



# EMPLOYMENT EQUALITY ACTS 1998 – 2015


A Guide For Trade Unions



STRONGER TOGETHER

**CONGRESS**

Irish Congress of Trade Unions





# **EQUALITY**

**IN THE WORKPLACE**



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

**This research is funded by the Irish Human rights and Equality Grant Scheme 2016-2017. The views and opinions expressed herein are those of the author and do not necessarily reflect the official policy or position of the Irish Human Rights and Equality Commission**





# CONTENTS

Foreword	1	Indirect Discrimination	20
Introduction	3	Pregnancy	21
Understanding Employment Equality Law	4	Victimisation	21
Conflicting Agreements	4	Age Discrimination	22
Sources Of Law	5	Disability / Reasonable Accommodation	24
Statutory Instruments	7	Equal Pay	25
Purpose Of The Act	8	Burden Of Proof And Standard Of Proof	27
Employee / Employment	9	Right To Information	29
Discriminatory Grounds	9	Exemptions	31
Discrimination	12	Positive Action	33
Associative Discrimination	13	Forum For Seeking Redress	34
Treating Similar Situations Differently/Different Situations imilarly	13	Duplication Of Claims	34
Comparators	14	Parallel Claims	36
Harassment And Sexual Harassment	17	Redress	36
Employers Liability And Defences	19	Maximum Amount Of Compensation	37
Direct / Indirect Discrimination	19	Computing Compensation	38
Direct Discrimination	19	Interest On Awards	39
		Tax Treatment Of Awards	39

Processing Claims	40	Sources	52
Time Limits	40	WRC / Labour Court	52
Time Limits – Continuing Discrimination/ Victimisation	41	Superior Courts	53
Extending Time	42	Court of Justice of European Community	53
Obtaining Information	43	Reported Cases	54
Completing The Form	43		
Statement Accompanying The Form	45		
Mediation	45		
Hearings	45		
Decision On Preliminary Points	46		
Appeal To The Labour Court	47		
Nature Of The Appeal	47		
Initiating The Appeal	48		
Submissions	49		
Content Of Submissions	49		
Hearings And Case Management	50		
Decisions	51		
Further Appeals	51		
Researching Cases	52		

# FOREWORD

Congress believes in equal rights for all workers and is committed to combating all forms of discrimination and promoting equality. As part of that commitment, we are publishing this new guide to taking an equality case. The guide follows the new architecture for employment rights cases in the Republic of Ireland, introduced following the enactment of the Workplace Relations Act 2015, and reflects changes in procedures and processes affecting both the Workplace Relations Commission and the Labour Court. The guide is written by Kevin Duffy B.L. (former Chair of the Labour Court) and we would like to thank Kevin for his work on this resource. It follows a well-received guide – Equality How by Eilis Barry B.L. – which was published some years ago.

This guide is a practical aid to trade unionists supporting or representing trade union members in taking cases under the Employment Equality Acts 1998-2015. It gives basic information on the relevant

provisions of the legislation and the procedures to be followed by Trade Union Officials in processing claims under these Acts on behalf of their members. It also provides information on the various institutions involved in implementing the legislation, including the Workplace Relations Commission and the Labour Court. It is a response to the ongoing demand by Trade Unions in all sectors for help in taking action under the equality legislation, so that Trade Union Officials can continue to contribute ever more effectively to workplace equality across the nine grounds covered by the equality legislation.

We would also like to acknowledge the support and assistance of the Irish Human Rights and Equality Commission under their Human Rights and Equality Grants Scheme 2016.

An online version of the guide, and also links to other publications referred to is available at <http://www.ictu.ie/equality/takingacase.html>





# INTRODUCTION

This Guide was prepared for the Irish Congress of Trade Unions and was grant aided by the Irish Human Rights and Equality Commission. Its purpose is to provide assistance to trade union officials in advising on issues concerning workplace equality and to provide guidance in processing claims where the provisions of the Employment Equality Acts have been contravened.

It is not intended as a legal interpretation of the Acts nor should it be relied upon on its own. The Acts themselves should always be consulted.

**The statutory provisions and legal principles referred to in this Guide are as they were at the date of publication. These may change over time, either through amending legislation or by decisions of the Courts.**

The Employment Equality Act 1998 has been amended five times since its enactment. Significant amendments were made by the Equality Act 2004. Amendments were also made by the following enactments:

- Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007
- Civil Law (Miscellaneous Provisions) Act 2008 (14/2008), Part 16
- Civil Law (Miscellaneous Provisions) Act 2011 (23/2011), ss. 18 to 26
- Equality (Miscellaneous Provisions) Act 2015 (43/2015), ss. 3 to 11

It is important that the revised or up-to-date version of the Acts be relied upon. An excellent website on which a consolidated version of the Acts can be obtained is that of the Law Reform Commission. The revised Acts can be found at: <http://revisedacts.lawreform.ie/eli/1998/act/21/front/revised/en/html>

There are also several legal textbooks on employment equality law that can be consulted.

# Understanding Employment Equality Law

The main work of most union officials is in resolving industrial relations disputes. The guiding principle in industrial relations dispute resolution is the achievement of fairness and acceptability.

**In dealing with issues of employment equality, as with all employment rights issues, the approach is materially different. It is about vindicating prescribed legal rights and imposing legally enforceable obligations.**

## Conflicting Agreements

**Section 9 of the Act provides, in effect, that the right to equal pay and equal treatment cannot be offset or limited by a collective agreement.** For the purpose of that provision, a

collective agreement includes an Employment Regulation Order and a Registered Employment Agreement<sup>1</sup>. If any provision in any of these instruments conflicts with the right to equal pay or equal treatment conferred by the Act, the provision is rendered null and void<sup>2</sup>.

The Acts also provides that the Irish Human Rights and Equality Commission or a person affected by a collective agreement, (including an Employment Regulation Order and a Registered Employment Agreement) may complain to the Director General of the WRC that a provision of the instrument in question is void because it is discriminatory<sup>3</sup>. For this purpose a person is affected by a collective agreement (as broadly defined by the Act) if he or she is an employee whose pay and conditions of employment are determined in whole or in part by the agreement. An employer cannot refer such a complaint<sup>4</sup>.

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- 1 Section 9(3) of the Act. It should be noted that a Sectoral Employment Order made under the Industrial Relations (Amendment) Act 2015 is not included in the extended definition of a "collective agreement"
  - 2 Section 9(4) contains a saver for agreements that contain discriminator provisions which were made before the commencement of the Act. Such Agreements could continue to apply for a period of 12 months after the Act came into effect. This provision is of no current relevance as the 'grace' period has long since expired
  - 3 Section 86(1) of the Act.
  - 4 Noonan Services Ltd v Labour Court, Unreported, High Court Kearns J, 25th February 2004

A complaint under this provision can only be regarded as properly referred if all parties to the agreement are impleaded as respondents.

The role of the WRC and that of the Labour Court on appeal, is confined to declaring whether or not the impugned provision is void. Neither the WRC nor the Labour Court can rewrite the agreement nor can a party using this process obtain the type of reliefs that are available where a complaint of discrimination is brought through the ordinary channels provided by the Act. However, if it is considered appropriate to do so, the WRC, or the Labour Court on appeal, may provide guidance to the parties to the agreement on alternative or amended provisions that could lawfully be included in the instrument<sup>5</sup>.

The application of these provisions was extensively considered by the Labour Court in Determination EDA068, Department of Finance v Collins. In that case the CPSU sought, unsuccessfully, to challenge the report of the Public Service Benchmarking Body on the grounds that pay adjustments

awarded were indirectly discriminatory against women.

## Sources of Law

**The source of those rights and obligations** is to be found in the Employment Equality Acts 1998-2015 (referred to in this Guide as the Act) and in various Directives of the European Union.

**The decisions of the Tribunals charged with adjudicating on disputes under the Act are also of central importance.** This includes the former Equality Tribunal, Adjudication Officers of the WRC and the Labour Court. It also includes the decisions of the Irish Superior Courts (High Court, Court of Appeal and the Supreme Court) and the Court of Justice of the European Union (CJEU), are also of central importance. Those decisions over the years have determined the nature and extent of the rights and obligations prescribed by the national and European enactments. They are referred to as the 'case law' or as 'authorities' or sometimes as 'precedents'. Together with the Act and the Directives they make up the whole body of law

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5 Section 87(1)(b) of the Act

on the right to equal treatment in employment. Decisions of courts in other jurisdictions on similar legislative provisions may also be relied upon. This relates principally to decisions of the UK courts. These decisions are not binding in Ireland but they are said to be persuasive. That means that they will normally be followed unless the wording of the legislation upon which they were based is different or there is some contrary decision in this jurisdiction.

**The legislative provisions in this area are primarily derived from the law of the European Union.**

The Treaty of Rome, which established what was then called the EEC, required Member States to apply the principle of equal pay for work of equal value as between men and women. That has now been expanded to include the principle of equal treatment as between men and women in employment. Article 157 of The Treaty on the Functioning of the European Union (TFEU) now prohibits discrimination on grounds of gender in respect of pay and treatment in employment.

The Charter of Fundamental Rights of the European Union, which is incorporated into TFEU, and is afforded the same status as the Treaty itself, prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation<sup>6</sup>.

There are three Directives of the European Union dealing with employment equality. They are:

**Directive 2000/43/EC**

The Race Directive, which prohibits all forms of discrimination based on race or ethnic origin

**Directive 2000/78/EC**

The Framework Directive, which lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age and sexual orientation as regards employment and occupation.

**Directive 2006/54/EC**

The Recast Directive, which contains provisions to implement the principle of

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6 Title III, Article 21

equal treatment as between men and women, in relation to access to employment, including promotions, vocational training, working conditions and pay. This Directive replaced two earlier Directives; 75/117/EEC and 76/207/EEC, which dealt separately with discrimination in pay and discriminatory treatment.

These Directives have been given effect in Irish law in the Act.



