Your Rights Information Note

Employer Equality Obligations Regarding Recruitment

About 'Your Rights'

The Irish Human Rights and Equality Commission ("IHREC") operates the Your Rights service to provide individuals with information in respect of their rights, and the remedies that may be available if they have suffered discrimination and/or a breach of their human rights in Ireland. IHREC can only provide information through this service, and cannot provide advice or comment on individual cases. This is not a legal document and it is not a substitute for legal advice.

Disclaimer

The contents of this document are for information purposes only. They do not constitute a legal analysis of any individual's particular situation. While we seek to ensure that the information provided is accurate and up to date, it is not legal advice and should not be relied on as such. For any professional or legal advice, all individuals should consult a suitably qualified person.

Recruitment and the Employment Equality Act 1998 – 2015

The Employment Equality Act 1998 – 2015 (the **"EEA") aims to** protect employees and prospective employees against discrimination both in the workplace and in recruitment. This guide will relate specifically to the obligations on employers in regards hiring, promoting, retaining and firing people, particularly people with disabilities. These obligations are set out in section 16 of the EEA. For a discussion of the EEA more generally, see the 'Your Rights' guide on the EEA.

The EEA prohibits discrimination in the workplace. Discrimination is defined in the EEA as treating a person less favourably than another person has been or would be treated in a comparable situation on the basis of any one of nine protected grounds. The grounds on which less favourable treatment will constitute discrimination are

- On the basis of gender
- On the basis of civil status
- On the basis of family status
- On the basis of sexual orientation
- On the basis of religious belief
- On the basis of age
- On the basis of disability
- On the basis of race
- On the basis of membership of the Traveller Community

Less favourable treatment on the basis of any of these grounds is generally prohibited in relation to access to employment, conditions of employment, training in relation to employment, promotion, re-grading, or classification of posts.

In general, employers are not liable for discrimination if they refuse to hire, refuse to retain, refuse to promote, or choose to let go an employee or prospective employee who:

a) Will not undertake their job requirements;
b) Will not accept the conditions under which those duties are performed;
c) Is not fully competent and capable of doing the job; and/or
d) is not available to fully undertake their job requirements, because of the specific conditions the duties are required to be performed under.

Outside of these exceptions, an employer can be found to have discriminated against an employee or prospective employee if that person is treated less favourably by their employer on the basis of one of the protected characteristics noted above, such as their gender, civil status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller community.

For instance, if an employee is treated less favourably in regards promotion than their colleague because they are female, or if they do not hire a prospective employee because of their race, this is discrimination and is unlawful under the EEA. However, if a female employee refuses to follow the requirements of her job, less favourable treatment of the employee on the basis of her performance will not, of itself, constitute discriminate.

Reasonable Accommodation - Disability

Under the EEA, a person who has a disability will be considered fully able to carry out duties of their employment, or prospective employment, if they would be able if their employer took '*appropriate measures'* to enable them to do so. These appropriate measures are known as '*reasonable accommodation, meaning that an employer has to do whatever is reasonable to accommodate the person's needs*'. The specific types of measures taken to provide reasonable accommodation to an employee vary on a case by case basis – they have to respond to the individual's needs.

The requirement to take 'appropriate measures' to reasonably accommodate a disabled employee is mandatory, unless the measures would place a disproportionate cost burden on the employer.

This requirement helps to ensure that people with a disability can:

i) Access employment;

ii) Advance in employment, and

iii) Undergo training.

The obligation to provide reasonable accommodation means that an employer cannot dismiss or fail to recruit a person with a disability purely because they do not meet the job requirements, if the employee *could* meet the job requirements through the making of reasonable accommodations.
For instance, where an employer refuses to recruit a prospective employee because they require a wheelchair ramp, and the employer does not currently have ramp access, this would constitute discrimination in recruitment under the EEA, where they employee would otherwise be capable of performing their duties, but for the lack of access.

