

DISABILITY RIGHTS - REASONABLE ACCOMODATION UNDER THE EMPLOYMENT EQUALITY ACTS

About “Your Rights”

“Your Rights” is a service operated by the Irish Human Rights and Equality Commission (“IHREC”) to provide members of the public with information about their rights and the remedies that may be available to them if they believe they have suffered a breach of equality law and/or human rights law in Ireland. IHREC can provide information only through this service, and cannot provide legal advice or comment on individual cases.

This is not a legal document and it is not a substitute for legal advice. Discrimination occurs where one person is treated less favourably than another person in a comparable situation due to one or more protected ground. The protected grounds include religion, gender, age, disability, sexual orientation, civil status, family status, and membership of the Traveller community.

If you have been discriminated against by an employer or a potential employer or in the workplace on one or more of these grounds you can bring a case to the Workplace Relations Commission. The areas of employment covered includes advertising, pay, access to employment, vocational training and work experience, terms and conditions, promotions, pensions, dismissal and collective agreements.

Types of Discrimination

Discrimination can take many forms. These include:

- **Direct discrimination** occurs when a person with a disability receives different less favourable treatment due to their disability.

For example, if your employer paid you less money because you had a disability, would be direct discrimination this .

- **Indirect discrimination** occurs where a neutral provision puts a person at a particular disadvantage compared with other persons.

For example, if you are visually impaired and a potential employer only provides hardcopy materials for an interview, this would be indirect discrimination.

- **Discrimination by imputation** occurs where a person is associated with another person and because of that association, is treated less favourably than a person who is not associated is, or would be treated in a comparable situation.

For example, if your employer incorrectly assumes you have a disability and treats you less favourably, this is discrimination by imputation, even if you do not have a disability.

- **Discrimination by association** occurs where a person is treated less favourably than another person would be treated in a comparable situation where a protected ground, like disability, is associated with them.

- For example, if your employer treats you less favourably because a member of your family has a disability, this is discrimination by association, even if you do not have a disability.

Harassment and Victimisation

- As well outlawing discrimination, the Employment Equality Acts also prohibit harassment, sexual harassment and victimisation.
- **Harassment** occurs when a person is subjected to unwanted conduct in the course of their employment due to their disability, or for one of the other protected grounds. It is conduct which has the purpose or effect of violating a person's dignity and

creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. This can be from your employer, from a person who is employed by the same employer, or from a client or customer of your employer.

- **Sexual harassment** is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature. It is conduct which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
- **Victimisation** occurs when you are treated adversely by your employer because you have made a complaint of discrimination to your employer, or supported another employee in their complaint, or made a complaint to the Workplace Relations Commission, or brought other proceedings. This is also unlawful.

Definition of Disability

In order to be discriminated against on the ground of disability, you must have a disability, or have a disability imputed to or associated with you, within the meaning set out under section 2(1) of the **Employment Equality Acts**.

This defines disability as:

- the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- the malfunction, malformation or disfigurement of a part of a person's body,
- a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.

This definition includes both physical conditions, as well as mental conditions, such as depression and anxiety.

This definition is guided by the definition of disability from the United Nations Convention on the Rights of Persons with Disabilities:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This includes a disability that you currently have or that you previously had or which may exist in the future or which someone may think you have, that is is imputed to you.

What is employment discrimination on the ground of disability?

- If a job advertisement says that it cannot hire wheelchair users, this may be discrimination on the ground of disability.
- If you are told at an interview that you cannot be hired as you have a physical disability, this may be discrimination on the ground of disability.
- If you are lose your job because you have an intellectual disability which means you perform your job differently to a person who does not have an intellectual disability, this may be discrimination on the ground of disability.

Who is covered by the Employment Equality Acts?

You are protected by the Employment Equality Acts if you are an employee, an agency worker, or in or seeking entry to vocational training, or a member or potential member of certain bodies and partnerships.

- **An employee** is a person who works or has worked under a contract of employment including a member of former member or a regulatory body. This includes persons who have a contract of apprenticeship, and persons who have any other contract where an individual agrees with another person personally to provide any work or service for that person.
- **An agency worker** is a person providing an employment agency with any work or service for another person, whether or not the other person is a party to the contract.
- **Vocational training** is any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity.
- **Members of certain bodies** includes an organisation of workers over employers, a professional trade organisation or a body controlling entry to or the carrying on of a profession, vocation or occupation.

