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# Selected Issues in Irish Equality Case Law 2008–2011

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The Equality Authority was established in 1999. It has a mandate to promote equality of opportunity and to combat discrimination in the areas covered by the Employment Equality Acts, the Equal Status Acts and the Intoxicating Liquor Act. It is a specialised equality body in Ireland for the promotion of equal treatment as required under the EU Race Directive and the amended Gender Equal Treatment Directive.





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## Chapter 1

# Introduction

## A. Introduction

Ireland's equality legislation has now been in force for over a decade.<sup>1</sup> At the time of their enactment, the Employment Equality Act 1998 and the Equal Status Act 2000 represented a milestone in the development of Irish law and, indeed in many respects, of Irish society.<sup>2</sup> The Acts for the first time prohibited discrimination in the field of employment and in the provision of goods and services on nine different grounds: gender, marital (now civil) status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. The Acts represented in part the implementation of obligations of the State under European Union and international law but, significantly, went beyond what was required by those obligations.

Ireland has changed dramatically over the past ten to fifteen years. The Celtic Tiger has come and gone. The economic and financial crisis of recent years has cast a dark shadow over the State. Irish society has also undergone radical change. Inward migration, both from within the enlarged European Union and beyond, has made Ireland a far more ethnically and religiously diverse society than was traditionally the case. On issues from disability to marriage to sexual orientation, attitudes have changed in many ways.

The Acts have been amended on a number of occasions since their enactment, most notably by the Equality Act 2004 which gave effect to legislative developments at the EU level such as Directive 2000/43/EC, the Race Directive, and Directive 2000/78/EC, the Framework Directive. More recently, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which provides for the registration of civil partnerships for persons of the same sex, has changed the definition of one of the nine grounds of discrimination under the Acts from marital status to civil status.<sup>3</sup> In addition, there have been

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1 The Employment Equality Act 1998 came into force on 18th October 1999 and the Equal Status Act 2000 took effect just over a year later on 25th October 2000: S.I. No. 320/1999, Employment Equality Act, 1998 (Commencement) Order, 1999; S.I. No. 351/2000, Equal Status Act, 2000 (Commencement) Order, 2000.

2 The Acts are now the Employment Equality Acts 1998–2011 ('Employment Equality Acts') and the Equal Status Acts 2000–2011 ('Equal Status Acts') and will be referred to collectively as the Acts or Irish equality legislation in this report. The report refers to the restatements of the Acts certified by the Attorney General: Employment Equality Act 1998, Restatement of 11 April 2012; Equal Status Act, Restatement of 10 May 2012.

3 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 102 and 103.



important developments at European and international level. In particular, with the coming into force of the Lisbon Treaty on the 1st of December 2009, the Charter of Fundamental Rights – Chapter III of which is dedicated to equality – has the same legal value as the European Union Treaties and enhances the protection of equality under the Treaties, as demonstrated by the recent judgment of the Court of Justice of the European Union in the *Test-Achats* case.<sup>4</sup>

Moreover, at the time of writing, far-reaching changes to the institutional framework established under the Employment Equality Acts and the Equal Status Acts are on the horizon. The Equality Authority is to be merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission.<sup>5</sup> The Equality Tribunal, alongside a number of dispute resolution bodies in the employment field, will be replaced by what is provisionally entitled the Workplace Relations Commission, part of a wider Workplace Relations Service.<sup>6</sup> Although it has not yet been confirmed whether complaints under the Equal Status Acts, which are not employment or workplace disputes, will also go before this body, this appears to be the most likely course of action.<sup>7</sup>

Taking these developments together, it is clear that the framework of Irish equality law – which is currently undergoing this process of change and transition – is at an important stage in its development. It is against this backdrop that this report examines the case law under the Acts for the period 2008 to 2011.

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4 C-236/09 *Test-Achats* [2011] ECR nyr (Judgment of the Court (Grand Chamber), 1st March 2011). See below Chapter 4.C.(i).

5 See the Heads of the Irish Human Rights and Equality Commission Bill available at <http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf> (last accessed 11 November 2012).

6 See the Submission to the Oireachtas Committee on Jobs, Enterprise and Innovation, *Legislating for a World-Class Workplace Relations Service July 2012* (Department of Jobs, Enterprise and Innovation, 2012), available online on the Workplace Relations website, [www.workplacelrelations.ie](http://www.workplacelrelations.ie) (last accessed 7 November 2012).

7 See the Submission to the Oireachtas Committee on Jobs, Enterprise and Innovation, note 6, 69-71.

## B. Background to the Report

Although the Employment Equality Acts and Equal Status Acts have now been in force, and the Equality Tribunal, the Labour Court and the Irish courts have been making decisions under the Acts, for over a decade, there has been relatively little analysis of Irish equality case law. This is, however, changing.<sup>8</sup> At a late stage in the preparation of this report, the first comprehensive treatment of the Equal Status Acts was published.<sup>9</sup> This will soon be complemented by a detailed treatment of Irish employment equality law.<sup>10</sup> Furthermore, the Irish Council of Civil Liberties will soon complete its Anti-Discrimination Law Review Project, a major critical study of Irish equality law.<sup>11</sup>

The purpose of this report, which has been commissioned by the Equality Authority and which is co-funded by a grant under the European Union's PROGRESS programme, is to analyse selected issues in Irish equality case law during the period 2008 to 2011. It is, therefore, significantly more modest in its scale and in its scope than the publications and research projects referred to in the previous paragraphs.

More specifically, the report is concerned with decisions made by the Equality Tribunal, the Labour Court, the Irish courts and the Court of Justice of the European Union under, or in respect of, the Employment Equality Acts 1998–2011 and the Equal Status Acts 2000–2011.<sup>12</sup>

The concept of 'case law' is broadly understood for the purposes of this report. While that concept might not typically extend to the decisions of lower courts and tribunals, in the case of equality law, the vast majority of decision-making and analysis of the legal issues arising under the Acts is to

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8 See the early treatment of the Acts in Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000) and Law Society, *Discrimination Law* (Cavendish Publishing, 2005). See also Costello and Barry, *Equality in Diversity: the New Equality Directives* (ICEL/Equality Authority, 2004). In relation to disability discrimination specifically, see the detailed treatment in Smith, *Disability Discrimination Law* (Thomson Round Hall, 2010). Another publication dealing with Irish equality law generally, written by the former legal adviser to the Equality Tribunal, is also forthcoming at the time of writing: Reid, *Equality Law in Ireland* (Bloomsbury, forthcoming, January 2014).

9 Walsh, *Equal Status Acts 2000–2011* (ICGL/Blackhall Publishing, 2011).

10 Bolger, Bruton and Kimber, *Employment Equality Law* (Thomson Round Hall, forthcoming, 2012/2013).

11 The principal investigator for this project is Dr. Judy Walsh, author of *Equal Status Acts 2000–2011* and one of Ireland's leading scholars in the field of equality studies. The final report is scheduled to be published in March/April 2013: see Irish Council of Civil Liberties, *Anti-Discrimination Law Review Project Briefing Paper*.