## Statutory Instruments

Statutory Instruments (S.I.s) are regulations made, usually by a Minister, and laid before the Oireachtas. They are referred to as 'secondary legislation'. The making of S.I.s are authorised by the Act under which they are made. Their purpose is to expand on provisions of the Act or to deal in more detail with specific matters covered by the Act under which they are made. They have the force of law unless the Oireachtas annuls them within a number of sitting days.

Four S.I.s have been made under the Act. They are:

**S.I. No 126 of 2016,  
Employment Equality Act  
1998 (Withdrawal of Certain  
Claims) (Relevant Date)  
Regulations 2016**

These Regulations deal with procedures for the withdrawal of overlapping claims under the Act and the Unfair Dismissals Acts 1977 - 2015

**S.I. No 208 of 2012,  
Employment Equality Act  
1998 (Code of Practice)  
(Harassment) Order 2012**

This S.I. gives effect to the Code of Practice prepared by the former Equality Authority

on Sexual Harassment and Harassment at Work

**S.I. No 251 of 2008,  
Employment Equality Act  
1998 (Section 12) (Church of  
Ireland College of Education)  
Order 2008**

This S.I. permitted the reservation of places on the Bachelor of Education course in the Church of Ireland College of Education for students who are members of the Church of Ireland or who are members of other Churches who subscribe to the Protestant tradition

**S.I. No 321 of 1999,  
Employment Equality Act  
1998 (Section 76—Right to  
Information) Regulations  
1999**

These Regulations prescribe the form to be used in raising questions, pursuant to section 76 of the Act, in relation to a suspected occurrence of discrimination, and the form to be used by a respondent in replying to those questions.

The full text of these Statutory Instruments can be seen on:  
[http://www.irishstatutebook.  
ie/eli/statutory.html](http://www.irishstatutebook.ie/eli/statutory.html)

## Purpose of the Act

The Act is based on the proposition that certain characteristics and personal circumstances must always be regarded as irrelevant in the context of employment. These characteristics and circumstances are referred to in the Act as the “discriminatory grounds”. They are sometimes referred to as “protected characteristics”. Both terms are used interchangeably in this guide.

The purpose of the Act is to prohibit employers, training providers and vocational and professional bodies from taking any of the discriminatory grounds into account in differentiating between individuals in relation to:

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

## Employee / Employment

**The Act provides protection to employees and prospective employees in respect of the matters referred to above.** An 'employee' is defined by the Act as a person who has entered into a contract of employment. An 'employer' is defined as a person with whom the employee has entered into, or for whom the employee works under a contract of employment.

However, the term "contract of employment" is given a broader meaning under the Act than it normally bears under other employment enactments. For the purpose of the Act it is defined as:

- a. *a contract of service or apprenticeship, or*
- b. *any other contract whereby—*
  - i. *(an individual agrees with another person personally to execute any work or service for that person, or*
  - ii. *an individual agrees with a person carrying on the business of an employment agency within the meaning of the Employment Agency*

*Act 1971 to do or perform personally any work or service for another person (whether or not the other person is a party to the contract), whether the contract is express or implied and, if express, whether oral or written;*

**Paragraph (b)(i) of this definition ensures that self-employed persons are covered by the Act, if they provide services personally. Paragraph (b)(ii) ensures that agency workers are covered by the Act.**

## Discriminatory Grounds

To come within the protection of the Act a person must have suffered discrimination on one of the nine discriminatory grounds set out at section 6(2) of the Act. Those grounds are:

1. **Gender:** This ground includes transgender persons. Discrimination based on pregnancy also comes within the prohibition of discrimination based on gender. It has been held by the CJEU that since pregnancy is a

uniquely female condition less favourable treatment based on pregnancy is to be regarded as direct discrimination on grounds of gender<sup>7</sup>;

2. **Civil Status:** This includes being single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner in a civil partnership;
3. **Family Status:** This is defined as meaning: *responsibility—*
  - a. *as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years, or*
  - b. *as a parent or the resident primary carer in relation to a person of or over that age with 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,*and, for the purposes of paragraph (b), a primary carer is a resident primary

carer in relation to a person with a disability if the primary carer resides with the person with the disability;

4. **Sexual Orientation:** This includes people who are of heterosexual, homosexual or bisexual orientation;
5. **Religious belief:** This includes religious background or outlook. It has also been held to include the practice of religion and religious observance<sup>8</sup>;
6. **Age:** There are special provisions in relation to age discrimination including the circumstances in which different treatment based on age can be justified. These provisions will be considered later in this guide;
7. **Disability:** This is broadly defined 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,*

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<sup>7</sup> See decision of the CJEU in Case 177/88, Dekker [1990] E.C.R. I-3941

<sup>8</sup> See Labour Court Determination EDA153, Tipperary County Council v McAteer



- 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;*

It has been held that a temporary disorder can amount to a disability<sup>9</sup>. It has also been held that alcoholism can come within the definition at (e) and can therefore be classified as a disability<sup>10</sup>;

**8. Race:** This includes race, colour, nationality or ethnic or national origins. What constitutes ethnic origin was extensively considered by the Labour Court in *Determination EDA1335 Dublin Institute of Technology v Awojuola*<sup>11</sup>;

**9. Membership of the Traveller Community:** "Traveller community" is defined by the Act as meaning "*the community of people commonly so called who are 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*"<sup>12</sup>;

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**9** Layden v Customer Perceptions Ltd [2004] E.L.R. 101

**10** A Worker v A Government Department [2004] E.L.R 225

**11** In that decision, the Labour Court applied the definition formulated by the UK House of Lords in *Mandla v Lee* [1983] 2 A.C. 548

**12** This definition was inserted by section 3 of the Equal Status Act 2000. It is very similar to the definition of an ethnic group applied by the Labour Court in *Dublin Institute of Technology v Awojuola*. It should be noted that the Traveller Community are now recognised as an ethnic group by the Irish Government

## Discrimination

**The Act applies where a person has suffered unlawful discrimination in relation to employment, including access to employment and training.**

Discrimination occurs where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the discriminatory grounds which:

- i. exists,
- ii. existed but no longer exists,
- iii. may exist in the future, or
- iv. is imputed to the person concerned

In most cases the discriminatory ground relied upon will have existed at the time the less favourable treatment occurred. However, that may not always be the case. The Act provides, at (ii), (iii) and (iv), above, for situations in which the discriminatory ground may not have existed at the time the act of discrimination occurred, but may have existed in the past or may be anticipated to exist in the future.

These provisions are intended to cover situations in which a person's circumstances have changed or may change in the future and the less favourable treatment is based on their previous position or a position that they are expected to attain. This could arise where a person had a disability from which he or she had recovered or where it may be anticipated that a condition constituting a disability may re-occur. It could also apply where, for example, a person's civil status has either changed or is in the process of changing, and the less favourable treatment is based on their prior status or the status that they are expected to acquire<sup>13</sup>.

The Act also deals with situations in which a person is treated less favourably because they are assumed to have a protected characteristic which they do not have. For example, a person may be treated less favourably because it is assumed that they have a particular religious outlook which they do not in fact have, or it may be wrongly assumed that a person has a particular sexual orientation and they are treated less favourably based on that assumption.

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<sup>13</sup> For example, where a person is in the process of being divorced or is planning to marry.

## Associative Discrimination

**The Act gives protection against discrimination by association.** Section 6(1)(b) of the Act provides, in effect, that it constitutes discrimination to treat a person less favourably because of his or her association with another person who comes within one of the discriminatory grounds. The scope that should be ascribed to the notion of associated discrimination was considered by the CJEU in case C- 303/6 *Coleman v Attridge Law* ECLI:EU:C:2008:415 [2008] IRLR 722. This case concerned a woman who was the mother and sole carer of a disabled child. Ms Coleman was employed as a legal secretary by the respondent firm of solicitors. She claimed to have been discriminated against and harassed as a result of taking time off to care for her disabled child. Her claim was grounded on grounds of disability.

A question arose as to whether Ms Coleman, who was not herself disabled, could maintain a case based on the disability of her child.

The CJEU held that the purpose of Directive 2000/78/EC was to **combat all forms of discrimination on grounds of disability**. The principle of equal treatment enshrined in the Directive was directed not at a category of person but at the ground of disability itself. Accordingly, the Court held that if Ms Coleman suffered discrimination because of her sons disability she was entitled to maintain a case on **grounds** of disability.

## Treating Similar Situations Differently/ Different Situations Similarly

**Treating similar situations differently can give rise to discrimination.** For example, where an employee of one national origin is dealt with more severely in a disciplinary process than other employees, of a different nationality, who were guilty of similar breaches of the company rules<sup>14</sup>. The Courts have consistently pointed out that discrimination can also arise where different situations are treated similarly.

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14 *Citibank v Ntoko* [2004] ELR 116

Such a situation arose in a case before the Labour Court involving an employee of Nigerian nationality who had poor English and was unfamiliar with Irish employment practices. She was accused of misconduct and the allegations against her were dealt with under the company's normal disciplinary procedure which was provided for in a collective agreement. Those procedures provided that an employee accused of wrong doing was entitled to be represented at every stage of the procedures by a union official. In all cases it was for the employee to contact the union and arrange for representation. In this case the employee did not arrange to be represented because she did not know that she had such an entitlement and did not understand how the process was to operate. She was subsequently dismissed. She claimed to have been discriminated against on grounds of her race.

While the process used in that case was the same as that applicable to Irish workers who were accused of similar misconduct, the Labour Court

held that the complainant had suffered discrimination. This, the Court held, was because the employer failed to properly inform the complainant of her right to representation and how to obtain representation. The Court pointed out that in the case of an Irish worker he or she would have been subjected to a process that they understood whereas the complainant was subjected to a process that she did not understand and in which she could not fully participate. This, the Court held, amounted to treating different situations similarly and constituted discrimination<sup>15</sup>.

