RECORD NO: SAPIE/2018/37

THE SUPREME COURT

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS, 1998 - 2011

AN APPEAL PURSUANT TO SECTION 90(1) AGAINST

DETERMINATION EDA 1430 BY THE LABOUR COURT, 12TH AUGUST 2014

Between:

NANO NAGLE SCHOOL

Appellant

-and-

MARIE DALY

Respondent

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

SUPPLEMENTAL SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

By leave of this Honourable Court on 20 November 2018, the Irish Human Rights and Equality Commission ("the Commission") hereby supplements its submissions of 25 October 2018 as follows:

1. Cahill v Minister for Education and Science[1]

1.1. The Supreme Court was concerned in this case with the interpretation of the obligation on the part of a service provider to provide reasonable accommodation to a person with a disability under Section 4 of the Equal Status Act, 2000 ("the Act of 2000").

1.2. The Commission notes that the Act of 2000 is a remedial social statute and that MacMenamin J., at paragraph 45 of his Judgment, recognised that "*therefore, the Court is permitted to adopt a broad generous, purposive approach, in order to identify and give effect to the plain intention of the Oireachtas.*"

1.3. Section 4 (1) provides that: - "*For the purposes of this Act, discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.*"

1.4. Failure to provide reasonable accommodation as required by Section 4, can give rise to a service provider being exposed to a claim of discrimination as a separate action. In that regard Section 4 differs substantially from Section 16 of the Employment Equality Act, 1998 ("the EEA"). The failure to provide reasonable accommodation is actionable as a separate complaint of discrimination on the grounds of disability, under the Act of 2000. Under the EEA there is a primary obligation on an employer to provide reasonable accommodation under Section 16(3)(b), but this does not give rise in itself to the basis on which an employee can raise a complaint under the EEA. [2]

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[1] [2017] IESC 29

[2] Some commentators consider this fact to render the EEA not in compliance with the EU Framework Directive or the UN Convention on the Rights of Persons with Disabilities ("CRPD"). The Centre for Disability Law and Policy, NUI Galway in its submission on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill comments on this issue that *"This is a clear breach of Article 2 of the CRPD, which states that*

1.5. There are, therefore, a number of significant differences between the treatment of reasonable accommodation in the Act of 2000 and the EEA but primary amongst those is the fact that Section 16 places a primary positive obligation on an employer *to take appropriate measures, where needed in a particular case, 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, unless the measures would impose a disproportionate burden on the employer*. Section 4(1) operates in a negative manner rendering a failure to do all that is reasonable actionable discrimination under the Act of 2000.

Inference of Proportionality

1.6. Laffoy J., at paragraph 65 of her Judgment, recognised the difference between reasonable accommodation in Section 4(1) and reasonable accommodation within Article 5 of the Framework Directive and the CRPD where the concepts of "*disproportionate burden*" and "*disproportionate or undue burden*" are present, but are absent from the Act of 2000. Laffoy J. recognises that it is in the language whereby the service provider is required to do "*all that is reasonab*le" in section 4(1) which imports the concept of proportionality into the section. It is in the context of this import of the concept of proportionality which "*envisages that a balance is to be maintained between the needs of the disabled person and how those needs are met by the provision of special treatment or facilities to the extent necessary to enable the disabled person to avail of the service or to do so without undue difficulty on the one hand and the effect of such provision on the service provider in the overall context of the position of the service provider, as the provider of the service on the other hand.*" [3]

1.7. The School in its submissions has suggested that by parity of reasoning there is a similar qualification of proportionality applied to the duty of the employer under Section 16 of the EEA. However, there is no requirement to infer proportionality into

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"'Discrimination on the basis of disability'... includes all forms of discrimination, including denial of reasonable accommodation". This could be easily addressed by amending section 16 of the Employment Equality Acts to reflect the position of section 4(1) of the Equal Status Acts."

3 Judgment of Laffoy J. at paragraph 73.

the obligation in Section 16(3)(b) as this is already expressly captured in the subsection by the words "*unless the measures would impose a disproportionate burden on the employer.*" There is further assistance provided in the EEA when considering whether the measures which the person with the disability needs are a disproportionate burden as Section 16 (3)(c) provides that "*In determining whether the measures would impose such a burden account shall be taken, in particular, of (i) the financial and other costs entailed,(ii) the scale and financial resources of the employer's business, and (iii) the possibility of obtaining public funding or other assistance.*" There is no assistance provided in the Act of 2000 when considering what measures constitute "*all that is reasonable*". For that reason, Laffoy J. determined that proportionality be inferred into the duty in Section 4(1).