An employment relationship is irrelevant, what is important is whether the person is performing a service under the direction of another person in return for pay. A contract of employment need not to be in writing.

What is not covered by the Employment Equality Acts?

There are some exemptions to what is covered by the Employment Equality Acts. These include:

- **Educational, technical or professional qualifications** – employers are allowed to reject job applicants who do not hold the qualifications that are generally accepted as being necessary for the job.

- **Benefits in respect of an employee's family** – Employers are allowed to provide certain benefits to employees who have families.
- **Officers or servants (employees) of the State** – it is not discrimination if some employees in these categories are required to fulfil special requirements, for example, Irish citizenship.
- **Primary and post-primary teachers** – Employers can require that teachers have a proficiency in the Irish language.
- **Defence Forces** – The Defence Forces are allowed to treat employees differently on grounds of age and disability.
- **Employment in another person's home** – This relates to workers providing a personal service in a person's private home, for example, childminding, care services and so on, where the employment affects the private or personal life of those residing in that home. The person employing the worker is not subject to the Employment Equality Acts when recruiting such an employee.
- **An Garda Síochána and the Prison Service** – Both the Gardaí and the Prison Service can assign certain tasks to either men only or women only, such as body-searching, controlling violent individuals or crowds and rescuing hostages. These services are also allowed to have a minimum height requirement that is different for men than for women. They are allowed to recruit more employees of one gender than the other if more employees of that gender are needed in the service at that time.
- **Certain religious, educational, and medical institutions** - may give more favourable treatment, on the religion ground, to an employee where it is reasonable to do so in order to maintain the religious ethos of the institution, or take action which is reasonably necessary to prevent an employee from undermining the religious ethos of that institution.

Under the Acts, employers are allowed to offer different pay rates to disabled workers if their disability means that they cannot do the same amount of work in the same time as a co-worker without a disability.

Reasonable Accommodation

If you have a disability your employer or potential employer is obligated to provide you with 'reasonable accommodation' also known as 'appropriate measures' to help and facilitate you to do your job. This includes enabling you to access employment, to participate and advance in employment or to -Your employer or potential employer must be aware of your disability – either because you have informed them or they have constructive knowledge - and this obligation must not place a disproportionate burden on them – this is explained below.

In essence, reasonable accommodation is where your employer or potential employer puts in place effective and practical measures to adapt their business place to your disability. For example, adapting premises or equipment, changing working hours, or distributing tasks.

If you have a disability, you are entitled to request reasonable accommodation from your employer or potential employer both in the recruitment stage and when you are in employment. This can be done directly with the employer or potential employer, or they may have their own specific internal process for doing so.

What is reasonable accommodation?

If you are deaf, providing an Irish Sign Language interpreter at your interview can constitute reasonable accommodation.

Allowing you to work partially or fully from home due to medical needs, can constitute reasonable accommodation.

If you are unable to perform certain physical tasks, transferring you to perform non- or less-physical tasks can constitute reasonable accommodation.

If you are unable to perform some of the tasks and duties assigned to you, redistributing these to other members of staff and assigned others to you, may constitute reasonable accommodation.

What is a disproportionate burden?

- If you are employed by a small business and the cost of adapting the workplace would result in a significant financial expenditure for your employer that it may not be able to afford, this may be a disproportionate burden.
- If you are physically unable to perform a task, and there is no other role that you could fulfil, providing one may be a disproportionate burden.
- If it is not physically or technologically possible to adapt your workplace to reasonably accommodate you, this may be a disproportionate burden.

In determining if a measure is a disproportionate burden, **your employer or potential employer needs to consider the financial or other costs, the scale and resources of their business, and whether they can obtain public funding or other assistance to help them.** The Department of Social Protection has a Reasonable Accommodation Fund which may be able to provide funding to make your workplace more accessible or to provide adapted equipment or to provide a sign language interpreter or reader at interview. Both you and your employer or potential employer can apply for this.

In determining both what a reasonable accommodation should be, and if it amounts to a disproportionate burden, your employer or potential employer should assess this on an individualised basis – your employer or potential employer must carefully consider what is appropriate for you in your particular circumstances.

If your employer or potential employer informs you that they believe providing you with a specific reasonable accommodation would cause a disproportionate burden, **they must still formally assess the provision of the reasonable accommodation.** It is not enough to simply refuse you without considering the issues.