## Comparators

**Equality law is based on comparison; how one person is treated by comparison to another.** It is therefore necessary to ground a claim of discrimination by pointing to how another person, not having the protected characteristic relied upon, was, is or would be treated in a comparable situation. **This is referred to as a comparator. A comparator must be employed by the same employer as the complainant or**

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15 Campbell Catering Ltd v Razaq [2004] ELR 310

**by an associated employer.** Two employers are associated if one is a body corporate of which the other has control or if both are bodies corporate of which a third person has control<sup>16</sup>.

**The comparator need not be employed at the same time as the complainant** and reliance can be placed on how a person who has left the employment was treated in a comparable situation.

**A comparator is an evidential tool.** They are intended to contrast the treatment of the complainant, in respect to the matter complained of, with that of another person in similar circumstances who does not have the protected characteristic relied upon.

**In many cases the comparator will be an actual person, but they need not be.** Situations may arise where the complainant is the only person in the employment, or all other employees whose circumstances are similar may have the same protected characteristic as the complainant. **In these situations,**

**it is permissible to select a hypothetical comparator.** A hypothetical comparator can be constructed by asking why the complainant was treated as he or she was. If the treatment complained of was because of a protected characteristic, a hypothetical comparator is a supposed person who does not have that characteristic but who is otherwise in the same position as the complainant. For example, if it is contended that a person was treated less favourably because he or she is a member of the traveller community, a hypothetical comparator would be a member of the settled community whose circumstances are otherwise similar<sup>17</sup>.

**It is for the person bringing a claim to select his or her comparator.** However, the Adjudication Officer / Court will consider if the selected comparator advances the claim being made. If there are other employees who are in the same category as the comparator (i.e. are the same gender/nationality/same civil status etc.) but who are treated similarly to

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<sup>16</sup> See section 2(2) of the Act.

<sup>17</sup> See Determination EDA1310, *Henry Denny & Sons Limited v Rohan*, in which the Labour Court followed the decision of the House of Lords in *Shamoon v Chief Constable of the RUC* [2003] IRLR 258

the complainant, the **chosen comparator can be regarded as anomalous and pointing towards a conclusion** that the different treatment / pay was on grounds other than the discriminatory ground on which the case is based.

**That arose in *Wilton v Steel Company of Ireland* [1999] ELR 1**, in which a woman claimed equal pay with a man who was previously employed in a similar position to her but was paid at a higher rate. Another man was also employed in a similar role and was paid the same rate as the complainant. **The High Court held that the complainant was entitled to nominate her own comparator and the Equality Officer was obliged to judge her case by reference to that comparator.**

However, the Court held that the Equality Officer was entitled to conclude that the presence of another man, performing like work to that of the complainant, and being remunerated at the same rate as the complainant, **indicated that the higher rate paid to the nominated comparator was not based on his gender.** Accordingly, it

was held that the difference in pay between complainant and her comparator was based on grounds other than sex<sup>18</sup>.

**In the case of discrimination based on pregnancy a comparator is not required.**



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<sup>18</sup> See also *NUI Cork v Ahern* [2005] 16 ELR 297

## Harassment and Sexual Harassment

**Section 14A of the Acts provides that harassment of a worker on any of the discriminatory grounds, or sexual harassment, at his or her workplace or otherwise in the course of his or her employment constitutes discrimination by the employer.**

The employer is rendered liable for harassment or sexual harassment once it occurs and the perpetrator is a person who is:

- i. employed at that place or by the same employer,
- ii. the victim's employer, or
- iii. a client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it<sup>19</sup>

Harassment and sexual harassment are defined by section 14A(7) of the Act, which provides:

- a. *In this section—*
  - i. *references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and*
  - ii. *references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,*
- b. *being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.*
- c. *Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.*

**The definition of harassment is very wide. It can include any form of unwanted conduct which is related to any of the discriminatory grounds.**

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19 Section 14A(1)

Sexual harassment can also arise from any form of unwanted conduct of a sexual nature. As can be seen from paragraph (c) of the subsection, the conduct must, in either case, have the **“purpose or effect”** of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. The language of the section makes it clear that the conduct need not be intended to harass the victim. **It is sufficient if it has that effect.**

The conduct can comprise any form of communication. It can include text messages and Facebook postings<sup>20</sup>. It has also been held that conversations of a sexual nature conducted between individuals in the workplace can amount to sexual harassment of a person who was not part of the conversation but overheard it in the course of her work<sup>21</sup>.

**The effects of the conduct must be experienced by the victim in the course of his or her employment** although the perpetrator need not be at

work or acting in the course of employment when the conduct occurred. So, for example, a posting on social media made by a person from home which was intended to disparage the victim at work was considered harassment<sup>22</sup>.

The requirement that the harassment must be suffered by the victim in the course of his or her employment is given a wide interpretation and can include conduct occurring outside the workplace. S.I. No 208 of 2012, *Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012*, provides that **conduct outside the workplace**, such as while attending a conference, a training session or while attending a work related social event, can amount to harassment in the course of employment for the purpose of the Act.

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20 Determination EDA164, *McCamley v Dublin Bus* [2016] ELR 81

21 Determination EDA163, *A Worker v A Store*

22 Determination EDA165 *McCamley v Dublin Bus*



## Employers Liability and Defences

Where a worker is harassed the employer is liable to the victim for the harassment (see above).

The employer can, however, avail of a defence by showing that it took all practical steps to prevent the harassment from having occurred.

However, it is not sufficient for the employer to show that complaints of harassment were dealt with. The employer must establish that measures were in place to prevent harassment occurring. In practice, the Adjudication Officer or the Court will have to be satisfied that the employer had an anti-harassment policy in place and that all employees were made aware of its existence and the importance of observing its provisions<sup>23</sup>.

## Direct / Indirect Discrimination

**Discrimination can be direct or indirect.** It is, however, important to know into which category the discrimination complained of fits as **there are different defences available and the proofs necessary to make out a case are different.**

### Direct Discrimination

**Direct discrimination arises where a person is treated less favourable because they are in one of the categories protected by the Act or because of a condition that cannot be disassociated from that characteristic.** So, if a person is refused employment because of his or her ethnic or national origin, that constitutes direct discrimination. Likewise, treating a woman less favourably because she is pregnant constitutes direct discrimination on grounds of gender because pregnancy is a uniquely female condition and therefore indissociable from gender.

**Direct discrimination (except in the case of age**

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23 Determination EDA163, A Worker v A Store

**discrimination) can never be justified.** Faced with a claim of direct discrimination the only defence available to a respondent is to show that the less favourable treatment was wholly unrelated to the discriminatory ground relied upon. For example, where a man is promoted in preference to a woman the employer may show that the successful man had greater relevant experience than the woman and that this was the only reason for his selection.

## Indirect Discrimination

**Indirect discrimination arises where an apparently neutral provision, criterion or practice (a PCP) in relation to employment puts persons who have a protected characteristic at a disadvantage in relation to employment.**

To take a simple example, an employer may stipulate a requirement for particular physical attributes of height or strength which significantly more men are likely to meet than women. Because the average height of women is lower than

that of men, such a requirement puts women at a disadvantage and can give rise to indirect discrimination.

It is a defence to a claim of indirect discrimination to show that the PCP is **objectively justified** on grounds unrelated to a discriminatory ground. To make out a plea of objective justification the employer must show:

- That the PCP is **unrelated** to a discriminatory ground;
- That it corresponds to **a real and legitimate need** on the part of the undertaking;
- That it is an **appropriate means** of achieving that need;
- That there are **no less discriminatory means** of achieving the need

It should be noted that the aim of reducing costs, or of not incurring additional costs, **can never be accepted** as providing objective justification for indirect discrimination<sup>24</sup>.

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24 See comments to that effect by Ms Justice Dunne in *Catholic University School v Dooley* and

## Pregnancy

**As pointed out earlier, treating a woman less favourably, including dismissal, because of pregnancy constitutes direct discrimination on grounds of gender.**

The protection against dismissal extends from the **commencement of pregnancy** until the **end of maternity leave**. During this period, if a woman is dismissed the employer must cite duly substantiated grounds for her dismissal in writing<sup>25</sup>.

Section 6(2A) of the Act also brings within the prohibition of discrimination on grounds of gender, any less favourable treatment of a woman, contrary to any other enactment, on grounds of pregnancy or maternity leave. That subsection provides:

*“Without prejudice to the generality of subsections (1) and (2), discrimination on the gender ground shall be taken to occur where, on a ground*

*related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated.”*

The effect of this provision is that where a woman’s rights under any statutory provision are infringed she can bring a complaint of discrimination under the Act. This could arise where a woman’s entitlements in respect of maternity leave under the Maternity Protection Act 1994 are contravened<sup>26</sup>.

## Victimisation

**The Act provides protection for workers against dismissal or any other adverse treatment in consequence of making a complaint or exercising a right under the Act.**

The dismissal or adverse treatment must be in reaction to the worker having committed what is referred to a **“a protected”** act.

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Ors [2010] IEHC 496

**25** Article 10.2 of Directive 92/85/EEC – The Pregnancy Directive

**26** This is in line with Article 2.2(c) of Directive 2006/54/EC, The Recast Directive, which provides that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes unlawful discrimination for the purpose of that Directive.

The protected acts which can give rise to victimisation are listed at section 74(2) of the Act, as follows:

- a. a complaint of discrimination made by the employee to the employer,
- b. any proceedings by a complainant,
- c. an employee having represented or otherwise supported a complainant,
- d. the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,
- e. an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,
- f. an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful under any such repealed enactment, or
- g. an employee having given notice of an intention to take any of the actions

mentioned in the preceding paragraphs.

The Labour Court has held that the concept of “victimisation” should be **“construed as widely and liberally as can fairly be done and should be given a sufficiently wide ambit so as to encompass all forms of detriment inflicted on a worker by his or her employer for having committed a protected act”**<sup>27</sup>. The adverse treatment must be by the victim’s employer. So, in a case in which a member of a trade union claimed to have suffered less favour treatment within the union after having made complaints of discrimination against the union, it was held that adverse treatment, even if it occurred, could not amount to victimisation under the Act<sup>28</sup>.