Interpretation of "all that is reasonable" standard in the Act of 2000

1.8. While the School suggests that the "*all that is reasonable*" standard in Section 4(1) is more onerous than that on an employer in Section 16, the Commission respectfully disagrees with this suggestion. The Commission submits that the standard in the EEA is in fact the more onerous standard.

1.9. There is no limitation such that an employer is only required to do "*all that is reasonable*" in Section 16. The employer is required to provide appropriate measures. The measures are appropriate if they are the ones which are necessary (and not reasonable) in a particular case for a person with a disability to vindicate their rights to participation and advancement in employment. The measures must be effective and practical. There is no limitation on what those measures should be, if they satisfy the requirements of the disabled person to engage in employment as envisaged by the section (unless the measures would impose a disproportionate burden on the employer).

1.10. The School claims that ,with respect to the Act of 1998, the specific limitation on an employer's obligation is that for such accommodations to be reasonable, they must result in the employee being brought to a level where they are fully competent and capable of undertaking the role for which they have been employed. This is not the

standard of accommodation which is required by Section 16. Section 16 requires an employer to take appropriate measures where needed on the basis set out therein. This is a further example of the School incorrectly limiting the relevance and the standard of reasonable accommodation to its interconnection with Section 16(1) and not as a primary obligation in Section 16(3)(b).

1.11. Paragraph 58 of MacMenamin J.'s Judgment recognises the difference between the duty to provide reasonable accommodation as a primary obligation and the separate treatment of disability discrimination in Section 3 of the Act of 2000 wherein he states that, in his view: - "*Section 3(2)(g) will not, therefore, always or inevitably lead to a determination of 'no discrimination' under Section 4(1). This is because Section 4(1) not only contains a 'substantive' aspect, overlapping at times with s. 3(2)(g), but also has a 'procedural' dimension that is one based on the question whether a respondent did* "all that is reasonable" *procedurally, as well as in substance.*"

1.12. The Commission relies on paragraph 66 of MacMenamin J.'s Judgment wherein he considers the criteria to be applied when considering "*all that is reasonable*":-

"The position is, rather, that, as a first step, the words of the provision should be broadly interpreted in light of the values contained in Article 40., asking the question, what are the 'needs' that are necessary to achieve equality in the case of a person with a disability. But, that is only a first step. In enjoining a service provider to do all that is reasonable, the provision imposes positive obligations to remove tangible and intangible barriers to disabled persons. The words all *and* everything *are, I believe, synonymous terms in this respect. What is in question here is not a simple common law 'duty of care', 'balancing' exercise, as to what is* "reasonable"*, but rather one where the balance is significantly tilted in order, where necessary, to impose positive obligations to ensure that all practical steps are taken. This is different from refraining or abstaining from doing something. The legislative object therein should be seen as to do everything that is reasonable and practicable, both procedurally, and in substance, ensures the treatment of a person with a disability is placed at the same level as a person without a disability. The obligation is not, therefore, simply to refrain from certain actions, but, where necessary, to engage in positive action. In colloquial terms, it can impose a duty to* "go the extra mile"*."*

1.13. The Commission submits that where Section 16(3)(b) specifically contains the type of positive obligation which is referred to in this part of MacMenamin J.'s Judgment, the reasoning applies to the manner in which the obligation on an employer to provide reasonable accommodation under the EEA should be interpreted. Such interpretation is precisely what is intended by the CRPD and it is not limited in any way by the EEA itself.

1.14. While O'Donnell J. in his Judgment disagreed with MacMenamin J. that the "*all that is reasonable*" test in the Act of 2000 should be converted into a more open-ended obligation to go the extra mile, the Commission submits that the reasoning in MacMenamin J.'s Judgment on what he saw as the positive obligations to ensure that all practical steps are taken, is persuasive in the context of Section 16. Unlike the Act of 2000, there is a positive obligation on an employer in Section 16. There is no similar "all that is reasonable" test. There is no requirement to "convert" that test into something more open-ended. The test is already open-ended such that an employer is obliged to go the extra mile.

Cathy Smith BL
Cliona Kimber SC
4 December 2018

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