 queries to the Public Information Centre under 5 pieces of legislation (up from 8,000 the previous year). There were 292,296 visits to the homepage of the Equality Authority website (down from 460,000 visits in 2009). The information booklets on the Employment Equality Act 1998-2008 and the Equal Status Act 2000-2008 are available in a number of languages.⁴²⁶

The Public Information Centre (PIC) is now based in Roscrea under the decentralisation programme. There was a substantial movement of staff in and out of

⁴¹⁸ Section 62 Employment Equality Act 1998-2008.

⁴¹⁹ Section 66 Employment Equality Act 1998-2008.

⁴²⁰ Section 65 Employment Equality Act 1998-2008.

⁴²¹ Section 69 Employment Equality Act 1998-2008.

⁴²² Section 69 Employment Equality Act 1998-2008.

⁴²³ Section 70 Employment Equality Act 1998-2008.

⁴²⁴ Section 72 Employment Equality Act 1998-2008.

⁴²⁵ Section 54 Employment Equality Act 1998-2008.

⁴²⁶ Arabic, Chinese, Croatian, Czech, French, Irish, Lithuanian, Polish, Portuguese, Romanian, Russian, Serbian and Spanish. Video guides are available in Irish Sign Language. For further information see Equality Authority, Annual Report 2007. <http://www.equality.ie/index.asp?locID=136&docID=684>.

the PIC to enable this change. Enquiries under the Employment Equality Acts numbered 2,819 (2,830 in 2009). General enquiries, access to employment, working conditions, dismissal, harassment and bullying were the dominant areas of enquiry. The grounds of disability, gender, age, and race made up the majority of the enquiries in the employment area. The numbers of enquiries under the Equal Status Acts was 2,075. The main areas of enquiry covered access to educational establishments and service provision.

The Equality Authority progressed 332 casefiles in 2010(685 in 2009)underd three pieces of legislation. There were 150 casefiles under the Employment Equality Acts (287 in 2009), with the grounds of disability, gender, age and race most prominent. There were 143 casefiles under the Equal Status Act (329 in 2009), with the grounds of disability, Traveller community, age and race most prominent. There were 39 casefiles under the Intoxicating Liquor Act (69in 2009) with the grounds of Traveller community and disability most prominent. 199 cases were closed by year end. 116 new cases were opened in 2010. 52 were under the Employment Equality Acts, 35 were under the Equal Status Act, and 29 were under the Intoxication Liquor Act.

- e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

Yes

- f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The Equality Authority has legal standing to bring discrimination cases or to intervene in legal cases by supporting the claimant or by using an amicus curiae brief. This is undertaken in a limited number of cases, selected according to the criteria which it has adopted.

- g) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

The Equality Tribunal is a quasi-judicial institution. The Equality Officers investigate complaints and issue a legally reasoned and public decision, which is binding. Discrimination complaints, including dismissal cases are brought at first instance to the Equality Tribunal. Cases may only be sent to mediation where both parties agree

to the process.⁴²⁷ A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.⁴²⁸ The Tribunal has had its legal mandate extended and it now has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues.

The Equality Tribunal may in the employment context provide for the following sanctions: compensation awards, arrears of payment (not including interest awards), orders for employers to take specific courses of action, re-instatement and re-engagement.

In the context of the provision of goods and services, the Equality Tribunal may order a course of action to be taken where discrimination has been found, and they may order compensation. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Minister for Finance determines the budget of the Department of Justice Equality and Law Reform annually, which comes from the national exchequer; the Minister submits an estimate for the Equality Tribunal. The budget estimate for 2009 was €2,354, 000 (a decrease of 8% over the previous year). The Tribunal issued a 312 decisions in 2009.

The decisions are of increasing legal complexity. Race continues to be the main ground in employment complaints and disability in access to goods and services.

The Tribunal is statutorily required to provide in writing the reasons for its decisions all of which are made available to the public. The increase in workload is significant, and has in turn resulted in a significant backlog of cases. The Equality Tribunal publishes an annual report, an annual legal review, an annual mediation review and statistics on its work.⁴²⁹

Appeals are to the Labour Court (employment cases) and Circuit Court (equal status cases).

i) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

The Equality Authority does not identify Roma as a priority issue but in its work since its establishment has recognised Travellers as an ethnic group, which the Government does not. The Strategic Plan 2009-2011 mentions two objectives

⁴²⁷ Section 78 Employment Equality Act 1998-2007.

⁴²⁸ Section 91(2) Employment Equality Act 1998-2007.

⁴²⁹ Section 75 Employment Equality Act 1998-2007 requires the Equality Tribunal to report on its activities to the Minister for Justice, Equality and Law Reform, these reports are also available to the public at: http://www.equalitytribunal.ie/html/about_us/stats_annual_report.htm.



concerning Travellers amongst 15 objectives identifying practical responses to inequality.⁴³⁰

The Equality Authority has used its power of assisting litigants in some important Traveller cases.⁴³¹

Publications include *Traveller Ethnicity 2006*, *Towards a Workplace Equality Infrastructure*, *Travellers' Experiences of Labour Market Programmes 2000*, *Good Practice in Employment Programmes for Travellers 2006*. The EA held a symposium on Traveller Ethnicity as part of Traveller Focus Week 2006 in Dublin.