## Age Discrimination

**Unlike all other forms of direct discrimination, different treatment on grounds of age can be objectively justified.** The law regards other discriminatory grounds, which relate to inherent

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<sup>27</sup> Determination EDA099, Watters Garden World Ltd v Panuta

<sup>28</sup> Determination EDA1128, Dunbar v ASTI

characteristics (gender, race, sexual orientation etc.), as always irrelevant in the context of employment. However, **age is not irrelevant** in that context. Being too young or too old can affect a person's capacity to work. This is reflected in the Act which **provides a number of exceptions and savers for different treatment based on age.**

The prohibition of discrimination on grounds of age is only applicable to persons who are above the statutory age at which they must attend school<sup>29</sup>. Also, an employer may stipulate that applicants for a job must be above a specified age, not exceeding 18 years<sup>30</sup>.

**An employer may stipulate a retirement age provided that the age selected can be objectively justified**<sup>31</sup>. It is also permissible to offer an employee who is above retirement age, employment on a fixed-term contract, again where to do so is objectively justified<sup>32</sup>.

An employer may specify a maximum age for recruitment into a particular post where this reflects the cost or time spent training for the post relative to the period of time that the person may spend in employment before retirement<sup>33</sup>.

**More favourable pay and conditions of employment may be provided by reference to length of service**<sup>34</sup>. This provision ensures that incremental salary scales, or such benefits as service related holiday entitlements, are not rendered unlawful as being indirectly discriminatory.

Non-statutory redundancy payments made to individuals may also be adjusted to take account of the length of time between the loss of employment and the individuals expected retirement age<sup>35</sup>

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29 Section 6(3)(a)

30 Section 6(3)(b)

31 Section 34(4)

32 Section 6(3)(c)

33 Section 34(5)

34 Section 34(7)

35 Section 34(3)(d), see also Determination EDA1315, *Hospira v Roper* [2013] ELR 263

## Disability/Reasonable accommodation

**The Act does not require an employer to recruit, promote or continue to employ a person who is unable to perform the duties of the job in question.** But that proposition is significantly circumscribed, in the case of disability, by the obligation which the Act places on employers to provide an employee who has a disability with **reasonable accommodation, referred to in the Act as “appropriate measures”**. The purpose of providing reasonable accommodation is to enable a person who has a disability:

- i. to have access to employment,
- ii. to participate or advance in employment, or
- iii. to undergo training,<sup>36</sup>

There is no limitation on the type or category of measures that an employer can be expected to take, provided that they **do not involve a disproportionate cost**. It can involve effective and practical

measures, where needed in a particular case, to adapt the employer’s place of business to the disability concerned. It may, in particular, involve the **adaptation** of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources<sup>37</sup>. The Labour Court has summarised the nature of the obligation to provide reasonable accommodation as follows:

*The provision of special treatment or facilities is not an end in itself. It is a means to an end and that 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 or to undergo training. This can involve affording the person with a disability more favourable treatment than would be awarded to an employee without a disability. Thus it may be necessary to consider such matters as adjusting the person’s attendance hours or to allow them to work partially*

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<sup>36</sup> Section 16(3)(b)

<sup>37</sup> Section 16(4)

*from home. The duty to provide special treatment may also involve relieving a disabled employee of the requirement to undertake certain tasks which others doing similar work are expected to perform. The scope of the duty is determined by what is reasonable, which includes consideration of the costs involved. This is an objective test which must have regard to all the circumstances of the particular case.”<sup>38</sup>*

Before deciding to dismiss an employee with a disability because of his or her incapacity, an employer is **first obliged to establish the factual position** concerning the nature and extent of the employee’s condition and its likely duration. If it is considered that the employee is not capable of performing the duties of their job the employer **must consider what, if any, special facilities or appropriate measures** could be provided so as to allow the employee to continue in employment<sup>39</sup>.

## Equal pay

**The term ‘equal treatment’ generally refers to the prohibition on affording different conditions of employment by reference to any of the discriminatory grounds.**

For the purpose of the Act, the term “conditions of employment” **does not include pay**. The entitlement to equal pay as between people who come within the discriminatory grounds, with those who do not, is separately provided for by the Act.

Unequal pay, based on any of the discriminatory grounds, is prohibited as between workers who are employed by the same employer, or an associated employer, and are engaged in like work.

**Pay (or remuneration, as it is referred to in the Act) is given a very broad meaning, and includes any benefit, including a benefit in kind, which is derived from the employment.** It is defined as:

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**38** Determination EDA0413 A Worker v an Employer [2005] ELR 159

**39** Determination EDA0359, A Worker v A Health and Fitness Club. This decision of the Labour Court was upheld on appeal and is reported as *Humphries v Westwood Club* [2004] 15 ELR 296

*“remuneration”, in relation to an employee, does not include pension rights but, subject to that, includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment<sup>40</sup>*

**A claim for equal pay must be grounded by reference to an actual comparator (a hypothetical comparator cannot be used) who is employed by the same employer or an associated employer.** This is in contrast to a complaint of unequal treatment where a hypothetical comparator can be relied upon.

However, the complainant and the comparator need not be employed at the same time. A person who was employed up to three years before or three years after the period to which the claim relates can be used as a comparator.

An essential requirement in grounding a claim for equal pay is to establish the existence of what is referred to as **“like work”** as between the complainant and

his or her comparator. This is defined as arising in three types of situation where, as between two people:

- a. both perform the **same work** under the same or similar conditions, or each is interchangeable with the other in relation to the work,
- b. the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant to the work as a whole, or
- c. the work performed by one is **equal in value** to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions<sup>41</sup>.

Paragraphs (a) and (b) of this definition rarely give rise to difficulty. Paragraph (a) applies

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**40** Section 2 of the Act. See also Article 157 TFEU

**41** Section 7(1) of the Act



where two workers are engaged in the same job or where two people are interchangeable with each other. Paragraph (b) applies where two jobs are similar but not identical in every respect. It has been held that a difference in jobs can be regarded as of small importance if the difference is not sufficient to justify a higher rate of pay for one of the jobs<sup>42</sup>.

Paragraph (c) of the definition is intended to capture jobs that are very different but can be valued as equal by reference to the criteria referred to in the paragraph. This usually requires a form of job evaluation exercise to be conducted against the type of criteria specified in the section.

As in the case of equal treatment claims, discrimination in relation to pay can be either direct or indirect.

## Burden of Proof and Standard of Proof

**The burden of proof refers to who has the responsibility to prove facts that may be in issue in a legal action.**

In most cases the person asserting something must prove what they assert. However, in employment equality cases what is usually in issue is **why the respondent acted as he or she did**. That involves a consideration of the respondent's thought process leading up to a disputed act or omission. The difficulty posed for complainants in trying to prove another person's motive or reason lead to the development of a form of **shifting burden of proof**. This means that the complainant is only obliged to establish surrounding or primary facts which could lead to an inference that discrimination has occurred.

If the complainant succeeds in raising an inference of discrimination in this way, the burden of proving the absence of discrimination then passes to the employer.

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42 Determination DEP861 Toyota Motor Distributors (Ireland) v Kavanagh

While the ‘burden of proof’ refers to who must prove what, the ‘standard of proof’ refers to the degree or standard that must be reached before a fact in issue can be accepted as proved. It should be noted that the standard of proof in these cases, like all civil cases, is very different to that which applies in a criminal case. Here, the standard is referred to as “**the balance of probabilities**”. That means that if it is shown that it is more probable than not that something occurred, or did not occur, the fact is said to be proved.

There is a three-tiered test for establishing if the burden shifts to the respondent, often referred to as the “*Mitchell*” test. It provides:

1. It is for the complainant to prove the primary facts upon which he or she relies in seeking to raise a presumption of discrimination. If the Complainant fails to do so, he or she cannot succeed.
2. If the primary facts relied

upon are **proved**, it is for the Adjudication Officer / Court to evaluate those facts and consider if they are of sufficient significance to raise a **presumption of discrimination**

If the facts proven are considered of sufficient significance to raise a **presumption** of discrimination the onus of proving that there was no infringement of the principle of equal treatment passes to the Respondent<sup>43</sup>.

At that stage the complainant is merely required to make our a ‘*prima facie*’ case (i.e. a case that calls for an answer). Consequently, in applying this test the inference of discrimination need not be the only, or the most likely, inference to be drawn from the primary facts established. It is sufficient if it is within the range of reasonable inferences that can be drawn from those facts<sup>44</sup>.

The Labour Court has held that where the burden of proof shifts to the Respondent it required “cogent evidence”<sup>45</sup> to

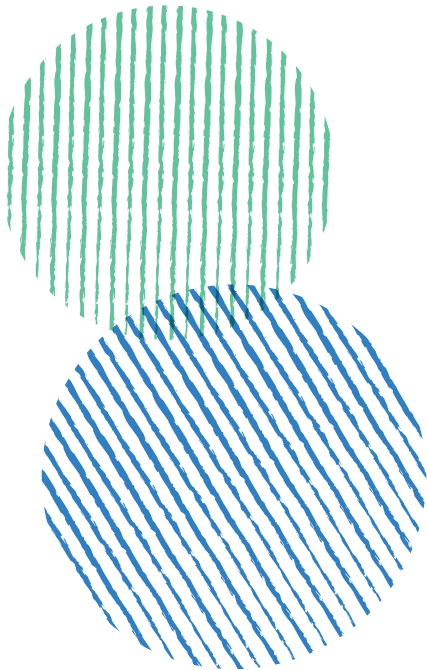
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43 Mitchell v Southern Health Board [2001] ELR 201

44 Determination EDA0821 Cork City Council v McCarthy

45 The Court did not elaborate on what it meant by ‘cogent evidence’ but it appeared to be a reference to the need for corroboration of oral evidence in the nature of records and other documentations.

discharge that burden. Mere denials of discriminatory motive, in the absence of independent corroboration, has to be approached with caution since, as the Labour Court has held, discrimination is *“usually covert and often rooted in the subconscious of the discriminator”*<sup>46</sup>.