12 It does not, therefore, consider case law on the equality clause of the Irish Constitution, Article 40.1. See generally Doyle, *Constitutional Equality Law* (Thomson Round Hall, 2004).

be found in the decisions of such courts and tribunals. While only a handful of cases concerning the Acts come before the Irish courts in any given year, during the period 2008–2011, the Equality Tribunal has handed down over a thousand decisions.<sup>13</sup> Indeed, because so few cases concerning the Acts come before the Irish courts, and authoritative guidance on the interpretation and application of the Acts is therefore limited, the Tribunal's own earlier decisions on issues of substance and procedure have inevitably taken on considerable importance in its activity. Interestingly, the Tribunal has suggested that the statutory requirement to publish its own decisions has as its primary reason the development of a corpus of case law.<sup>14</sup> It both follows and distinguishes its own earlier decisions as appropriate. Moreover, the Tribunal has also actively and consistently followed the jurisprudence of higher courts, both the Irish courts and the Court of Justice of the European Union. In doing so, the Tribunal has arguably built up a corpus of case law worthy of the name.

While the Tribunal's decisions under the Acts are all publicly available and accessible through the database of decisions on the Tribunal's website, and most of the decisions of the Irish superior courts are also publicly available, this is not generally the case for judgments, orders and other decisions of the District Court and Circuit Court.<sup>15</sup> Indeed, in most cases, the District Court and Circuit Court do not deliver reserved or written judgments. This poses a considerable difficulty in analysing the approach of those courts to the issues coming before them under the Acts. While it has been possible to access a number of judgments of the Circuit Court for the purposes of this study, in many other cases, the available information is limited to that which is to be found in the Annual Reports of the Equality Authority or in newspaper reports.

13 In 2008, it delivered 84 decisions under the Employment Equality Acts (EEA) and 126 under the Equal Status Acts (ESA); in 2009, 123 decisions (EEA) and 87 decisions (ESA); in 2010, 262 decisions (EEA) and 56 decisions (ESA); in 2011, 268 decisions (EEA) and 67 decisions (EEA).

14 *Lavery v. HSE Mid-Western Region*, DEC-E2008-046 (referring to the purpose as being that “a corpus of case law develops and is readily available to the public on complaints under equality legislation and thus inform best practice in the area”). The requirement to publish is set out in section 89(1), Employment Equality Acts, 1998–2011 and section 30(1), Equal Status Acts 2000–2011. In practice, the Tribunal makes its decisions available through its online database of decisions. See <http://www.equalitytribunal.ie/Database-of-Decisions/> (last accessed 11 November 2012).

15 An exception to this is *Christian Brothers High School Clonmel v. Stokes* [2011] IECC 1.

## C. Scope and Structure of the Report

The Equality Authority commissioned this report following a request for tenders published in late June 2012. The research, analysis and writing for this report were then undertaken over a two-month period between August and October 2012. Because of the significant volume of decisions under the Acts during 2008 and 2011, and the limited time-frame for this research, the report focuses on a number of selected issues in Ireland's equality case law during that period, two of which were prescribed by the terms of the initial request for tenders and two of which were selected by the author with the agreement of the Equality Authority.

In Chapter 2, the report examines the jurisdiction of the Equality Tribunal. Over the past decade, the cases coming before the Tribunal have highlighted the very broad scope of Ireland's equality legislation. Increasingly, in recent years, respondents have responded to this by challenging the jurisdiction of the Tribunal to hear complaints referred to it under the Acts. Such challenges have taken a number of forms. For example, it may be contended that the complaint has not been referred to the Tribunal in a timely fashion, that the subject matter of the dispute does not fall within the scope of the Acts or that the complaint has been made against the incorrect respondent as a matter of law. Other challenges - such as the recent High Court challenge to the Tribunal's entitlement to consider the compatibility of Irish law with European Union law - are of an even more fundamental nature. Chapter 2 therefore examines the different aspects of the Tribunal's jurisdiction which have been considered in Irish equality case law during the period between 2008 and 2011. While the Equality Tribunal is soon to be replaced by the Workplace Relations Commission, the issues of jurisdiction which have arisen under the Acts to date will nonetheless remain relevant for whatever body is charged with the investigation of complaints under the Acts.

In Chapter 3, the report considers the manner in which the burden of proof in discrimination claims has been assessed and applied between 2008 and 2011. The problem of proof in claims of discrimination is notorious. Under the Acts, a complainant must establish a *prima facie* case of discrimination. If a complainant does so, it then falls to the respondent to prove that its conduct was not discriminatory. In other words, there is a partial shifting of the burden of proof. Notwithstanding this partial shifting of the burden of proof, the majority of complaints referred to the Tribunal for investigation do not succeed. While every decision of the Tribunal or the courts under the Acts turns on its own specific facts and circumstances, and it is very difficult to reach any definitive general conclusions about questions of proof, Chapter 3 seeks to examine the approach to the assessment of the burden of proof in the case law during the reporting period. As part of this examination, it looks at the general principles set out in the case law as well as the application of those principles in a number of specific contexts: first, complaints in an employment context arising from pregnancy; second, complaints in an employment context on the race ground which constitute the largest category of complaint under the Acts in recent years, particularly in 2010 and 2011.



In Chapter 4, the report looks at a selection of other issues in the evolving case law of the Equality Tribunal during the reporting period. Because of the specific focus of Chapters 2 and 3, the purpose of Chapter 4 is to provide a more general perspective on the case law of the Tribunal between 2008 and 2011. To this end, Chapter 4 considers a range of substantive and procedural issues which have arisen under the Acts. First, it explores important developments in the case law of the Tribunal during the reporting period on the different grounds of discrimination. Second, it looks at a number of the most topical exemptions from the general prohibition on discrimination under the Acts. Third, it analyses a number of significant procedural issues which have featured prominently in the Tribunal's case law in recent years. While Chapter 4 is of necessity selective in the issues it examines, it nevertheless seeks to provide a fuller picture of the case law of the Tribunal for the period under review.

Last but certainly not least, Chapter 5 considers how the Irish courts have approached, interpreted and applied the Employment Equality Acts and the Equal Status Acts between 2008 and 2011. It considers the different types of cases coming before the Irish courts under or in respect of the Acts: appeals from the decisions of the Tribunal and Labour Court; judicial review applications invoking the supervisory function of the High Court in respect of the Equality Tribunal; and other cases involving the interpretation and application of the Acts. The Acts are complex and novel if not radical pieces of legislation. While the Tribunal is the decision-maker for the vast majority of equality cases, the decisions of the Irish courts, in particular the High Court and Supreme Court, provide extremely valuable and authoritative guidance on the interpretation of Ireland's equality legislation for the Tribunal. While the number of cases coming before the Irish courts under the Acts remains modest, those cases are nonetheless of great significance in providing guidance to the Equality Tribunal, the Equality Authority and all other organisations and individuals concerned with the operation of the Acts. In contrast to the Equality Tribunal and, to a lesser extent, the Labour Court, however, the Irish courts are not specialised or expert fora on issues of discrimination. Chapter 5 therefore considers the extent to which the Irish courts have, over a decade on from their enactment, adapted to the Employment Equality Acts and the Equal Status Acts.