⁴³⁰ <http://www.equality.ie/index.asp?locID=106&docID=778>.

⁴³¹ E.g. *Doherty v South County Dublin*,



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe *briefly* the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The Equality Authority is required to 'provide information to the public' on the workings of both the Employment Equality Act 1998-2008 and the Equal Status Act 2000-2008.⁴³² The Equality Authority does not have a statutory duty to provide information to the public on Section 19 of the Intoxicating Liquor Act, 2003. Therefore the Equality Authority does not provide a service on this Act through the medium of its Public Information Centre, leaflets, videos, website or seminars. The impact of this is that no body disseminates information about the legal protection against discrimination in licensed premises. This does not appear to be in compliance with Article 10 Directive 2000/43, or Article 12 Directive 2000/78.

As regards the Equality Authority's statutory duty to provide information, it has published extensively in respect of all nine grounds.⁴³³ The Equality Authority may prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.⁴³⁴ Once the Minister approves a code of practice it shall be admissible in evidence for the purposes of proceedings. In drafting the codes of practice the Equality Authority may consult with such person or persons as it considers appropriate. The Equality Authority has built up partnerships and joint ventures with the Department of Education and Science, Congress of Trade Unions and IBEC⁴³⁵ continuing its work in the Equal Opportunities Framework Committee, the Framework Committee and the Work-Life Balance Framework Committee and Anti-Racist Workplace. The Authority has also worked with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships include anti-racist training. A number of publications have also been produced.⁴³⁶ The Irish Congress of Trade Unions have also published a pack entitled 'Lesbian, Gay and Bisexual Rights in the Workplace'.⁴³⁷

⁴³² Section 39 Employment Equality Act 1998-2008: they also provide information on The Maternity Protection Acts 1994-2004, The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. They are not granted the function to provide information on the Intoxicating Liquor Act 2003.

⁴³³ <http://www.equality.ie/php/workflow.php?queryType=1>.

⁴³⁴ Section 56 Employment Equality Act 1998-2008.

⁴³⁵ Irish Business and Employer's Confederation.

⁴³⁶ http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/2-Examples_of_good_practices/1-Specialised_Bodies/SB_Ireland_Equality.asp.

⁴³⁷ <http://www.ictu.ie/html/publications/ictu/Gay%20&%20Lesbian%20Leaflet.pdf>.

- b) *to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

The Equality Authority formerly held regular quarterly meetings with NGOs, but no regular meetings are held now. Following a racist incident reported in the press, a one-off race consultation was held on 20 April 2010 with stakeholders on the race ground to hear their views on the issues facing minority ethnic communities in Ireland.

- c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The Authority has held regular meetings with the Trade Union movement, and quarterly meetings with the National Disability Authority and Disability Organisations, which focus on issues relating to reasonable accommodation.

- d) *to specifically address the situation of Roma and Travellers.*

Besides the activities described under Section 7 (h), the Authority has produced research concerning women travellers, explored the development of a pilot programme to develop a scheme to promote intercultural approaches to education at primary level, and published studies on the integrated workplace and barriers to participation specifically focusing on Travellers and ethnic minorities. The Authority published '*Positive Action for Traveller Employment: Case Studies of Traveller Participation in Employment and Enterprise Initiatives*'. This publication documented ten innovative projects where employers, Traveller organisations, state agencies and others have come together to establish labour market opportunities for Travellers. Each case study briefly describes the initiative undertaken, its aims and objectives, the stakeholders involved, the outcomes for the participants and the lessons learned. This report was co-funded by the EU and was launched on 2 December 2008, as part of Traveller Focus Week.

In 2010 the Equality Authority's Mainstreaming Unit supported County Louth Vocational Education Committee in carrying out an equality mainstreaming project which focused on undertaking an initial assessment as to how the VEC could best support the integration of adult Travellers into its mainstream programmes. The Equality Authority also published *Investing in Equality / Improving Services: Report of the Work by Cavan and Kildare County Councils to Improve Services for Black and Minority Ethnic (including Traveller) People*.⁴³⁸ The report details the work by Cavan and Kildare County Councils to enhance service delivery to Black and minority ethnic

⁴³⁸ http://www.cavancoco.ie/cavanweb/publish/domain/cavancoco/file/community/social_inclusion/Equality_Report.pdf.



(including Traveller) people. It was launched at an equality mainstreaming seminar for local authority equality staff organised by the Local Government Management Agency on 21 September 2010.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

The Employment Equality Act 1998-2008 provides that all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination.⁴³⁹ All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.⁴⁴⁰

- b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Were the Equality Tribunal to determine that the clause in question is contrary to the legislation, then that part of the collective agreement/contract cannot be enforced and must be modified. The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules.