You can inform your employer or potential employer of your disability and if you believe you require reasonable accommodation. While there is no obligation to formally do so for the purposes of a reasonable accommodation, and your employer may have constructive

knowledge of your disability, it may be wise to ensure your employer is informed of your disability, where it may not be something they are aware of. If your disability may cause you or another person to be exposed to a danger, you are obliged to disclose it to your employer.

What is constructive knowledge?

- This is where your employer is aware that you have a disability, even though you have not informed them of it. This can include where you have the use of a wheelchair or other mobility aid.
- Where you have a 'hidden' or 'invisible' disability, your employer may not have constructive knowledge of this.

However, an employer or potential employer is not obliged to hire someone who is not competent to perform, or fulfil the duties of the role, however where this is done on the basis of a disability, there is still an obligation on the employer or potential employer to have assessed whether they can reasonably accommodate you. **If you are not able to fully undertake the duties of your role, even with reasonable accommodation, then this does not constitute discrimination.**

When an employer is considering how to provide you with reasonable accommodation, they must consider your employment as a whole, including considering the effects on fellow workers and the workplace.

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In assessing how to reasonably accommodate you, an employer or potential employer must take steps to do so appropriately, for example carrying out an appropriate occupational or medical assessment, or examining what adaptations could be pursued. While it is not mandatory for an employer to consult with an employee in relation to their reasonable accommodation requirements, it is advisable that employers do provide the opportunity for employees to meaningfully participate in the process.

If employers do not allow the employee to meaningfully participate in the process, it would be more difficult for the employer to meet their obligations under the law. Where the employer cannot provide reasonable accommodation and is considering the dismissal of an employee due to their inability to do their job, the employee should be made aware of this.

What is meaningful participation?

If your employer has a number of options as to how to reasonably accommodate you, consulting with you and seeking your opinion on what is most appropriate could be meaningful participation.

If your employer seeks your input on what you believe would reasonably accommodate you to do your job, this could be meaningful participation.

If you request reasonable accommodation and your employer refuses to without informing you of the assessment process, this would not be meaningful participation.

If your employer is considering options on how to reasonably accommodate you and excludes you from this, this would not be meaningful participation.

In the case of Marie Daly v Nano Nagle School, the Supreme Court provided guidance on the scope of an employer's obligation to reasonably accommodate an employee who, due to disability, was no longer able to carry out the full range of duties associated with her role. The Commission's press release on this case can be read [here](#).

In that case, the Ms Daly had been employed as a special needs assistant. She was injured in an accident which left her paralysed from the waist down and sought to return to work following her partial recovery. She was assessed by an occupational health physician, who noted that she could not perform some of the tasks of an SNA but could carry out many others. An occupational health therapist then assessed how the school could facilitate the respondent's return to work as she could perform the majority of tasks assigned to SNAs and could be accommodated as a 'floating' SNA. The principal of the school was reluctant to accommodate her and asked the doctor to reassess her fitness for work. The doctor reported back that, in light of the school's difficulties with accommodation, she was unfit for the SNA

position and Ms Daly was dismissed from her role. Ms Daly brought a complaint that reasonable accommodation had not been properly and lawfully assessed.

The case reached the Supreme Court, who determined that:

Reasonable accommodation can involve a redistribution of any task or duty in a job, as long as not disproportionate in the context of the employment in question. The individual's employment should be looked at in the round by considering it within the wider context of its relationship to fellow workers and the workplace.

An employer is under a mandatory duty to take all "appropriate measures" unless any measure would constitute a "disproportionate burden". The employer must demonstrate that they have fully considered reasonable accommodation.

While not mandatory, "a wise employer will provide meaningful participation" not only with the person seeking reasonable accommodation but also with other employees in relation to the role.

An employer is under a mandatory duty to explore the possibility of obtaining public funding or other assistance when considering reasonable accommodation.

The employer or potential employer must demonstrate that they have fully considered reasonably accommodating you. An employer or potential employer is not under a duty to create a new and entirely different job in order to ensure that an employee is facilitated, as this would may impose a disproportionate burden on an employer or potential employer. For example, if an employer or potential employer's business requires a person to have no visual impairments, creating a new role where there is not required may be disproportionate.

An employer or potential employer must examine the possibility of obtaining public funding or other assistance when considering reasonable accommodation.

How is a reasonable accommodation and disproportionate burden assessed?