Under the EEA, 'appropriate measures' are defined as effective and practical measures taken to adapt the employer's place of business to the disability concerned, including the adaptation of premises and equipment, patterns of working time, distribution of

tasks or the provision of training or integration resources. However, the obligation to take appropriate measures to accommodate a person with a disability does not extend to any treatment that the person with a disability would ordinarily or reasonably provide for themselves (for example, wearing glasses).

An employer can only dismiss or refuse to hire an employee which they know has as a disability if they have considered the possibility of reasonably accommodating the employee. Where such a possibility has been entertained, and the employer has concluded that it would be unreasonable to accommodate an employee incapable of meeting the requirements of their job without accommodations, this will be a defence against a claim of discrimination.

For instance, in *Carroll v Heinz Frozen and Chilled Foods*, the employee worked in the employer's frozen food business. Arising from a disability, the employee could work only in temperatures of 18 to 20 degrees, could not lift weights and could not carry out shift work. The company argued it had no option but to terminate her contract of employment due to the restrictions as regards temperature, weights and shift work and that as a result of her medical condition she could no longer fulfil her contract of employment. The Equality Officer hearing the case found in favour of the company, as there were no appropriate measures that the employer could put in place which could accommodate the employee's disability and allow her to return to work to perform the duties which she was employed to do.

The provision of 'appropriate measures' to reasonably accommodate an employee with a disability can involve affording the person with a disability more favourable treatment than would be accorded to an employee without a disability. For instance, if a prospective employee for a job that requires sitting at a desk has a disability which would prevent them from sitting uninterrupted for several hours, before declining the employee's application, the employer must ascertain whether the employee could complete their job requirements if appropriate measures to accommodate them were taken. At a minimum, the employer must consider what adjustments can be made,

before then considering whether those adjustments would constitute an unreasonable or disproportionate burden.

Employers must be aware that employees or prospective employees have a disability that merits appropriate measures before they can be held responsible for making reasonable accommodations. Illustrating this, in *An Employee v A Logistics Company*, an employee had frequent sick days over a fourteen-month period, which they told their employer was stomach problems. Upon revealing to their employer that in fact, they had been diagnosed with depression, the employee was dismissed. Finding in favour of the employer, it was found that the onus is on the employee to disclose honestly and fully to their employer, and in the absence of knowing about the disability, the employer cannot be held liable for failing to accommodate.

Employers have a duty to make '*adequate enquiries*' to ensure that they know all the material facts about an employee's disability, before they conclude what accommodations are needed, if any. In *Humphries v Westwood Fitness Club*, the Circuit Court found that a dismissal of a person with a disability was discriminatory where the employer had not adequately enquired prior to the firing as they had no medical evidence supporting their finding that the employee could not continue to work even with accommodations; and furthermore they had not discussed the situation with the employee. The Court held that the employee could have been rendered capable to continue in her job with the provision of reasonable accommodation and that, as a result, she had been unlawfully dismissed on the grounds of her disability.

It is best practice for employers to consult with their employees about their disabilities when considering what accommodations would be reasonable to make. This is supported by the **UN Convention on the Rights of Persons with Disabilities**, which Ireland ratified in 2018. In the preamble to the Convention, it reads '*persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them*.' This also was recently affirmed by the Supreme Court in *Nano Nagle v Daly* [2019] IESC

63, where the Supreme Court observed that, as a matter of good practice, employers should consult with the employee concerned.

What is a 'Disproportionate Burden'

As noted above, the duty to accommodate an employee does not extend to instances where such accommodations would impose a 'disproportionate burden' on the employer. To determine what constitutes a disproportionate burden, consideration is given to:

i) The financial costs of making an accommodation

ii) The financial resources of the employer, and

iii) The possibility of public funding supporting the accommodation.

Thus, what is considered a disproportionate burden to a small company may be greater than for a larger company. Whilst a corner shop may be able to argue that installing a sound loop in the building would be disproportionately expensive, this would be less persuasive for a multi-national company with much greater financial resources.