By examining these selected issues in Irish equality case law between 2008 and 2011, the report seeks to contribute to a better understanding of Ireland's equality legislation and the potential for using the legislation more effectively. In Chapter 6, the report brings together the conclusions of each of the preceding substantive chapters before offering some more general conclusions on the basis of the case law during the reporting period.



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## Chapter 2

# Jurisdiction of the Equality Tribunal

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## A. Introduction

The Equality Tribunal is the body primarily responsible for the interpretation and application of the Employment Equality Acts 1998–2011 and the Equal Status Acts 2000–2011. An independent, quasi-judicial forum, the Tribunal mediates and investigates complaints of alleged discrimination and other forms of prohibited conduct under the Acts and its decisions are legally binding on the parties coming before it. The broad nature of Irish equality legislation inevitably raises issues as to the scope of the Tribunal’s jurisdiction. Moreover, because this legislation represents, at least in part, the implementation of an important body of European Union law in Ireland, the jurisdiction of the Tribunal cannot be understood as a matter of Irish law alone. The Tribunal forms part of the wider network of courts and tribunals across the European Union empowered to interpret and apply EU equality law. As the Tribunal has developed since its establishment in 1999, challenges to its jurisdiction have become increasingly common. This chapter examines the developments in the case law relating to the jurisdiction of the Tribunal during the period of 2008–2011.

## B. The Statutory Framework

The Equality Tribunal, originally entitled the office of the Director of Equality Investigations, was established under the Employment Equality Acts 1998–2011.<sup>1</sup> The Tribunal is comprised of the Director and staff, including equality officers and equality mediation officers to whom the Director can delegate the performance of his or her functions, all of whom “shall be independent in the performance of their functions.”<sup>2</sup> While the officers generally have some legal training, they are civil servants and not professional lawyers or judges. However, the Tribunal has an in-house legal advisor and may also seek the opinion of outside lawyers on legal issues arising in its work.<sup>3</sup>

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1 Section 75(1), Employment Equality Acts (as amended by section 24, Equality Act 2004).

2 Section 75(5), Employment Equality Acts.

3 See e.g. Keena, “We are not crusaders here. We just administer the law”, *Irish Times*, 22 October 2004.



In accordance with section 77 of the Employment Equality Acts, a person who claims to have suffered discrimination, victimisation or any other contravention of the Act “may... seek redress by referring the case to the Director.”<sup>4</sup> In cases raising issues of gender equality, a person may seek redress by referring the case directly to the Circuit Court instead of to the Director.<sup>5</sup>

Where a case is referred to the Director which it appears “could be resolved by mediation”, the Director may refer the case to an equality mediation officer.<sup>6</sup> However, where the case cannot be resolved by mediation, the Director “shall investigate the case and may, as part of that investigation and if the Director considers it appropriate, hears persons appearing to the Director to be interested.”<sup>7</sup>

In similar terms, section 21 of the Equal Status Acts 2000–2011 provides for the referral of claims to the Director of the Equality Tribunal while sections 24 and 25 of the Acts provide for the mediation and investigation of complaints.

In undertaking its functions, the Tribunal adopts an investigative approach, proactively seeking facts and considering legal issues even where such issues have not been raised by the parties. Barry has described this as a cornerstone of the legislation.<sup>8</sup> In some cases, the Tribunal will simply clarify or properly characterise the underlying complaint.<sup>9</sup> However, in other cases, the Tribunal will go beyond this, considering additional grounds of discrimination or claims of harassment or victimisation to those grounds which have been raised by the complainant.<sup>10</sup> While this is a valuable role, it must be exercised with caution and with respect for the parties’ right to fair procedures.

There have been a number of changes to the Tribunal’s jurisdiction since its establishment. First, the Tribunal has been vested with jurisdiction to investigate complaints of unlawful discrimination in relation to occupational pensions under the Pensions Acts.<sup>11</sup> These complaints fall outside the scope of the present report. Secondly, discriminatory dismissals, which were originally excluded from the Tribunal’s jurisdiction, now form part of its case load under the Employment

4 Section 77(1), Employment Equality Acts.

5 Section 77(2), Employment Equality Acts

6 Section 78, Employment Equality Acts.

7 Section 77(1), Employment Equality Acts.

8 Barry, “Different Hierarchies - Enforcing Equality Law” in Barry and Costello eds, *Equality in diversity: the new equality directives* (Irish Centre of European Law/Equality Authority, 2003), 428.

9 *Mary Higgins -v- Permanent TSB*, DEC-E2010-084.

10 *Byrne v. Association of Irish Racecourses Ltd.*, DEC-E2008-008; *A Post Leaving Certificate Student v. An Educational Institution*, DEC-S2009-043.

11 Part VII of the Pensions Act 1990 (as amended by the Social Welfare (Miscellaneous Provisions) Act 2004).

Equality Acts.<sup>12</sup> Thirdly, discrimination on or at the point of entry to licensed premises no longer falls within the jurisdiction of the Tribunal as a result of the transfer of this jurisdiction to the District Court under the Intoxicating Liquor Act 2003.<sup>13</sup> At the time of writing, the most significant changes in the Irish equality architecture since the coming into force of the Acts were imminent, with the Tribunal, alongside other bodies in the employment and industrial relations fields, to be replaced by the Workplace Relations Service.<sup>14</sup>

## C. The Material Scope of the Jurisdiction of the Tribunal

The material scope of the Equality Tribunal's jurisdiction is at once limited and wide-ranging. It is limited in the sense that it is confined exclusively to the subject-matter conferred to it under the Acts; that is, in simple terms, discrimination and other forms of prohibited conduct, such as harassment and victimisation, in the fields of employment and the provision of goods and services. However, it is also very wide-ranging in the sense that the prohibited conduct, which the Acts seek to combat, can take many different forms and arise in many different contexts.

### (i) The Breadth of the Tribunal's Jurisdiction

The broad scope of the Tribunal's jurisdiction under the Acts is especially clear in respect of the Equal Status Acts. Its core provision, section 5, provides that a person shall not discriminate "in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service can be availed of only by a section of the public."<sup>15</sup> Section 2 defines the term "service" as "a service or facility of any nature which is available to the public generally or a section of the public" before going on to enumerate a non-exhaustive list of services. The case law during the reporting period demonstrates the very broad interpretation which "service" has been given by the Equality Tribunal. In addition to the obvious examples of the provision of services, it encompasses the following areas: health services, including mental health services in the context of involuntary detention;<sup>16</sup> social benefits such as the

12 Section 46, Equality Act 2004.

13 Section 19 of the Intoxicating Liquor Act 2003, discussed below at section C.(iii).

14 See below note 123. The Equality Authority and the Irish Human Rights Commission will also merge into the Irish Human Rights and Equality Commission: see the Heads of Irish Human Rights and Equality Commission Bill 2012, available online at <http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf> (last accessed 7 November 2012).

15 Section 5(1), Equal Status Acts.

16 *A Patient v. Health Service Provider and A Hospital*, DEC-S2010-053, paras. 6.2.2 – 6.2.4.