## Right to information

**A person who considers that he or she may have been discriminated against has a right to obtain information from the suspected discriminator for the purpose of considering whether a claim should be brought under the Act.**

This entitlement is derived from section 76 of the Act and is expanded upon by Statutory Instrument (S.I.) 321 of 1999 - Employment Equality Act 1998 (Section 76—Right to Information) Regulations 1999.

The information can be obtained by using a questionnaire, the prescribed form of which is set out in Schedule 1 to the Statutory Instrument. The person to whom the questionnaire is addressed must reply using a prescribed form which is at Schedule 2 of the Statutory Instrument.

The information must be **“material information”**, that is to say, it must relate to the case under consideration<sup>47</sup>. The information may be withheld if it is confidential information<sup>48</sup>.

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<sup>46</sup> Determination EDA051, *Portroe Stevedores v Neven and Ors* [2005] ELR 282

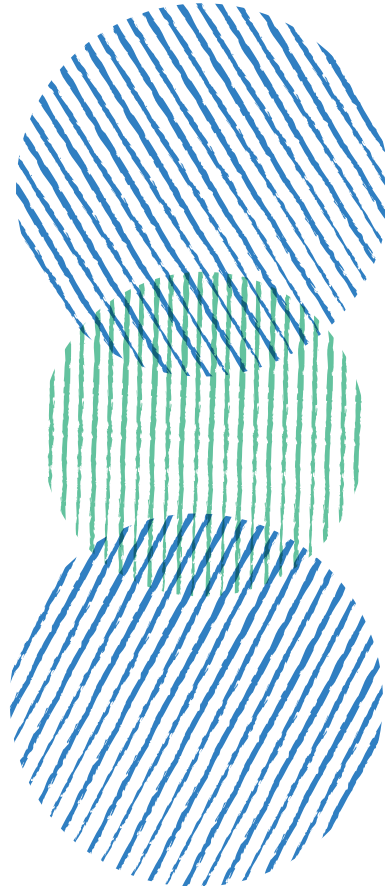
<sup>47</sup> See section 76(2) of the Act

<sup>48</sup> Section 76(3)

The Act does not provide a timescale within which the information is to be provided. However, if a respondent fails to reply to the questionnaire, or if false or misleading information is provided, the Adjudication Officer, or the Labour Court (or the Circuit Court where a claim is initiated before that Court- see section below on seeking redress) may draw such inferences as are considered appropriate<sup>49</sup>.

**There is no limitation on the type of inferences** that can be drawn, provided they are appropriate inferences. In the UK, where a similar provision is contained in their Equality legislation, it has been held that a failure to provide information, or the provision of inaccurate information, is a fact from which discrimination may be inferred for the purpose of shifting the burden of proof<sup>50</sup>. In a case involving equal pay, a failure by the employer to provide information concerning the work undertaken by a prospective comparator led to the Labour Court inferring that had the information been provided it

would have shown that the complainant and the comparator were engaged in like work<sup>51</sup>.



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49 Section 81 of the Act

50 See *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 and *Igen v Wong* [2005] IRLR 285

51 *Determination EDA116, Irish Ale Breweries Ltd v O'Sullivan* [2007] ELR 150

## Exemptions

**The Act allows for certain exemptions from the prohibition on discrimination, either generally or in respect of some of the discriminatory grounds.**

These exemptions are:

**A genuine and determining occupational requirement:**

This applies where gender or another protected characteristic is a genuine and determining requirement for a job. It could arise where an actor of the same sex or colour as the character being played is selected<sup>52</sup>.

**Religious ethos or values;**

There are certain exemptions from the prohibition of discrimination on grounds of religion that apply to educational and medical institutions 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

## Assignments in An Garda Síochána and Prison Service:

The Act permits the selective assignment of men or women to perform certain roles in An Garda Síochána and the Prison Service where that is considered essential:

- i. in the interests of privacy or decency,
- ii. in order to guard, escort or control violent individuals or quell riots or violent disturbances, or
- iii. in order, within the Garda Síochána, to disarm or arrest violent individuals, to control or disperse violent crowds or to effect the rescue of hostages or other persons held unlawfully, or
- iv. prevents the application of one criterion as to height for men and another for women, if the criteria chosen are such that the proportion of women in the State likely to meet the criterion for women is approximately the same

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<sup>52</sup> Section 25(1), in the case of gender discrimination and section 37(2) in the case of discrimination on all other grounds

as the proportion of men in the State likely to meet the criterion for men<sup>53</sup>.

**Operational Efficiency in Emergency Services:** The Act provides that it is an occupational requirement for employment in the Garda Síochána, prison service or any emergency service that persons employed therein are fully competent and available to undertake, 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.

This provision, in effect, provides that fitness and capacity to undertake all the duties of the post in question are a genuine and determining occupational requirement for employment in An Garda Síochána and the emergency services. Consequently, this criterion may be taken into account in relation to employment in those services without infringing the

prohibition of discrimination on grounds of age or disability.

**Defence Forces:** The prohibition of discrimination on grounds of disability does not apply to the defence forces

**Exceptions in relation to certain occurrences:** The act allows an employer to provide a benefit to an employee in respect of the occurrence of family related events such as the birth of a child, marriage, civil partnership, etc<sup>54</sup>.

**Pension and occupational benefit schemes:** There are a number of exceptions to the prohibition of discrimination on age grounds in the case of occupational pension schemes. It is permissible to fix a minimum age for admission to a scheme and it is also permissible to fix age as a criterion for an entitlement to benefit from a scheme. Age can also be used in actuarial calculations in relation to entitlement to benefits under a scheme<sup>55</sup>.

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53 Section 27 of the Act

54 Section 34(1)

55 Section 34(3). See also the decision of the CJEU in case C- 443/15 Parris v Trinity College

### **Special requirements for certain posts:**

The Act permits the stipulation of requirements in relation to residency, citizenship and proficiency in the Irish language for recruitment to certain Government appointments including posts in An Garda Síochána, the Defence Forces, the Civil Service and positions in Local Government, Education and Training Boards and the HSE<sup>56</sup>. There is also a saver for a requirement that primary and secondary teachers be proficient in Irish<sup>57</sup>.

### **Educational Qualifications:**

In relation to access to employment, it is permissible to restrict recruitment to a particular post to those who hold a specified educational, technical or professional qualification which is a generally accepted qualification in the State for posts of that description<sup>58</sup>.

## **Positive Action**

**Positive action can be taken in relation to access to employment, vocational training, working conditions and promotion so as to redress gender imbalances in a workforce.**

The Act is without prejudice to any measures maintained or adopted with a view to ensuring full equality in practice between men and women in employments, and providing for specific advantages so as—

- i. to make it easier for an under-represented sex to pursue a vocational activity, or
- ii. to prevent or compensate for disadvantages in professional careers<sup>59</sup>

It should be noted that the right to take positive action only applies in the case of representation by gender. It does not apply in respect to the other eight discriminatory grounds.

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Dublin and Ors ECLI:EU:C:2016:897, in which it was held that the stipulation of an age before which a member of a pension scheme must marry or enter a civil partnership in order for his or her spouse / civil partner to accrue an entitlement to a survivor's pension does not constitute unlawful age discrimination

56 Section 36(1)

57 Section 36(3)

58 Section 36(4)

59 Section 24

It could arise, for example, in a competition for a management role in an employment where women are underrepresented in senior positions, a man and a woman are equally qualified, it is permissible to appoint the woman on the basis of her gender.

## Forum for seeking redress

**Since the enactment of the Workplace Relations Act 2015 complaints under the Act are now initiated at the Workplace Relations Commission (WRC).**

There is one optional exception. In the case of discrimination or victimisation on grounds of gender the complainant may initiate the claim in the Circuit Court. If that option is exercised, the Circuit Court has unlimited jurisdiction in awarding compensation by contrast to the upper limit of two years' remuneration in the case of the WRC.

There is a right of appeal from the WRC to the Labour Court. The appeal is in the form of a full rehearing of the case (a 'de novo' hearing). There is a further

appeal, confined to a point of law, to the High Court.

## Duplication of Claims

Section 101 of the Act contains a number of provisions directed at preventing duplication of claims and obtaining double redress. They are:

- If a claim in respect of equal pay or equal treatment has been **initiated at common law**, and the hearing of the action has commenced, a claim cannot be referred to the WRC in respect of the same matter<sup>60</sup>.
- If a claim has been submitted to the WRC, and a settlement has been achieved through mediation, or an investigation of the claim has commenced, a claim cannot be taken at common law<sup>61</sup>.

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**60** Section 101(1)

**61** Section 101(2)(a)



- If a complaint is made to the WRC under the Act in respect of a dismissal, and **a settlement had been achieved through mediation or an investigation has commenced**, the complainant cannot initiate a claim under the Unfair Dismissals Acts 1977-2015 in respect of the dismissal. There is an exception to this prohibition where the WRC, having concluded the investigation, directs that a claim of unfair dismissal can be taken<sup>62</sup>. This discretion could be exercised where, for example, an Adjudication Officer concludes that a dismissal was not discriminatory but has reason to believe the it could be an unfair dismissal within the meaning of the Unfair Dismissals Acts.
- A claim in relation to a dismissal may not be brought under the Act if the complainant has:
  - a. Brought proceedings at **common law for wrongful dismissal** and the hearing of the action has begun
  - b. **An Adjudication Officer has made a decision** in respect of that dismissal under the **Unfair Dismissals Acts 1977-2015**
  - c. The Employment Appeals Tribunal had **commenced a hearing** in respect of the dismissal<sup>63</sup>
- Where a claim is referred to the WRC under the Act in respect to a dismissal, and a claim is also referred under the Unfair Dismissals Acts 1977-2015, in respect of the same dismissal, the claim under the Employment Equality Acts will be deemed to have been withdrawn in favour of the claim under

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**62** Section 101(2)(b)

**63** Section 101(4)

the Unfair Dismissals Acts, unless within 42 days of the referral<sup>64</sup>, the claim under the Unfair Dismissals Acts is withdrawn<sup>65</sup>.

