

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

**RESPONSE ON BEHALF OF THE AMICUS CURIAE TO SUBMISSIONS FILED
ON BEHALF OF NANO NAGLE SCHOOL**

I. The Irish Human Rights and Equality Commission (“the Commission”) wishes to respond to the submissions of the Respondent School dated November 2018, as follows.

II. The duty to provide Reasonable Accommodation is a primary obligation to secure non-discrimination on grounds of disability.

1. The Commission wishes to set out first the understanding in international law and the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) as well as the EU Framework Directive (“the Directive”) that the duty to provide reasonable accommodation is one of the primary obligations which underpins the principle of equal treatment in relation to persons with disabilities. An understanding of the centrality of the duty as a *grundnorm* for equality for persons with disabilities is the starting point for the interpretation of the parameters of the measures which must be undertaken in practice by an employer under the duty to reasonably accommodate an employee.

2. Article 5 of the CRPD provides for the right of equality and non-discrimination for person with disabilities and sets out expressly at article 5(3): -

“In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”

3. Article 2 of the CRPD, the definition section, provides a definition of reasonable accommodation and Article 27 develops the equal rights of persons with disabilities in relation to work and employment.

4. The United Nations Committee on the Rights of Persons with Disabilities makes it clear that: -

*“Reasonable accommodation is an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability.”*¹ and follows: -

*“The duty to provide reasonable accommodation in accordance with articles 2 and 5 of the Convention can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation which is a modification or adjustment that is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.”*²

5. In EU law, Article 5 of the Framework Directive sets out the status of reasonable accommodation as part of the primary obligation as to equality for persons with disabilities, stating: -

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.”

6. Section 16(3)(b) of the Employment Equality Act 1998-2011 (“EEA”) is practically a word for word like implementation of the centrality of Article 5 of the Framework Directive. Thus, the duty in section 16(3)(b) to reasonably accommodate a person with a disability in fact comprises a primary obligation on the part of an employer - notwithstanding the manner in which the EEA is drafted and the positioning of the implementation of Article 5 of the Directive in a subsection of the EEA. The only limitation on this duty is if the fulfilment of it would impose a disproportionate burden on the employer.
7. By contrast, the derogation in section 16(1) of the EEA, stating that the Act does not require recruitment, promotion or maintenance of persons with a disability where they are not fully competent and capable to perform the essential functions of the post, is a direct implementation of Recital 17 of the Directive.

¹ Committee on the Rights of Persons with Disabilities, General Comment (No. 6) on equality and non-discrimination (6 April 2018), para 23.

² Ibid at para 25.

8. The manner in which the primary obligation and derogation should be read was made clear by the Court of Justice of the European Union (“CJEU”) which stated in **HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab**³ (hereinafter “**Ring**”) that “*It must be recalled however that as stated in recital 17 in the preamble, Directive 2000/78 does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities, which includes a possible reduction in their hours of work.*”
9. The Commission also relies upon the judgment of the Supreme Court in **Cahill v Minister for Education**⁴ in considering the effect of the words “*without prejudice to*” in the context of its interpretation of the Equal Status Acts, a sister Act of the EEA. Laffoy, J. having regard to the meaning contained in the Oxford Dictionary of English interpreted the phrase as having the meaning “*without detriment to any existing right or claim.*”⁵
10. Therefore, it is submitted that in interpreting the EEA, the Section 16(3)(b) obligation to reasonably accommodate is not subject to or without prejudice to the derogation in Section 16(1). Rather, the derogation in Section 16(1) must be interpreted in a manner without detriment to the existing right and claim of a person with a disability to have reasonable accommodation as is set out in Section 16(3).
11. The Section 16(3)(b) reasonable accommodation obligation, therefore, imports into Section 16(1) a right of an employee to demand reasonable accommodation of their disability in the form of appropriate measures, to enable them to exercise their right to work and participate in employment on an equal basis. (The right set out in Article 27 of the CRPD).

³ C 335/11 [2013] IRLR 571.

⁴ *Cahill v Minister for Education and Science* [2017] IESC 29.

⁵ *Ibid*, judgment of Laffoy J. at para 50.

12. In addition to the interaction with Section 16(1), it is submitted that the obligation to provide reasonable accommodation in Article 5 of the Directive, as implemented in Section 16(3), has the capacity to operate separately and independently as a primary obligation applicable in appropriate circumstances more generally as to equality in the workplace.

III. The School's interpretation of Reasonable Accommodation

1. The school in its submissions at paragraph 4.5 treats the obligation under section 16(3)(b) as being entirely subject to Section 16(1) and fails entirely to consider the primary obligation in Section 16(3)(b), incorrectly treating it as a secondary matter. The school in its submissions adapts Recital 17 of the Directive – which has been implemented in Irish law by Section 16(1) - into the “overriding principle.”
2. This approach is rejected by the Commission as contrary to the Directive, the CJEU in **Ring** and the CRPD.⁶
3. Further, where the School at paragraph 3.2 of its submissions refers to reasonable accommodation as a balancing exercise between the employee with disabilities and the employer, the Commission submits that this goes too far. A balancing exercise implies giving equal weight to both sides, when in fact, it is submitted, that the matter is that of a right and a derogation therefrom. A derogation from that obligation must be strictly construed. Moreover, the Directive, in Article 5, imposes a requirement to take appropriate measures up to the point where such measures do not impose a disproportionate burden on the employer.
4. The Commission rejects the characterisation of the words ‘reasonable’ in reasonable accommodation by the School in paragraph 3.2 as limiting the ambit of that term. Such an interpretation has been rejected by this Supreme Court in **Cahill v Minister for Education and Science**⁷ and by the UN Committee in General Comment No 6: -

⁶ In addition, such a position is contrary to the position, advocated elsewhere by the School in its submissions, that the recitals cannot be elevated to a status which they are not intended to have.