Back to Education Allowance Scheme,<sup>17</sup> or maternity and adoptive leave,<sup>18</sup> the Free Travel Scheme and the Disability Allowance;<sup>19</sup> access to a website;<sup>20</sup> the allocation of shares;<sup>21</sup> membership of the youth wing of a political party;<sup>22</sup> and even the non-adjudicative functions of bodies such as the Employment Appeals Tribunal and the Garda Síochána Ombudsman Commission.<sup>23</sup>

In response to an argument that its definition of “service” was too wide and was not consistent with that laid down in Council Directive 2004/113/EC, an officer of the Tribunal has vigorously defended its approach:

I note that the Equal Status Act predated the Council Directive by four years. In that time the Tribunal’s broad definition of “service” has contributed enormously to the promotion of equality and the prohibition of discrimination in Irish society, which was the original primary purpose of the Equal Status Act 2000. To dilute the Tribunal’s definition of “service” at this point and exclude such services as education would, in my opinion, be a retrograde step and completely contrary to the intention of the legislature that enacted the legislation.

I also consider that such a step would be contrary to the intention of the EU legislature who introduced Council Directive 2004/113/EC as a means of further strengthening equality legislation across Member States rather than diluting the impact of laws already in existence. As instruments of social legislation, it is my opinion that both the Equal Status Acts and the Council Directive must be interpreted in a purposive manner and I cannot accept that it was ever the intention of the Oireachtas, in transposing the Directive, to limit the scope of the Equal Status Acts.<sup>24</sup>

17 *Gerard Crowley v. Department of Social and Family Affairs*, DEC-S2010-020.

18 *A Complainant v. Department of Social Protection*, DEC-S2011-053 (rejecting the respondent’s arguments that these benefits do not constitute services within the meaning of the Acts but holding that the service contended for by the applicant did not exist within the statutory scheme).

19 *Mrs. X (on behalf of her Daughter, Ms. Y) v. The Minister for Social and Family Affairs*, DEC-S2009-039.

20 *Dalton -v- Aspire*, DEC-S2009-062.

21 *Fitzgerald v. Dairygold Co Operative Society Limited*, DEC-S2009-083, para. 5.3. See also *Oladoyin & Others v. Abby/Ecp Taxis*, DEC-S2011-009.

22 *Mr Paul Egan v. Young Fine Gael*, DEC-S2011-001.

23 *Fogarty -v- Employment Appeals Tribunal*, DEC-S2009-087, para. 4.7 (referring to the reception and processing of complaints and the organising and hearing of complaints; under appeal). See also *Peter O’Neill v. Garda Síochána Ombudsman Commission*, DEC-S2010-037.

24 *A Separated Father v. A Community School*, DEC-S2010-049 (concerning access to a student’s school records).

Indeed when one considers the wide range of contexts in which the Tribunal has applied the Equal Status Acts, the radical nature of the legislation becomes clear. It covers the supply of goods and the provision of services across all sections of Irish society, from the refusal of entry to men in a bridal shop<sup>25</sup> or of access by certain non-nationals to fishing facilities,<sup>26</sup> to the refusal of services on the ground that the person seeking the service was suffering from HIV<sup>27</sup> or Hepatitis C<sup>28</sup> and the refusal of international adoption services,<sup>29</sup> to take a handful of examples from across the spectrum of cases during the reporting period.

If the Employment Equality Acts might, on first impression, appear significantly more limited in their scope, nonetheless they apply at all significant stages of the employment process: access to employment; conditions of employment; training or experience for or in relation to employment; promotion or re-grading; and the classification of posts.<sup>30</sup> The Acts apply both to employers and to providers of agency work. As shown by cases such as *Byrne*, which involved a casual employee who worked only a few days every year for her employer,<sup>31</sup> the reach of the Employment Equality Acts is also extensive.

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25 *McMahon v. Bridal Heaven Ltd.*, DEC-S2008-015 (finding there to be discrimination on the ground of gender); *Blaney v. The Bridal Studio*, DEC-S2008-032 (rejecting the complaint of discrimination on the basis that the exception set out in section 5(2)(g) of the Acts applied).

26 *Ghetau v. New Ross Coarse Angling Limited*, DEC-S2011-059.

27 *Goulding v. O'Doherty*, DEC-S2009-073.

28 *Ms A v. A Hotel and Leisure Centre*, DEC-S2011-012.

29 *A Couple v. The Intercountry Adoption Services*, DEC-S2010-002.

30 Section 8(1), Employment Equality Acts.

31 *Byrne v. Association of Irish Racecourses Ltd.*, DEC-E2008-008 (following, *inter alia*, *Nevin v. The Plaza Hotel*, DEC-E2001-033).



**(ii) The Limits to the Tribunal's Jurisdiction**

Although its jurisdiction is extremely broad in its potential scope, the Tribunal, in its decisions, is also careful to emphasise the limits of its material jurisdiction. Although complaints under the Acts do not always come neatly compartmentalised and frequently raise other legal issues, the Tribunal has been careful to emphasise that it has no general jurisdiction to apply the law of land, whether it be criminal, civil, or public law.<sup>32</sup> While it will often have regard to the general law, for example in considering the other legal obligations imposed on service providers or employers,<sup>33</sup> it takes care in drawing the line between such legal obligations and those arising under equality legislation.<sup>34</sup> Furthermore, in its case law for the period of 2008–2011, the Tribunal has made it clear that it has no general jurisdiction to provide redress for unfairness, unless it constitutes prohibited conduct under the Acts.<sup>35</sup>

32 *Dalton v. Glynn*, DEC-S2008-082 (incitement of hatred); *Dalton v. Glynn*, DEC-S2008-083 (theft); *Dalton v. Glynn*, DEC-S2008-083 (perjury); *A Pupil v. A Named Primary School*, DEC-S2010-038 (child abuse); *Traynor v. H.S.E Dublin North East*, DEC-S2009-072 (slander and breach of confidentiality); *Huszcz v. Billy Grennon House Ltd.*, DEC-S2011-054 (landlord/tenant); *Cash v. Murphy Property & Finance Ltd.*, DEC-S2011-031 (data protection); *O'Donnell v. Roscommon County Council*, DEC-S2008-113 (issues under the European Convention on Human Rights Act); *Lyamina v. The Department of Education and Science*, DEC-S2009-016 (constitutional right to education); *A Complainant v. A Primary School*, DEC-S2009-040 (constitutional rights of parents); *Dalton v. Citizen Information Centre Dún Laoghaire and Comhairle*, DEC-S2010-040 (constitutional right of access to the courts); *A Separated Complainant v. A Hospital*, DEC-S2010-046 (guardianship).

33 *Banjoko -v- Ms. Linda Mellon t/a Dolmen Nursery & Montessori School*, DEC-S2009-020 (taking note of the relevant provisions of the Child Care Act, 1991 (as amended) and the Child Care (Pre-School Services) Regulations, 1996); *Chawla -v- Irish Wheelchair Association*, DEC-S2009-024 (taking account of the relevant provisions of the Freedom of Information Acts); and, most significantly, *McGreal v. Clúid Housing*, DEC-S2011-004 (taking note of the findings of the High Court in the *Pullen*, *Gallagher* and *Donegan* cases in relation to the procedure for evicting tenants from local authority housing under section 62 of the Housing Act 1966 and its incompatibility with the ECHR).