## Parallel Claims

Section 101A of Act provides that where an act or omission constitutes a contravention of the Act and of either the Protection of Employees (Part-Time Work) Act 2001 or the Protection of Employees (Fixed-Term Work) Act 2003, redress may not be obtained in respect of that contravention under both the Act and either the Act of 2001 or 2003.

It should be noted that the prohibition provided by this section operates differently than that provided for by section 101 (referred to above). In the case of the latter, the prohibition applies if alternative proceedings have either commenced or have been completed, regardless of the outcome. In the case of section 101A, the bar on redress under

the Act **only applies if redress was obtained** in the alternative proceedings.

Consequently, if unsuccessful proceedings were taken under either the Act of 2001 or the Act of 2003 the bar on obtaining redress under the Act would not apply because no redress was obtained in the other proceedings<sup>66</sup>.

## Redress

**Where a complainant succeeds in a claim under the Act he or she is entitled to redress. The type of redress that can be provided is specified at section 82 of the Act.**

That section provides, in effect, that the following redress can be provided:

- a. **In an equal pay claim, an order directing the employer to pay the complainant equal remuneration.** The order can make provision for compensation in respect

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<sup>64</sup> See S.I. No. 126 of 2016, referred to earlier in this Guide in which the 42 day period is specified.

<sup>65</sup> Section 101(4A)

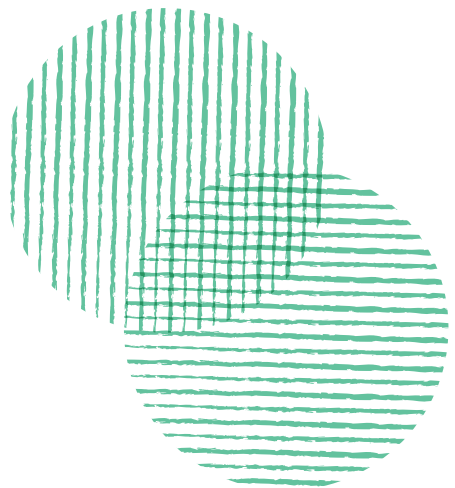
<sup>66</sup> See Determination FTD065 Galway City Council v Mackey, in which the Labour Court considered the effect of a similar provision in section 18 of the Protection of Employees (Fixed-Term Work) Act 2003

of arrears of remuneration for a period of not more than three years prior to the date on which the claim was initiated. An order can also be made directing the employer to pay the complainant equal remuneration from the date of claim onwards. If the claim is based on grounds of gender and it is initiated in the Circuit Court, compensation in respect of arrears of pay for a period not exceeding six years can be awarded.

- b. **An order for compensation for the effects of acts of discrimination or victimisation** that occurred not earlier than 6 years before the date on which the claim was initiated. It should be noted that the reference here to discrimination or victimisation that occurred in the 6 years prior to the initiation of the claim relates to ongoing or continuing discrimination or victimisation<sup>67</sup>.
- c. **An order directing the respondent to afford**

**the complainant equal treatment in whatever respect is relevant.** This could include, for example, an order directing an employer to alter the complainant's conditions of employment so as to comply with the principle of equal treatment. It can also involve a mandatory order requiring the appointment of a complainant to a particular post.

- d. An order directing a person or persons to take a **specified course of action**
- e. In the case of a **dismissal**, an order for **re-instatement or reengagement, with or without compensation.**



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67 See section below on continuing discrimination / victimisation

## Maximum Amount of Compensation

**The maximum amount of compensation that can be awarded by the WRC, and the Labour Court on appeal, is generally set at 104 weeks' remuneration, or €40,000, whichever is the greater.**

If the complainant was not in receipt of remuneration from the respondent at the date the discrimination occurred a maximum of €13,000 can be awarded. That could apply where a complainant was discriminated in relation to a job application.

The maximum amount referred to applies notwithstanding that the conduct complained of may have amounted to discrimination on more than one of the discriminatory ground or that the it amounted to discrimination and harassment or sexual harassment<sup>68</sup>. That is not to say that separate awards may not be made for discrimination and harassment arising from the same conduct. It merely means that the total aggregate award arising

out of that conduct cannot exceed the relevant maximum amount. **The reference here to discrimination does not include a failure to provide equal remuneration.**

It should also be noted that if conduct giving rise to a complaint amounts to **discrimination and victimisation** the provision in relation to aggregation for the purpose of applying the statutory maximum does not apply. Consequently, **separate awards of compensation** can be made in respect of each transgression and the statutory maximum applies to each award separately.

## Computing Compensation

**Section 82(1)(c) of the Act provides that compensation can be awarded for the effects of discrimination or victimisation.**

The former Equality Tribunal and the Labour Court have consistently held that in measuring the quantum of compensation to be awarded regard must be to all the

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68 Section 82(6)(a) of the Act

effects that flow from the **discrimination** and not just to financial or pecuniary loss<sup>69</sup>. It has also been consistently held that compensation must be **effective, proportionate and dissuasive**<sup>70</sup>.

## Interest on Awards

In cases involving equal pay, equal treatment or victimisation in which the gender ground is relied upon, interest at the rate which is applicable to awards made by the ordinary courts under the Courts Act 1981, can be added to award made by an Adjudication Officer or the Labour Court<sup>71</sup>.

## Tax Treatment of Awards

Awards of compensation, other than awards in the nature of remuneration, including arrears of remuneration, are not liable to tax or other statutory deductions. Awards in the nature of remuneration, including arrears of remuneration are subject to tax and other statutory deductions in the same way as other remuneration. An Adjudication Officer and the Labour Court are expected to specify if an award, or any part of an award, is not in respect of remuneration<sup>72</sup>.

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**69** See, for example, Determination DEE045, Citibank v Ntoko [2004] E.L.R. 116

**70** That formulation was set out by the CJEU in case C-14/83, Von Colson and Kamann v Land Nordrhein-Westfalen EU:C:1984:152. The European Court's case law on computing compensation is now codified in Directive 2006/54/EC – The Recast Directive. However, in case C-407/14 Arjona Camacho v Securitas Seguridad España SA ECLI: EU:2015:831, at par 40, the CJEU held that article 25 of that Directive allows, but does not require, Member States to provide for punitive damages. The Court went on, at par 44 of the judgment, to point out that in setting limits on punitive damages the principles of equivalence and effectiveness must be respected. That means that if punitive damages are available within the legal system of a Member State they cannot be excluded in cases where a right derived from European Union law is in issue. Punitive damages are available in certain circumstances within the Irish legal system.

**71** Since 1<sup>st</sup> January 2017 the rate of interest prescribed by the Courts Act 1981 (Interest on Judgment Debts) Order is 2% p.a.

**72** See section 7 of the Finance Act 2004, which amended section 192A of the Taxes Consolidation Act 1997

## Processing Claims

Since the commencement of the Workplace Relations Act 2015 claims under the Act, in common with all claims arising under employment enactments, are initiated in the Workplace Relations Commission. A standard online form is used for this purpose.

A comprehensive guide to the procedures in processing claims was published by the WRC entitled, "**Procedures in the Investigation and Adjudication of Employment and Equality Disputes**". It is available on line at:

[https://www.workplacerelations.ie/en/Publications\\_Forms/Procedures\\_Employment\\_and\\_Equality\\_Complaints.pdf](https://www.workplacerelations.ie/en/Publications_Forms/Procedures_Employment_and_Equality_Complaints.pdf)

This guide should be consulted before completing the complaint form.

## Time Limits

**It is of critical importance that the statutory time limits are observed.** The time for bringing a claim of discrimination or victimisation under the Act is six months from the date of occurrence of the discrimination or victimisation or the most recent occurrence<sup>73</sup>. This time limit does not apply to a claim for equal pay.

The time-limit of six-months includes the date of the occurrence (or the last occurrence) giving rise to the complaint. Consequently, the six months is counted as including that date.

The reference to the "most recent occurrence" is intended to address situations in which there is ongoing or continuing discrimination or victimisation. Where that is the case the time limit generally runs from the time that the discrimination or victimisation ceases. If the complaint is presented within the six-month period from that date, all of the continuing discrimination or victimisation can be relied upon in seeking redress.

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73 Section 77(5) of the Act.

## Time Limits – Continuing Discrimination / Victimisation

**Continuing Discrimination can occur in two different types of situation.** Firstly, an act will be regarded as extending over a period, and so treated as having been done at the end of the period over which it extended, if an **employer maintains and keeps in force a discriminatory regime, rule, practice or principle** which has had a clear and adverse impact on the complainant<sup>74</sup>.

This could arise, for example, where an employer applies a practice or policy which has the effect of preventing women from obtaining a benefit in employment such as access to a pension or sick pay scheme. Likewise, continuing victimisation could arise where, for example, an employer pursues a policy of not promoting an employee who brought a complaint of discrimination. In these circumstances, there is a

single act of discrimination or victimisation which extends over a period. In such cases the time limit only starts to run in relation to the totality of the discrimination or victimisation when the regime, rule, practice or principle is discontinued.

Secondly, continuing discrimination can arise where there are a series of separate acts or omissions which, although not forming part of a regime *etc.*, are sufficiently connected so as to constitute a continuum.<sup>75</sup> This could arise, for example, where there are a number of seemingly unrelated acts or omissions in relation to an individual but they arose in consequence of the same discriminatory disposition towards that individual.

In order to rely on this type of continuing discrimination or victimisation there **must have been an actual act** of discrimination or victimisation within the six-month period preceding the reference of the complaint. In these situations, the Adjudication Officer / Labour Court will first consider,

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<sup>74</sup> This type of continuing discrimination is covered by section 77(6A) of the Act. See also *Barclays Bank plc v Kapur* [1989] I.R.L.R. 387.

<sup>75</sup> This type of situation is covered by section 77(5) of the Act. See also *Arthur v London Eastern Railway Ltd* [2007] I.R.L.R. 58

as a preliminary issue, if an act or omission relied upon, that occurred within the time limit, constituted discrimination or victimisation. If it is found that the act or omission relied upon within the time-limit did not constitute discrimination or victimisation the claim will fail (unless an extension of time is obtained). That will arise because the last actual act of discrimination or victimisation will have occurred outside the six-month time limit.