An example of a disproportionate burden is the case of *Mr B v A Metal Processing Company*. An employee who suffered from diabetes was removed from driving duties following a hypoglycaemic incident. Subsequently the employer employed the employee alongside a buddy who was present in the truck with him. This continued for a period of a year after which the buddy had his employment terminated by reason of redundancy. The Equality Officer found that reasonable accommodation had been provided until it became a disproportionate burden for the employer and so the termination of employment of the employee was lawful.

There is a limit to the duty to provide reasonable accommodation. An employer may not be required to create a different job to accommodate the disabled employee. However, whilst it may not be reasonable to create a different job for a disabled employee, the

duty to reasonably accommodate can extend to the redistribution of tasks, where reasonable, to relieve a person with a disability from performing tasks beyond their capabilities.

Who Do These Obligations Apply to?

The duty to not discriminate applies to employers, employment agencies, vocational training bodies, and regulatory bodies in specific professions, for instance the Institute for Chartered Accountants.

How Do I Challenge a discriminatory Recruitment Decision?

An alleged discriminatory recruitment decision can be challenged in the same way as any other claim under the EEA referred to the WRC. Please see the guidance note on taking a claim under the EEA linked HERE.

Time Limits

A complaint must be filed at the WRC within six months of the last date of discrimination, and that deadline may start from one of the following:

- the date of the most recent instance of offending conduct;
- the date upon which the discriminatory actions or regime ended;
- or the date of an isolated incident.
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It is possible for the WRC to extend the time for the making of a complaint by a further six months (resulting in a total time period of twelve months). Information on the procedure to use when applying for an extension of time can be found here. Once the six-month extension period has passed, the WRC has no discretion to extend the time for bringing a claim.

What Does It Cost to Make a Complaint to the WRC?

There is no cost associated with submitting a complaint to the WRC. It is also not possible for the Adjudication Officer to order one party to pay another party's legal costs. This means that, regardless of whether a party wins or loses, they must both pay their own legal costs (if lawyers are employed).

Remedies

Where a breach of the EEA is found, the Workplace Relations Commission can order one or more of the following:

- An order for compensation by paying arrears for three years before the complaint was referred (for instance, where a person is dismissed on the basis of their sex, they can seek compensation for up to three years after their dismissal).
- An order for equal pay from the date of referral (for instance, where a person is dismissed on the basis of their age, they can seek an order that they will be paid going forward at the same level as their colleagues).
- An order for equal treatment in whatever respect is relevant to the case (for instance, where a person is dismissed on the basis that they do not wish to work on a holy day for their religion, but colleagues from other religions are granted a day off for their holy days, they can seek an order to be treated equally to their colleagues in regards getting holy days off.
- An order of compensation of up to two years pay or €40,000, whichever is greater, for the effects of discrimination. (The WRC may also award interest on any compensation which is awarded in gender discrimination cases.)
- An order for a specified person to take a specified action. (for instance if it is found that an employer has failed to promote a person on the basis of a protected characteristic who otherwise is entitled to a promotion, the Adjudication Officer may order that the employer promote the employee.)
- An order for re-instatement, with or without compensation.

Can the Decision of the Adjudication Officer be Appealed?

Both parties to a dispute heard in the WRC are entitled to appeal an Adjudication Officer's decision, and to seek a fresh decision. Please see the guidance note on taking a claim under the EEA linked HERE.

Further Information

The WRC will respond to general queries and explain how the system works. It is not possible for staff at the WRC to assist complainants in filling out the EE.1 form or to advise them as to whether their complaint will be successful. Other bodies that may be able to provide assistance include:

- IHREC;
- trade unions;
- Citizens Information;
- Free Legal Advice Centres ("FLAC");
- Community Law and Mediation ("CLM");
- solicitors and other professional advisors (legal aid is not currently available for claims under the EEA 1998-2015 and/or the ESA 2000-2018).