34 *Mr Pat Hallinan v. Moy Valley Resources I.R.D. North Mayo-West Sligo Ltd.*, DEC-S2008-025; *Nolan v. Bettystown Court Hotel*, DEC-S2009-042 (both relating to requirements under building regulations).

35 *Kukajs -v- Technical Support Services Ltd.*, DEC-E2009-009; *Slawomir Kacxmarek -v- Boxform Limited (In Liquidation)*, DEC-E2011-003.

The Tribunal will also lack jurisdiction in relation to a complaint if it has been the subject of a settlement agreement between the parties. Following the approach of the Labour Court, the Tribunal has confirmed in a number of cases during the reporting period that, if such a settlement expressly or impliedly compromises all claims between the parties, this deprives the Tribunal of jurisdiction.<sup>36</sup>

In the employment field, the jurisdiction of the Tribunal may be excluded in certain circumstances where the employee has sought alternative forms of redress, such as, in the context of dismissal, redress under the Unfair Dismissals Act or damages for wrongful dismissal at common law.<sup>37</sup> In a similar vein, while the Tribunal can consider whether a provision of a collective agreement is null and void by virtue of section 9 of the Acts, it has no other jurisdiction to interpret or apply collective agreements.<sup>38</sup> While in some cases applications may be made under both the Acts and other employment legislation, such as the Protection of Employees (Part-Time Work) Act 2001,<sup>39</sup> the Tribunal has no

36 *Kaszetlan v. Fingal County Council*, DEC-E2011-189; *John Whelan v. Dublin City Council*, DEC-E2011-033; *John Green v. Siemens Enterprise Communications Ltd.*, DEC-E2011-073. The Tribunal will have careful regard to the terms of the settlement: see, for an example of a case where the Tribunal considered that it retained jurisdiction, *Mark Langford v. An Grianan Hotel*, DEC-E2011-220.

37 Section 101, Employment Equality Acts. See *Barry O'Carroll v. Sovereign Security Limited*, DEC-E2011-247 (finding that the Tribunal had no jurisdiction to consider the issue of dismissal where the Employment Appeals Tribunal had begun a hearing into the issue under the Unfair Dismissals Acts); *A Complainant v. A Retail Chain*, DEC-E2011-218 (finding no jurisdiction in circumstances where the complainant was relying on the same set of facts relating to dismissal before the Tribunal and the Rights Commissioner under the Unfair Dismissals Acts). However, the provision is not absolute in its terms: *Valpeters -v- Melbury Developments Ltd.*, DEC-E2009-019 (affirming jurisdiction in circumstances where no claim of unfair dismissal had been brought under the Unfair Dismissals Acts and where claims under the Organisation of Working Time Act, 1997, the Terms of Employment (Information) Act, 1994, and the Payment of Wages Act, 1991 had not been heard before the Rights Commissioner as issues of discrimination); *Stoskus v. Goode Concrete Limited*, DEC-E2011-167 (acknowledging entitlement to apply for redress for discriminatory dismissal under the Acts where High Court proceedings arising from the employment dispute did not address the issue of dismissal).

38 *Ivan Dikov v. SAP Landscapes Ltd.*, DEC-E2008-053 (refusing jurisdiction to interpret or apply a registered employment agreement); *Ilko Jaremukcs v. Maughan Construction Ltd.*, DEC-E2008-056 (emphasising its limited jurisdiction in relation to collective agreements under section 86(1)).

39 Section 101A, Employment Equality Acts. *Ashmore v. The Nationalist & Leinster Times Limited & Others*, DEC-E2011-240 (acknowledging the entitlement to apply under the Acts where no relief had been granted under Protection of Employees (Part-Time Work) Act 2001).



general jurisdiction in matters of employment law.<sup>40</sup> Nevertheless, the case law during the reporting period demonstrates that complainants frequently make claims under the Acts and other employment legislation, without regard to the effect which this may have on the jurisdiction of the Equality Tribunal. However, the establishment of the Workplace Relations Service, with its Single Complaints Form,<sup>41</sup> should serve to remove some of the difficulties which have traditionally arisen as a result of the variety of first instance fora before which employment law issues have had to be canvassed by complainants.

### **(iii) Changes to the Tribunal's Jurisdiction: section 19 of the Intoxicating Liquor Act 2003**

One of the most significant changes to the jurisdiction of the Equality Tribunal since its establishment has been the transfer from the Tribunal to the District Court of discrimination claims relating to licensed premises. Section 19 of the Intoxicating Liquor Act 2003 ('the Act of 2003') provides that a person who claims that prohibited conduct under the Equal Status Acts has been directed against him or her "on, or at the point of entry to, licensed premises" may apply to the District Court for redress.

Complaints in relation to refusal of admission to, or service in, licensed premises – particularly on the ground of membership of the Traveller community – had a prominent place in the Equality Tribunal's case law under the Equal Status Acts prior to the reporting period.<sup>42</sup> Although this change had already been in place for over four years at the start of the reporting period, decisions on the final complaints which pre-dated this change were only handed down in 2008 and 2009, a symptom of the significant delays which beset the Tribunal's work.<sup>43</sup>

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40 *Slevin v. Liberty Mutual Insurance Europe Limited (t/a Liberty International Underwriters Limited)* DEC-E2009-026 (expressing its lack of jurisdiction in matters of parental leave); *Golovan -v- Porturlin Shellfish Ltd.*, DEC-E2008-032 (noting that, while there may have been a breach of its provisions, it had no jurisdiction to make a finding in relation to breaches of the Payment of Wages Act 1994).

41 The Single Complaint Form is in fact already in use: <http://www.workplacerelements.ie/en/services/howtomakeacomplaint/> (last accessed 7 November 2012).

42 See the Annual Legal Reviews of the Equality Tribunal for the years 2001-2007, available online at <http://www.equalitytribunal.ie/Publications/Annual-Legal-Reviews/> (last accessed 7 November 2012).

43 See e.g. *Joseph Kerry v. Fox's Bar*, Galway, DEC-S2008-001 (relating to an incident which took place on 17th March 2003); *Michael Ward v. The Fiddler's Elbow Pub, Ballaghderreen*, DEC-S2008-002 (relating to an incident which took place on 31st August 2001); *Breda Berry & Ors v. Sheldon Park Hotel*, DEC-S2008-008 (relating to an incident which took place on 30th May 2003). Most but by no means all of these complaints were brought on the Traveller community ground: see e.g. *Grogan v. Crocketts on the Quay, Ballina*, DEC-S2009-001 (family status).