The application of these special rules in relation the six-month time limit in cases of continuing discrimination and victimisation was extensively considered by the Labour Court in Determination EDA1124 *Ann Hurley v Cork VEC*.<sup>76</sup>

## Extending Time

**The time within which a claim of discrimination or victimisation can be brought may be extended where there was reasonable cause for the delay.**

An application for an extension of time can be made to the Director General of the Workplace Relations Commission or, on appeal, to the Labour Court. The maximum extension that can be obtained is a further six months' – giving a total maximum time limit of 12 months<sup>77</sup>.

The standard which must be met in order to obtain an extension, that of **reasonable cause**, is not particularly high. But it should never be assumed that an extension will be granted and the initiation of a claim should never be delayed in the expectation of obtaining an extension.

**The onus is on the applicant** for an extension of time to show that there are reasons which both explain the delay and which afford a justifiable excuse for

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<sup>76</sup> The decision in *Hurley* was referred to with approval by McKechnie J in the Supreme Court decision in *County Louth Vocational Educational Committee (Now Known as Louth and Meath Education and Training Board) v The Equality Tribunal [2016] IESC 40*

<sup>77</sup> Section 77(5)(b)



the delay. The excuse offered must be reasonable and it must be shown that the reason relied upon was the actual cause of the delay. Regard will also be had to the question of whether the Respondent **suffered any prejudice** in consequence of the delay<sup>78</sup>.

A decision of the WRC on an application to extend time **can be appealed** to the Labour Court by either the complainant or the Respondent. The time limit of 42 days from the date of the decision applies, as it does to all other appeals to the Labour Court (see section below on appeals). Unless the parties otherwise agree, where an extension of time is granted the substantive case cannot proceed until the expiry of the 42 day period or where an appeal is taken, until the appeal is determined.

## Obtaining Information

Depending on the nature of the complaint being pursued, it may be prudent to seek information from the Respondent under the

procedure provided by section 76 of the Act. If information is being sought, the form contained in the schedule to S.I. No 321 of 1999 (see section earlier in this Guide on the right to information).

## Completing the Form

**Care should be exercised in completing the form. In particular, the correct name of the employer/ respondent should be given.**

This often gives rise to difficulty. The employer is usually either a human person or a company. If it is a human person he or she may carry on business under a trading or business name. The business name is not a legal entity and is not the correct name of the employer. In these type of situation the correct description of the employer is *"Joe Blogs, Trading as (or T/A) Joe's Car Sales"*.

A company is a legal entity and is distinct from its shareholders. Where a business is owned by a company the company is usually

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**78** See Determination EET042, Department of Finance v IMPACT and Ors [2005] ELR 6. This Determination was appealed to the High Court. While setting the substantive decision of the Labour Court aside, Laffoy J agreed with the approach taken by the Labour Court in relation to the test for extending time (Minister for Finance v CPSU and Ors [2007] ELR 36

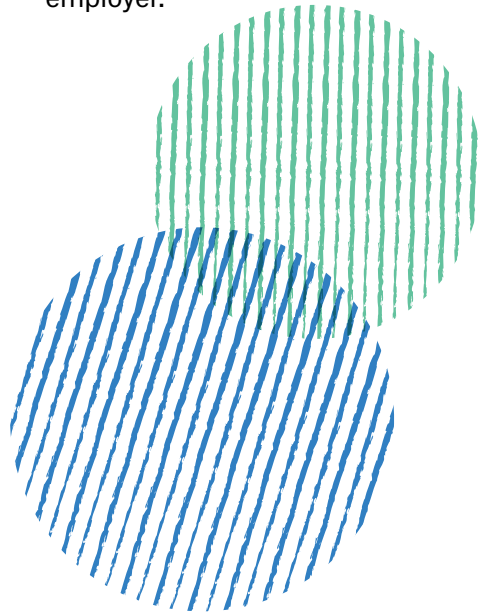
the employer. Most business are limited companies and the entity running the business will usually have the word Ltd at the end of its name, as in *“Joe’s Car Sales Ltd”*.

In order to ensure that the correct name and description of the employer is given there are a number of important precautions that should be taken:

- Check the employee’s contract of employment or the statement that he or she received from the employer under the Terms of Employment (Information) Act 1994-2014<sup>79</sup>.
- Check pay slips and P60s to see how the employer is described
- Check with the Companies Registration Office (CRO). If the employer is a company it should be described using the name under which it is registered with the CRO. If it is a business name

that should also be registered with the CRO. The entry with the CRO will give the name of the owner of the business name, whether it is a human person or a company.

- As a further precaution, it is advisable to write to whoever is thought to be the employer asking for confirmation of that fact and for confirmation of the correct name and description of the employer.



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**79** Section 3(1)(a) and (b) of the Terms of Employment (Information) Acts 1994-2014 obliges an employer to include in the statement with which an employee must be provided, a statement of the name and the address of the employer.

## Statement Accompanying the Form

**The procedures of the Workplace Relations Commission provide that in equality and unfair dismissal cases the party bearing the burden of proof must submit a statement setting out the details of the complaint.** This statement should be sent to the WRC at the same time as the form. However, if the six-month deadline for initiating the claim is approaching the submission of the form should not be delayed and the statement can be sent to the WRC as soon as practicable thereafter.

The relevant requirements are set out at section 5 of the **Procedures in the Investigation and Adjudication of Employment and Equality Disputes**. A link to this document is provided earlier in this guide.

## Mediation

The parties to an equality dispute may be offered mediation as an alternative to adjudication. A mediation service is provided by the WRC on a selective basis. Mediation is voluntary and either party can decline to engage in the process. If either party declines mediation, or if it is unsuccessful, the case will be referred to adjudication.

**A settlement reached in mediation is enforceable in law through the ordinary courts.<sup>80</sup>**

## Hearings

**Hearings before an Adjudication Officer are held in private.**

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**80** Section 39(6) of the Workplace Relations Act 2015

## Decision on Preliminary Points

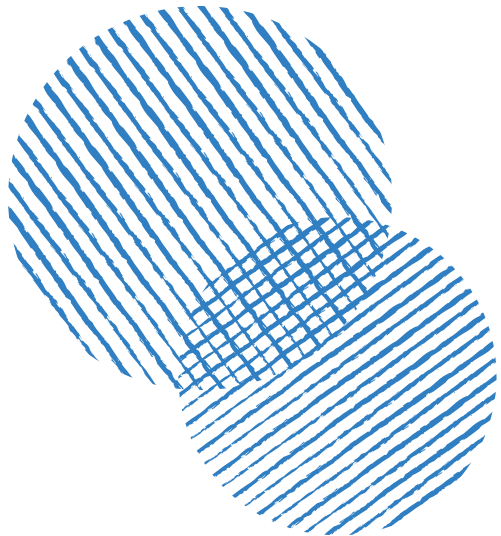
**An Adjudication Officer may give a preliminary decision on certain questions that may arise in a case.**

The Act provides that a preliminary decision can be given where:

- In an equal pay case, a question arises as to whether a difference in remuneration is on **a ground other than a discriminatory ground,**
- A question arises concerning the entitlement of a party to bring or defend a complaint. This can include questions relating to:
  - Whether the complainant has **complied with a statutory requirement** in relation to the referral

- Whether the complainant is an employee (as that term is defined by the Act)
- **Any other related question of law or fact**<sup>81</sup>

Where a decision on a preliminary question is in favour of the complainant the Adjudication Officer must proceed to investigate the substantive case. If the decision on the preliminary question is against the complainant, he or she may appeal against that decision to the Labour Court<sup>82</sup>.



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<sup>81</sup> Section 79 (3) and (3A) of the Act

<sup>82</sup> Section 79(6)(b) of the Act

## Appeal to the Labour Court

**A party who is dissatisfied with a decision of an Adjudication Office may appeal to the Labour Court.**

Section 44(2) of the Workplace Relations Act 2015 provides that an appeal *“shall be initiated by the party concerned giving a notice in writing to the Labour Court containing such particulars as are determined by the Labour Court in accordance with rules under subsection (5) of section 20 of the Act of 1946 and stating that the party concerned is appealing the decision to which it relates”*. Rules have been made by the Labour Court under subsection (5) of section 20 of the Industrial Relations Act 1946 for this purpose. The Rules, entitled Labour Court (Employment Enactments) Rules 2016, can be found at:

[https://www.workplacerelations.ie/en/Publications\\_Forms/Labour-Court-Employment-Rights-Enactments-Rules.pdf](https://www.workplacerelations.ie/en/Publications_Forms/Labour-Court-Employment-Rights-Enactments-Rules.pdf)

The Rules set out the process to be observed in initiating an appeal and the Court’s requirements in relation to the filing of submissions etc. They also set out in some detail the procedures followed by the Court in the conduct of hearings.

**The Rules should be consulted before initiating an appeal.** Part I of the Rules relates to appeals in cases under the Employment Equality Acts.

## Nature of the Appeal

**The appeal takes the form of a complete rehearing of the case heard before the Adjudication Officer. This is referred to as a ‘de novo’ hearing.**

New evidence can be adduced which was not proffered to the Adjudication Officer and new submissions can be made. However, the nature of the claims must remain the same. An appeal cannot be used to introduce additional claims or to change the nature of the claim made before the Adjudication Officer<sup>83</sup>.

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83 See Determination DWT12141, Dawn Country Meats Limited and Roisin Hill

## Initiating the Appeal

The appeal should be initiated on a form which can be obtained on the Workplace Relations website at: [https://www.workplacerelations.ie/en/Publications\\_Forms/](https://www.workplacerelations.ie/en/Publications_Forms/). The form can also be obtained directly from the Court.

The appeal must be lodged with the Court within **42 days from the date of the decision to which it relates**. The date of the decision counts as the first day of the 42-day period<sup>84</sup>. The notice of appeal must be received by the Court within the 42-day period prescribed. It is not sufficient to show that it was posted within that period.