Section 13 of the Employment Equality Act 1998-2008 prohibits discrimination by professional or trade organisations. There are no specific laws or regulations in force that are contrary to the Directives there are however, a number of provisions of the Equality legislation that may not be in compliance with the Directives.⁴⁴¹

The major concern remains section 14(a)(i) of the Equal Status Act 2000-2008 as this provides that nothing in that Act will prohibit any action taken under any enactment. Therefore this provision ensures that the Equal Status Act 2000-2008 remains subordinate to other legislative enactments.

⁴³⁹ Section 30 Employment Equality Act 1998-2008.

⁴⁴⁰ Section 9 Employment Equality Act 1998-2008.

⁴⁴¹ See section 0.2 above.



9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

In January 2005 the Government launched the National Action Plan Against Racism 2005-2008. This aimed to provide strategic direction to combat racism and to promote the development of a more inclusive, intercultural society in Ireland. The plan highlighted five key points to this end, namely Protection, Inclusion, Provision, Participation, and Recognition.⁴⁴² This action plan was intended to follow on from the 'Know Racism' campaign. The aim of this scheme was to enable organisations to raise awareness about racism and to highlight cultural diversity in Ireland. This grant scheme was organised in association with the National Consultative Committee on Racism and Interculturalism.⁴⁴³ This body was abolished in the budget of October 2008.⁴⁴⁴ The National Action Plan Against Racism was not followed by another national plan on its expiry. Instead the Government established a new Office of the Minister for Integration with a junior minister to oversee anti-racism measures.

⁴⁴² <http://www.justice.ie/80256DFD00637EE0/vWeb/pcSSTY5UBER3-en> It should also be noted that some concern has been expressed about this project. See http://www.irishrefugeecouncil.ie/press05/action_plan.html as an example.

⁴⁴³ This committee was established by the Department of Justice, Equality and Law Reform in 1998, the committee consists of members of government departments, agencies and non-governmental organisations.

⁴⁴⁴ <http://www.nccri.ie/>.



ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Ireland

Date: 1 January 2012

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.		Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Employment Equality Act 1998 (http://www.justice.ie/en/JELR/EmpEqActsConsLtd.pdf/Files/EmpEqActsConsLtd.pdf)	18.6.1998	18.10.1999	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation,	Civil Law	Public and Private employment with certain exceptions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation.

last amended 14.7.2008			membership of the Traveller Community			The law also requires the provision of reasonable accommodation for people with disabilities and establishes the Equality Tribunal and the Equality Authority.
Equal Status Act 2000 (http://www.justice.ie/en/JELR/EqualStatusActsConsltd_00_04.pdf/Files/EqualStatusActsConsltd_00_04.pdf) last amended 14.7.2008	26.4.2000	25.10.2000	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil law	Access to goods and services	Prohibits direct and indirect discrimination the procurement of discrimination, discrimination by association as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.

Equality Act 2004 (http://www.equality.ie/index.asp?docID=206)	18.7.2004	19.7.2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil law	Amends both the Employment Equality Act 1998 and the Equal Status Act 2000 with a view to ensuring compliance with the two Directives	Amends the definition of reasonable accommodation and introduces the concept of discrimination by association into the Employment Equality Act 1998.
Pensions Act 1990-2004 http://www.irishstatutebook.ie/2004/en/act/pub/0009/index.html	25.3.2004	5.4.2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil law	Pensions including occupational pensions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.

Unfair Dismissals Act 1977-1993 (http://www.irishstatutebook.ie/1993/en/act/pub/0022/index.html)	14.7.1993	1.10.1993	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Unfair dismissals from employment	Provides remedies for dismissals that are deemed to be unfair
Prohibition on the Incitement to Hatred Act 1989 http://www.irishstatutebook.ie/1989/en/act/pub/0019/index.html	25.11.1989	25.12.1989	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Criminal law	Criminal legislation relating to the incitement to hatred	Prohibits hate speech

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Ireland

Date: 1 January 2012

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4.11.1950	25.2.1953	No	Yes	Yes in an interpretative sense, as a result of the passage of the European Convention on Human Rights Act 2003
Protocol 12, ECHR	Yes	No	No	No	No
Revised European Social Charter	Yes	Yes	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes	No

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
International Covenant on Civil and Political Rights	Yes	Yes	Article 10 paragraph 2, Article 14, Article 19 paragraph 2, Article 20 paragraph 1, Article 23 paragraph 4.	Yes	No
Framework Convention for the Protection of National Minorities	Yes	Yes			No
International Convention on Economic, Social and Cultural Rights	Yes	Yes		N/A	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes		Yes	No
Convention on the Elimination of Discrimination Against Women	Yes	Yes		Yes	No

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
ILO Convention No. 111 on Discrimination	Yes	Yes		N/A	No
Convention on the Rights of the Child	Yes	Yes			No
Convention on the Rights of Persons with Disabilities	Yes	No		No	No