Recent case law illustrates that the effects of this transfer of jurisdiction may be more far-reaching than might have initially seemed the case. In *Dunne & Anor v. Planet Health Club*,<sup>44</sup> the complainants, who were members of the Traveller community, were members of a gym for two months before their membership was abruptly terminated, allegedly because of their membership of the Traveller community. The respondent informed the Tribunal that the gym, which formed part of a larger entertainment centre, was part of a licensed premises, with the result that the complaint of discrimination fell within the jurisdiction of the District Court, not of the Tribunal. However, other cases show that the transfer of jurisdiction to the District Court, being restricted to discrimination “on, or at the point of entry to, licensed premises,” is not without its limits.<sup>45</sup>

While complaints in relation to licensed premises were a staple of the caseload of the Equality Tribunal under the Equal Status Acts prior to the transfer of jurisdiction, it is not clear to what extent the jurisdiction of the District Court under section 19 has been invoked. The limited information which is available from the annual case-work reports of the Equality Authority does not tell a positive story. In *Maughan v. Michael Warde’s Public House*, the District Court accepted the defendant’s argument that the plaintiff’s case should be dismissed because the plaintiff had not tendered formal proof that the defendant’s premises were licensed premises at the time of the incident although it refused to award the defendant its costs.<sup>46</sup> This case illustrates the very real practical difficulties facing victims of discrimination as a result of the transfer of jurisdiction to the District Court: first, there are the evidential difficulties – as exemplified by the requirement for formal proof of the licence – which are the hallmarks of an adversarial process as opposed to an investigative process and which highlight the need for legal representation even at the District Court level; secondly, there is the very real risk of an award of costs. Similar difficulties are evident in a number of other cases which have been taken under the Act of 2003.<sup>47</sup> While more information than that which is currently available on the practice of the District Court under

44 *Dunne & Anor v. Planet Health Club*, DEC-S2011-018.

45 *McGuffin & Harte v. Eyre Square Hotel*, DEC-S2008-051;  
*Ward v. Menlo Park Hotel*, DEC-S2011-042.

46 *Maughan v. Michael Warde’s Public House* (Claremorris District Court (Judge Geoffrey Brown), *ex tempore* decision, 14th February 2008), referred to in *Case Work Activity 2008* (Equality Authority, 2008), 31.

47 *Catherine Joyce v. The Bell Bar* (District Court, undated, Equality Authority Report, 2009, 27-28) where the Court expressed concern at the refusal of service but, holding that this refusal had been due to a previous incident, rejected the complaint of discrimination. The 2009 Report also refers to another District Court decision but no further details are given. See also, on the disability ground, *McGee v. Downey’s Pub* (District Court, Judge Mary Collins, undated, Equality Authority Report, 2011).

section 19 of the Act of 2003 would be necessary before coming to any firm conclusion on this issue, the initial signals certainly appear to confirm the concerns raised in relation to the transfer of jurisdiction to the District Court.<sup>48</sup>

## D. The Personal Scope of the Jurisdiction of the Tribunal

During the reporting period, the Tribunal, and the courts, have also clarified a number of issues relating to the personal scope of the Tribunal's jurisdiction.

In a number of recent cases, the Tribunal has confirmed that an equality complaint may survive the death of the complainant and may be pursued by the estate of the deceased complainant. In *Hegarty v. Area Development Management Ltd.*, the Equality Officer, after considering legal submissions on the issue, was satisfied that there was "no provision in the Equal Status Acts that precludes a complaint of the kind made by Mr. Hegarty from being a cause of action or from devolving on his estate."<sup>49</sup> This approach has been followed in a number of later decisions, where the Tribunal has, on the facts of the particular cases, rejected arguments that the survival of the complaint would place the respondent at an unfair disadvantage or would make redress impossible.<sup>50</sup>

In *Gloria (Ireland's Lesbian and Gay Choir) v. Cork International Choral Festival Limited*,<sup>51</sup> the Tribunal obtained the opinion of counsel on the issue of whether the complainant, an unincorporated association, had *locus standi* under the Equal Status Acts and came to the following conclusion:

Having regard to the foregoing, I am of the view that the Equal Status Acts should be interpreted as limiting complainants to individuals. Whilst the term "person" is usually interpreted broadly to include

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48 In addition to the opposition to the measure in the Oireachtas during the passage of the Intoxicating Liquor Act 2003, the transfer of jurisdiction has been the subject of critical comment and scrutiny by non-governmental organisations and international bodies such as the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities: see e.g. Committee of Ministers, Resolution CM/ResCMN(2007)10 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland (20th June 2007).

49 *Hegarty v. Area Development Management Ltd.*, DEC-S2009-004.

50 *Hendrick (Deceased) v. National Learning Network t/a Roslyn Park College*, DEC-S2009-013. See to similar effect, under the Employment Equality Acts, *Ibidunni v. Boston Scientific (Ireland) Ltd.*, DEC-E2010-230. See also *Kelly & Masterson (Deceased) v. Chivers Ireland Ltd.*, DEC-E2011-177 (where the Tribunal commented that the case was atypical in that the facts were mostly agreed and thus neither side was at a particular disadvantage as a result of the second complainant's absence and inability to give oral evidence).

51 *Gloria (Ireland's Lesbian and Gay Choir) v. Cork International Choral Festival Limited*, DEC-S2008-78.

corporate and unincorporated bodies, I am satisfied that a contrary intention is evident from the Equal Status Acts given the manner in which the discriminatory grounds are set out and the particular definition of “person” as contained in the Acts. I am therefore of the view that the legislative intent in this regard was to protect individuals and not bodies from discrimination. In the circumstances, I find that the complainant in the present case i.e. Gloria (Ireland’s Lesbian & Gay Choir) does not have the locus standi to make a complaint under the Equal Status Acts, 2000 to 2008. Accordingly, I find that I do not have jurisdiction.

The appropriate course of action in such a case would thus appear to be for a member or members of the unincorporated association to seek to make a complaint insofar as such member or members may claim to have been refused a service.

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The case law during the reporting period also highlights the potential pitfalls in identifying the proper respondent in equality complaints.

In respect of the Equal Status Acts, the Tribunal has confirmed the importance of suing, in the case of a complaint of discrimination in the provision of services, the “service provider”. In *Gogarty v. Gilna*,<sup>52</sup> for example, the Tribunal held that it had no jurisdiction because the complaint – that a bookmaker had not provided a suitable ramp to allow the complainant access to the premises – was made against the landlord of the premises, and not his lessee, the bookmaker. However, identification of the correct respondent is not always a straightforward exercise<sup>53</sup> and, while the onus is on the complainant to identify the correct respondent, the Tribunal will often adopt a practical and purposive approach to this issue once the respondent is not prejudiced.<sup>54</sup>

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52 *Gogarty v. Gilna*, DEC-S2008-056. See also *Hallinan v. Mayo Education Centre*, DEC-S2008-063 and *Murray v. Longford Society for the Prevention of Cruelty to Animals Charity Shop*, DEC-E2008-060. *Merriman v. O’Flaherty’s Ltd t/a Reads Print Design & Photocopying Bureau*, DEC-S2011-049 (where the Tribunal was of the view that, in light of section 42 of the Equal Status Acts, the correct respondent was the service provider company which was responsible for its servants and agents and that therefore it was unnecessary to name individual servants and agents as respondents).