The 42-day period **may be extended** where the delay in presenting the appeal is due to **'exceptional circumstances'**<sup>85</sup>. This is a higher standard than that of 'reasonable cause' which applies for the purpose of obtaining an extension of time for the initiation of a claim. In interpreting a similarly worded provision of the Unfair Dismissals

Act 1977 the Employment Appeals Tribunal said that exceptional circumstances means something "*out of the ordinary*" and "*probably quite unusual but not necessarily highly unusual*"<sup>86</sup>. The Labour Court has held that in order to be exceptional "*a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regularly or routinely or normally encountered*"<sup>87</sup>.

**The onus in on the applicant** for an extension of time to establish the existence of exceptional circumstances and to establish that the existence of the exceptional circumstances was the substantial cause of the delay in initiating the claim within the requisite 42-day period.

A copy of the Adjudication Officer's decision to which the appeal relates must be sent with the appeal form. A copy of the Appeal form is sent to the Respondent by the Labour Court.

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<sup>84</sup> This is in accordance with section 18(h) of the Interpretation Act 2005

<sup>85</sup> Section 44(4) of the Workplace Relations Act 2015

<sup>86</sup> *Byrne v PJ Quigley Ltd* UD/7621994, [1995] E.L.R. 205

<sup>87</sup> *Determination EET034 Fitzsimons-Markey v Gaelscoil Thulach na nÓg* [2004] E.L.R. 110

## Submissions

**Within three weeks of the initiation of the appeal the appellant is required to forward a submission in writing to the Court setting out the basis of the case that he or she intends making in advancing the appeal.**

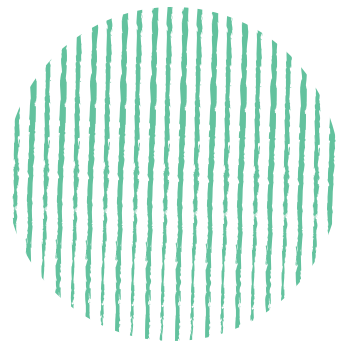
The appellant's submission is then sent by the Court to the respondent. The respondent then has three weeks following receipt of the appellants submission in which to file a replying submission in which the basis upon which the appeal will be defended must be set out. The respondent's submission is then sent to the appellant.

The purpose of the submissions is to inform the Court of the content of the case. That facilitates the Court in allocating sufficient time to the hearing. It also ensures that both parties are aware in advance of the case that they are expected to meet. As pointed out earlier, the appeal involves a rehearing of the whole case and the evidence and arguments advanced by either the appellant or the respondent might not necessarily be the same as that relied upon at the earlier hearing before the Adjudication Officer.

## Content of Submissions

The Rules provide that the submissions from both the appellant and the respondent should contain:

- a. **A concise statement** of the factual background to the claim giving rise to the appeal;
- b. **A summary of the evidence** to be adduced by, or on behalf of, the party making the submission;
- c. **A summary of any legal arguments** that will be relied upon in the course of the appeal;
- d. The **number of witnesses**, if any, that the party proposes to call at the hearing of the appeal.



## Hearings and Case Management

When all the necessary documents are received by the Court, a date for the hearing will be fixed and notified to the parties. However, where the Court considers it desirable to do so, **the parties may be invited to a pre-hearing case management conference.** The purpose of a case-management conference is to ensure that the issues necessary to dispose of the appeal are properly addressed by the parties. At that stage issues arising in the case that could be disposed of by way of a preliminary hearing can be identified.

**At least seven days before the hearing** of the appeal each party must send to the Court a notice giving:

- The **names of witnesses** that the party intend calling,
- An **outline of the evidence** that each witness is expected to give,
- **Any document** that the party intends to rely on in the appeal.

Appeals are heard by a Division of the Labour Court. A Division consists of three members of the Court – A Chairman, who is either the Chairman of the Court or a Deputy Chairman of the Court and two ordinary members, one of whom is appointed on the nomination of ICTU and one appointed on the nomination of IBEC. All three members of the Division are expected to approach the case with an open mind and impartially. The ordinary members should not be expected to represent the interests of either party.

It is vitally important that no contact whatsoever be made between the parties to an appeal or their representatives and any member of the Court outside of the formal hearing.

Hearings before the Court are somewhat more formally conducted than hearings before the WRC Adjudication Officer. Hearings are also conducted in public and representatives of the media may attend. The details of the procedures followed by the Court in the hearing of appeals is set out at **Part IV of the Labour Court Rules.**



In summary, the Rules provide:

- Those present in Court **should stand** when the members of the Court enter and leave the courtroom.
- Unless the Court decides otherwise, the normal practice is for each party to **read their submission** at the commencement of the hearing. The Representative presenting the submission should stand while doing so. Otherwise parties may remain seated when addressing the Court.
- Evidence may be taken from witnesses **under oath or affirmation**. Witnesses who intend giving evidence will be sworn by the Court Secretary before the commencement of the hearing,
- **Oral evidence is taken on questions of facts that are relevant to the case and in dispute between the parties.** Witnesses are first questioned by the

representative of the side for which they appear. This is referred to as 'examination-in-chief'. A witness may then be questioned by the representative of the other party to the appeal. This is referred to a cross-examination. Witnesses may be questioned by the members of the Court for the purpose of clarifying any aspect of their evidence

## Decisions

The decision of the Court on the appeal, which is referred to as the 'Determination' is given in writing as soon as possible after the hearing.

## Further Appeals

There is a further appeal available from the Determination of the Labour Court to the High Court. This is a more restricted appeal and it is confined to a point of law.

# RESEARCHING CASES

**This Guide is intended to provide the reader with a basic understanding** of the statutory provisions and general principles governing the law in relation to equal treatment in employment and occupations. **Many of the legal propositions set out in the Guide are supported by references in the footnotes to cases** decided under the Act by the Labour Court, the Superior Courts, the Court of Justice of the European Community (CJEU) and, in some cases, the UK Courts. These decided cases are referred to as **'authorities'**. A fuller understanding of this area of law can be obtained by reading these authorities and seeing how the statutory provisions and legal principles were applied in practice to a particular set of facts.

This part of the Guide provides information on how the cases referred to, and other decided cases, can be accessed.

## Sources

### WRC / Labour Court

**There are a number of public websites on which decisions are published.** The Workplace Relations website contains all decisions and of the WRC Adjudication Service and determinations of the Labour Court. This web site also contains decision of the former Equality Tribunal. This website can be accessed at [http://www.lrc.ie/en/Decisions\\_Determinations/](http://www.lrc.ie/en/Decisions_Determinations/).

Every decision contains a decision number and the easiest way of accessing a case is by using that number in the search platform (i.e. EDA1605, in the case of a Labour Court Determination)

## Superior Courts

Most decisions of the Superior Courts (the High Court, Court of Appeal and Supreme Court) can be obtained on the Court Service website

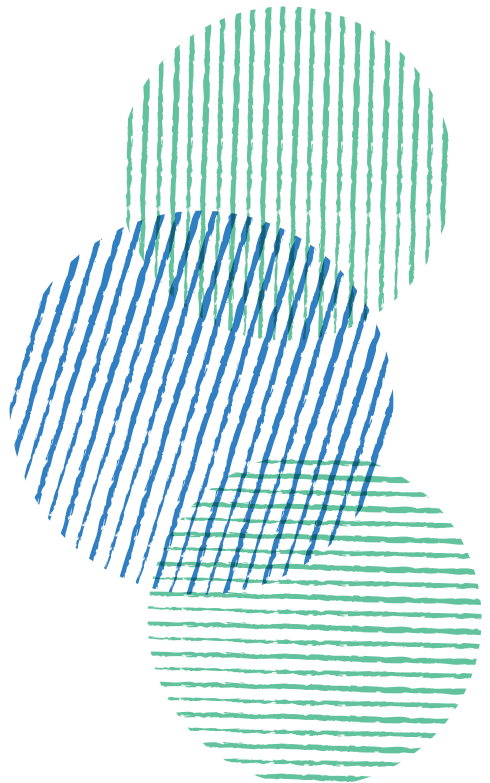
<http://courts.ie/Judgments.nsf/Webpages/HomePage?OpenDocument>

The reference number, or 'citation' as it is technically referred to, indicates the year of the judgment and the court which delivered the judgment. So, in the citation the year of the judgment is given in square brackets followed by the Court (IEHC = High Court, IECA = Court of Appeal and IESC = Supreme Court). The numerical listing of the case is then given, as in [2017] IEHC 200.

Another useful publically available legal web site is that of the Irish Legal Information Initiative, which is provided by University College Cork at <http://www.ucc.ie/law/irlii/irliiindex/irliiindexdisp.php?ct=hc&yr=1991>. This website contains the decisions of the Superior Courts listed by year.

## Court of Justice of European Community

All cases decided by the CJEU are available online at the Court's website at <http://curia.europa.eu/juris/recherche.jsf?language=en>. Cases can be found on the search engine by putting in the case number which in the format C- file number / year of reference, as in: "C-20/17"



## Reported Cases

**There are a number of commercial enterprises who publish reports** of legal decisions of tribunals and courts. These are referred to as 'reported cases'. The abbreviation in the citation indicates where the report can be obtained. The main reports are:

### Report Abbreviation

Employment Law Reports:	E.L.R.
Industrial Relations Law Report <sup>88</sup>	IRLR
Irish Report	IR
Irish Law Report Monthly	I.L.R.M.

There are also a number of commercial websites which contain reports of many employment related cases, including equality cases decided by the employment tribunals, the Labour Court and the Superior Courts. These websites are available on subscription only.

A reported case contains a **"head note"** which sets out the material facts and the key finding made by the Court. The head note is a useful tool in conducting legal research in that it can indicate if the case is relevant to the subject under consideration without reading the whole judgment.

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**88** This is a UK publication which reports decisions of UK Courts and Tribunals. It also reports decisions of the CJEU that relate to employment and equality law









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