- If your employer or potential employer is aware of your disability, they must consider what reasonable accommodation can be provided to you.
- This must be done on an individualised basis, considered in detail in light of your particular circumstances.
- This may include a medical or occupational assessment.
- In considering the options available to reasonably accommodate you, your employer or potential employer should consult with you and allow you to meaningfully participate.
- Your employer or potential employer must be able to show they have fully considered reasonably accommodating you. This includes examining whether public funds are available to fund this.
- If your employer or potential employer determines the reasonable accommodation creates a disproportionate burden, they must be able to demonstrate this with regard to the financial and administrative cost of this.

Bringing a Claim

If you have been **discriminated against or harassed or victimised** in this context, you can bring a case to the **Workplace Relations Commission**.

A complaint can be made via the online complaint form on the Workplace Relations Commission website (www.workplacerelations.ie). Such a complaint should include when the discrimination occurred and, if the discrimination is ongoing, this should be made clear.

Such a complaint must be made within **six months** of the incident. The Workplace Relations Commission can extend this for a **further six months** for “**reasonable cause**”, although this is only in rare circumstances. If a person wishes, in order to aid them in deciding to bring a claim, they can seek information from an employer or potential employer, for example, they may wish to ask why their employer took a certain action or treated them in a certain way. This request for information from an employer or potential employer can be made using the Form EE.2 that is available on the WRC website. However, making this type of request is

optional and a complaint can be made to the WRC without taking this step. The employer or potential employer can then reply on Form EE.3.

It is important to ensure that you include the proper name of the employer or potential employer – this may differ from their trading name. An employer's proper name can be found, for example, on your payslip or can be found online by examining the register of companies held by the Companies Registration Office.

If you believe you have been discriminated against, you are advised to contact IHREC or seek legal advice as to what your options are. If you are a member of a union, they may be able to advise, support and represent you. If you believe you have been discriminated against do not delay in seeking legal advice as the timeframe for bringing a complaint is very short.

What to expect at the Workplace Relations Commission?

Once you have made a complaint to the Workplace Relations Commission, your case will be assigned a hearing date and an adjudication officer. You will also be offered the option of mediation. This is where a mediator is appointed to speak to you and your employer or potential employer to examine if a solution can be found between you. This can only occur where you both agree to mediation - you are not obligated to do so. The mediation officer is a neutral person whose job it is to work with both parties to reach an agreement. Both parties must agree on the terms of settlement, which are confidential and legally binding.

If you decide to proceed to a hearing, it can be held in person or remotely. You may request an accommodation from the Workplace Relations Commission in order to fully participate.

If you wish to provide written submissions, you can do so and must provide them at least 15 working days in advance of the hearing date. Submissions are a written document that sets out the case that each of the parties to a complaint is making. Written submissions will usually include details of what each party say happened (the factual background) and how they argue the law applies to their particular case and circumstances.

You may also bring witnesses to the hearing to give evidence. Those present at the hearing will include you and any witnesses you wish to bring, your union or legal representative if you have one, your employer and their witnesses and their employer or legal representative if they have one, and the adjudication officer.

Following any preliminary issues, you will give evidence as to your case. Evidence must be given under oath or affirmation. Initially, the burden of proof is on you to show that there are credible facts from which discrimination can be inferred. This cannot be mere speculation or assertions. Once this is done, the burden then moves to your employer or potential employer to demonstrate that their conduct was not discriminatory. Once all witnesses have given evidence, the adjudication officer may hear legal arguments from both sides and then will end the hearing. The adjudication officer will then prepare a written decision which will be issued to you.

If the adjudication officer determines there was discrimination, they can award you redress. This includes one or more of the following:

An order for equal pay (plus a maximum of 3 years arrears before the complaint was referred, where appropriate);

An order for equal pay from the date of referral of the complaint;

An order for equal treatment;

An order for compensation of up to 2 years pay or up to €40,000, whichever is the greater, for the effects of discrimination or harassment/sexual harassment suffered (up to €13,000 for someone who is not an employee of the respondent);

An order for compensation of up to 2 years pay or up to €40,000, whichever is the greater, for the effects of 'victimisation' (up to €13,000 for someone who is not an employee of the respondent);

An order for a specified person to take a specified action;

An order for re-instatement or re-engagement.

If the adjudication officer determines there was not discrimination, you can appeal to the **Labour Court within 42 days of the date of the decision** if you wish.