53 See e.g. *Lyamina v. Department of Education and Science*, DEC-S2009-016; *O’Brien v. Kerry County Council*, DEC-S2010-015 and *O’Brien v. HSE South*, DEC-S2010-016. In some cases, the Tribunal will rely on the principle of agency as enshrined in section 42(2) of the Acts to address these issues: *Thompson v. Iarnrod Eireann/Irish Rail*, DEC-S2009-015 (finding the respondent liable as agent of Department of Social and Family Affairs in the administration of Free Travel Pass Scheme); *Callan v. United Travel*, DEC-S2009-027 (finding the travel agent liable as agent for tour operator). However, this will not always be the case: see e.g. *Neill v. Joe Walsh Tours*, DEC-S2008-099.

54 *Comerford v. Trailfinders Ireland Ltd. and Hurtigruten Ltd.*, DEC-S2011-013, para. 6.6.

In a series of challenges to the Taxi Hardship Payments Scheme, which was an *ex gratia* scheme established by the Government and administered by a company known as Area Development Management Ltd. (later Pobal), the Tribunal rejected arguments that, because the terms of the scheme were laid down by a decision of the Government, the scheme fell outside scope of the Equal Status Acts.<sup>55</sup> However, on appeal in the case of *Pobal v. Hoey*, the Circuit Court (Judge Reynolds) concluded that the respondent was doing no more than administering the scheme in accordance with the criteria established by the Government and for it to do otherwise would have been *ultra vires* and unlawful. The Court also considered that the Tribunal had no jurisdiction to entertain the complaint because to do so was “in effect, to purport to review a decision of the Government.” For these reasons, the Circuit Court allowed the appeal.<sup>56</sup>

While the Court’s decision would be understandable insofar as it related to formal decisions of the Government acting as a collective body, particular on matters of policy, this was not the case in *Hoey* itself and it is suggested that an argument which would seek to exclude from the scope of the Acts other decisions of Government – such as decisions of individual Government Ministers, Departments or other entities or indeed implementing measures taken on foot thereof – would be unsustainable, particularly in the absence of any exception of the kind in place for conduct required by law under section 14 of the Acts.

In respect of the Employment Equality Acts, the case law has confirmed that the onus is on the complainant to identify the correct employer.<sup>57</sup> While in some cases – such as where employees are provided through providers of agency work to prospective employers<sup>58</sup> – it may be appropriate to name more than one respondent, in most cases there will be a single correct respondent. In *Whooley v. Millipore Ireland BV and Millipore Corporation*,<sup>59</sup> the plaintiff sought to bring proceedings against both the Irish company by whom she was employed and its parent company which, she alleged, at all material times controlled, directed and instructed the Irish company. After a careful consideration of the statutory scheme, the High Court (Clarke J.) concluded that the Irish company was the plaintiff’s employer for the purposes of the Employment Equality Acts and that, if persons in the parent company had a direct role in the plaintiff’s

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55 See e.g. *McCall v. Area Development Management Ltd.*, DEC-S2007-058; *Hoey v. Area Development Management Ltd.*, DEC-S2008-010; *Hegarty v. Area Development Management Ltd.*, DEC-S2009-04.

56 The Equality Tribunal has followed this decision in later cases: see e.g. *Brennan v. Area Development Management Ltd. (now Pobal)*, DEC-S2012-010.

57 See *Ruja v. Arden Holdings Ltd.*, DEC-E2010-179, and *Orlowski & Sierzanski v. John Murphy*, DEC-E2011-168. See also *Makauskail v. Masterlink Logistics Ltd.*, DEC-E2011-064 (where the Tribunal was referred to four different possible names for the respondent and rejected the complainant’s argument that it had the power to accede to an application to change the name of the respondent).

58 *An Employer v. A Worker*, Labour Court, Case EDA1129.

59 *Whooley v. Millipore Ireland BV and Millipore Corporation* [2010] IEHC 314.



employment, the Irish company would nonetheless be responsible for such persons. In short, “the statutory liability rests on the employer and no one else.”<sup>60</sup> Accordingly, the Court dismissed the proceedings against the parent company.

Perhaps the most striking feature of the case law under this heading during the reporting period is the significant and increasing number of respondents which are insolvent, no longer trading or dissolved. This has serious implications not only for the conduct of the investigations but also, of course, for the enforcement of any award which may be made. In some cases, the representative of the respondent will simply inform the Tribunal that the entity has ceased trading<sup>61</sup> or disbanded.<sup>62</sup> In many cases, an insolvency practitioner, such as liquidator or receiver, will have been appointed to a respondent company. While on rare occasions the liquidator or receiver will appear as a courtesy to the Tribunal,<sup>63</sup> generally the liquidator or receiver will take a more limited role, providing a written submission,<sup>64</sup> undertaking certain inquiries,<sup>65</sup> or, as in many cases, simply writing to the Tribunal to indicate that he or she cannot or does not intend to defend the proceedings.<sup>66</sup> This reflects the reality that, in many cases, there are no funds available to pay for representation at the hearing, let alone to pay any award which may be made against the company.<sup>67</sup> Nevertheless, the informal nature of the Tribunal’s proceedings is such that it may take account of written submissions from liquidators, receivers or other representatives of a respondent in coming to its decision, even where they do not attend and give oral evidence,<sup>68</sup> and that it may allow directors of a company in liquidation to represent and give evidence on behalf of the company notwithstanding the appointment of a liquidator.<sup>69</sup>

60 [2010] IEHC 314, para. 4.13.

61 *Kudrevice v. L N Sirbh Company*, DEC-E2011-116.

62 *Percy v. Board of Laois Independent Living Association Company Living Ltd.*, DEC-S2008-118.

63 *Businkas v. Eupat Ltd.*, DEC-E2009-039.

64 *Kacxmerek v. Boxform Limited (in liquidation)*, DEC-E2011-003.

65 *Luzak -v- Sales Placement Ltd (in liquidation)*, DEC-E2011-010

66 *Maughan v. Bluered Limited (in liquidation) t/a Kate’s Bar*, DEC-S2009-006; *Jonikas & Ors v. Miskey Cladding Ltd.*, DEC-E2011-120; *Kepezniskas & Ors v. All Purpose Stone Ltd t/a Sanderwood Stone Ltd (in voluntary liquidation)*, DEC-E2011-158. *Howley Civil Engineering Ltd. v. Baksatis*, Labour Court, Case EDA1024.

67 See e.g. *Parker v. Federal Security Limited (in receivership)*, DEC-S2011-036 (where the receiver contacted the Tribunal to advise that he would not be attending the oral hearing, as any award in favour of a third party would rank as an unsecured creditor and he did not anticipate any funds being available to distribute to such a creditor). In certain cases, a successful complainant under the Employment Equality Acts may be able to make a claim under the Insolvency Payments Scheme established under the Protection of Employees (Employers’ Insolvency) Acts, 1984–2004, which give effect to Directives 80/987 and 2002/74/EC.

68 See e.g. *Kudrevice v. L N Sirbh Company*, DEC-E2011-116.

69 *Brenda Farrell v. Irish Youth Promotions (in liquidation)*, DEC-E2011-002.