⁷ Para. 66, Judgment of MacMenamin J. and Para. 65 Judgment of Laffoy J.

“‘Reasonable accommodation’ is a single term, and ‘reasonable should not be understood as an exception clause: the concept of reasonableness should not act as a distinct qualifier or modifier to the duty.’”⁸

5. The School states at paragraph 4.4 of its submissions that section 16 provides “*a complete defence to a claim of discrimination on the disability ground if it can be shown that the employer in question formed a bona fide belief that the employee with disabilities was not fully capable of performing the duties for which he or she was employed.*”
6. This interpretation is rejected by the Commission. Nowhere in equality law is there any authority for the proposition that a bona fide belief of an employer would entirely negative the performance by an employer of its obligations not to discriminate. In this context, it is worth reiterating that it in many cases it is the assumptions as to the abilities of persons with a disability which are a barrier to employment rather than the actual disability or impairment itself. A stereotyped or incorrect assumption may nevertheless be a bona fide belief of the employer.
7. The School submits at paragraph 4.7 that reasonable accommodation means adapting the person with the disability to the role in question. The Commission rejects this interpretation and instead submits that the obligation in reasonable accommodation- as set out in Section 16(3) of the EEA – is that an employer will adapt the employer’s place of business to the person. This is apparent from the ***Ring*** decision.
8. The School seems to suggest at paragraph 4.9 of its submissions that any obligation to re-distribute tasks is confined to those tasks which are “peripheral” to the essential functions. The sectioning out of tasks into “peripheral”, which it is argued by the School, are subject to the duty of reasonable accommodation, and those which are essential, for which an employer has no duty to reasonably accommodate, is, in the Commission’s respectful submission, a re-drafting of the legislation. Such an approach amounts to a considerable watering down of the primary obligation to reasonably accommodate.

⁸ Committee on the Rights of Persons with Disabilities, General Comment (No. 6) on equality and non-discrimination (6 April 2018), para. 25(a).

9. At paragraph 4.10 (iv) of its submissions the School argues that Ms Daly's situation is entirely different to the plaintiffs in **Ring**, as those workers sought accommodations which related to the hours in which they could perform the duties. This misses the point, which is that the accommodations sought by the workers in **Ring** were not expressly provided for in the Directive. The Commission also relies on the Advocate General's Opinion in **Z v A Government Department**⁹ in support of its submission that the parameters of reasonable accommodation are broad. In **Z**, the Advocate General acknowledged that paid leave could feasibly come within the meaning of reasonable accommodation in certain circumstances.
10. In summary, the School's submissions on the matter of reasonable accommodation are somewhat circular – they state that no reasonable accommodations of the appellant teacher would render her capable of doing the job and therefore that section 16(1) in conjunction with section 16 (3) does not require any other accommodation.
11. The Commission, however, submits that the law must be interpreted first from a point of principle. The parameters of reasonable accommodation should be established first, and the facts of any case then considered in light thereof. The legal principles established in this case must, it is respectfully submitted, be capable of application to workers beyond the Appellant, to workers with a wide range of disabilities, mental, physical, psychological, and of varying severities. The Commission is cognisant that it has applied for leave to appear on the basis that there are important issues of legal principle at issue which concern not only the Appellant, but the employment equality rights of many persons not parties to these proceedings.
12. The Commission, therefore, reiterates its submission that a correct interpretation of Irish law as informed by the Directive which is in turn informed by the CRPD does encompass - in a suitable case - a reorganisation of a job or the tasks therein as a reasonable accommodation.

⁹ C-363/12. This was a preliminary reference from the Equality Tribunal in Ireland to the CJEU.

IV. Consultation

- (i) The Commission relies on its primary submissions as to the centrality of consultation with the person with a disability in ensuring compliance with the principle of equal treatment in relation to disabilities, of which the duty to reasonably accommodate is an intrinsic part.¹⁰ To fulfil its obligations under Section 16(3)(b) an employer cannot realistically do so without consultation with the employee.
- (ii) The Commission draws the attention of this Honourable Court to the Opinions and Comments of the UN Committee on the Rights of Persons with Disabilities on the issue of consultation. This Committee has determined that consultation and dialogue with persons with disabilities is a key element that guides the implementation of the duty to provide reasonable accommodation.¹¹
- (iii) It is submitted that the School's interpretation as to consultation is rooted in its subordinate view of the obligation to reasonably accommodate, as is apparent from paragraph 8.1 of its submissions.
- (iv) The Commission rejects the School's interpretation on two bases, first, because the duty to consult is recognised internationally as a fundamental part of the practice of reasonable accommodation, and second, on the basis that the obligation to reasonably accommodate is a primary obligation, not a secondary one.

Cathy Smith BL
Cliona Kimber SC
6th December 2018

Word count 2330

¹⁰ *Reasonable accommodation is an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability.* Committee on the Rights of Persons with Disabilities, General Comment (No. 6) on equality and non-discrimination (6 April 2018), para 23.

¹¹ Committee on the Rights of Persons with Disabilities, General Comment (No. 6) on equality and non-discrimination (6 April 2018).