The position in relation to companies which have been dissolved is even more stark. While in some early cases during the reporting period the Court conducted its investigation and even made an award notwithstanding the dissolution of the respondent,<sup>70</sup> the practice of the Tribunal since 2010, on foot of legal advice, has been to come to a finding that it lacks jurisdiction in complaints against respondent companies which have been dissolved. In *Ramanauskas v. Igor Kurakin Transport Ltd.*, DEC-E2010-260, the Tribunal referred to the opinion of senior counsel which it had recently obtained to the effect that there was no legal basis for hearing a case against a dissolved company in the absence of an express statutory power to do so:

Given the express effect of the State Property Act 1954 and the fact that there are other express statutory provisions which give the dissolved company a legal existence for certain limited purposes, I feel that one is obliged to hold that the Tribunal simply has no jurisdiction in such circumstances.

After giving the complainant an opportunity to make legal submissions on the issue, the Tribunal concluded that it had no jurisdiction to investigate the case.<sup>71</sup> Short of making an application to the courts for the restoration of the company under the Companies Act,<sup>72</sup> this deprives a complainant of the possibility of seeking redress from the dissolved company for discrimination under the Acts.

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70 See *Hennessy v. Cherub Creche Ltd. (dissolved)*, DEC-E2008-033. See also *Luckos v. A & M Platinum Security Ltd.*, DEC-E2009-104.

71 See, to similar effect, *Rebezovs v. A Respondent*, DEC-E2010-214 and *Maciulskis & Ors v. Solid Building Company Ltd.*, DEC-E2011-017. See also *First Bathroom Solutions Ltd. v. Tarvydas*, Labour Court, Case EDA1110.

72 See Courtney, *The Law of Private Companies* (2nd ed., Tottel Publishing, 2004), 728-739.

## E. The Temporal Scope of the Jurisdiction of the Tribunal

The jurisdiction of the Tribunal to investigate complaints is subject to such complaints being made within certain time limits set out in the Acts.

In the case of the Equal Status Acts, section 21(2) requires the complainant to notify the respondent of the allegation and the intention to seek redress under the Acts within 2 months of the occurrence of the prohibited conduct, while section 21(3) makes provision for the extension of this time period in certain circumstances. Failure on the part of the complainant to notify the respondent may therefore be fatal to its investigation by the Tribunal.<sup>73</sup> Section 21(6) provides that a claim for redress may not be referred after the end of the period of 6 months from the date of the occurrence of the prohibited conduct to which the case relates (or its last occurrence) and, on application by the complainant showing reasonable cause, for the extension of this period to 12 months. Similarly, failure to refer the case within this time limit may be fatal to its investigation by the Tribunal.<sup>74</sup>

In the case of the Employment Equality Acts, while there is no analogous notification requirement, section 77(5) lays down an identical time limit for the referral to the Tribunal of claims for redress of 6 months from the date of the prohibited conduct to which the case relates (or its last occurrence) and also makes provision for its extension on an application by the complainant showing reasonable cause. During the reporting period, the Tribunal and the Labour Court have confirmed their existing case law on the meaning of “reasonable cause” in this regard. As expressed by the Labour Court, referring to the “established test” set out in its earlier decision in *Cementation Skanska v. Carroll*,<sup>75</sup> the “irreducible minimum requirement under this test is that the complainant shows that there are reasons which both explain the delay and afford an excuse for the delay”.<sup>76</sup>

73 See, for example, *Adeduntan v. Vodaphone Ireland*, DEC-S2008-110; *Jackson v. Ann’s Hot Bread Shop*, DEC-S2009-018 (failure to prove notification); *Wood v. Aer Lingus*, DEC-S2009-061 and *A Student v. An Institute of Technology*, DEC-S2011-055 (both cases where the Tribunal found it had no jurisdiction and noted that the complainant had the benefit of legal advice and that no application to extend the time was made or no reasonable cause for doing so presented). See also *Ennis v. Navan O’ Mahony’s Football and Hurling Club*, DEC-S2010-031 (dispensing with the requirement of notification in accordance with section 21(3)(a)(ii)); *Litzouw v. Matthews Promproperty Management*, DEC-S2010-026 (rejecting an application to extend time for reasonable cause).

74 See *Lennon v. Health Service Executive*, DEC-S2009-063.

75 *Cementation Skanska v. Carroll*, Labour Court, WTC0338.

76 *An Employer v. A Worker*, Labour Court, Case EDA104.



In the *Stokes* case,<sup>77</sup> the High Court (McCarthy J.) considered an argument that the initial referral of the case to the Equality Tribunal had not been made within the time limits prescribed by the Equal Status Acts. While the Court expressed its view that the application was out of time and that an “application within time is a condition precedent to exercise of jurisdiction by the Director,”<sup>78</sup> the Court ultimately did not rule on the issue on the basis that what was before it was an appeal on a point of law of the Circuit Court decision and not an application for judicial review of the Director’s decision at first instance.<sup>79</sup> Nevertheless, this is an important reminder that compliance with the time limits under the legislation is fundamental to the exercise of the Tribunal’s jurisdiction and that, where there is no compliance, this is a ground for challenging the Tribunal’s decision by way of judicial review.

## F. The Territorial Scope of the Jurisdiction of the Tribunal

In *A Complainant (on behalf of her son C) v. An Airline*,<sup>80</sup> the complainant claimed that the respondent airline had discriminated against her and failed to provide her with reasonable accommodation by not providing her with suitable arrangements to allow for the changing of her disabled son’s nappy on a flight from the USA to Ireland. The respondent submitted that section 46 of the Acts – which provides that the Acts “shall extend to and apply in respect of any ship or aircraft registered in the State that is operated by a person who has a principal place of business or ordinary place of residence in the State, whether or not the ship or aircraft is outside the State” – excluded their application to it because the aircraft in question was registered in the United States and the principal place of business of the respondent was also in that jurisdiction. The respondent further submitted that the Acts only covered flights outside the State to the extent provided for in section 46.

Having considered the principles of international law governing the nationality of, and jurisdiction over, aircraft, the Tribunal noted that section 46 extended the jurisdiction of the Tribunal and the Irish courts “over acts committed on an Irish owned aircraft even where that incident takes place

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77 *Stokes v. Christian Brothers High School, Clonmel*, High Court (McCarthy J.), unreported judgment of 3rd February 2012. While the judgment is not strictly within the reporting period, because the Tribunal decision and Circuit Court judgment were delivered within that period, it is necessary and appropriate to consider it in the context of this study.

78 *Ibid.*, para. 8.

79 *Ibid.*, para. 13. The Court’s approach was no doubt influenced by the fact that the issue had not been raised by the parties prior to the Circuit Court hearing, that parties had, moreover, fully participated in the process before the Tribunal and that counsel for the respondent had conceded that there was no question of prejudice arising from the failure to fulfil the time limit.

80 *A Complainant (on behalf of her son C) v. An Airline*, DEC-S2011-033.

outside the Irish State.<sup>81</sup> However, because the aircraft in question in this case was not registered in Ireland and operated by a person who has a principal place of business or ordinary place of residence in the State, the Tribunal concluded that it had no jurisdiction to consider the complaint.

In *Comerford v. Trailfinders Ireland Ltd. and Hurtigruten Ltd.*,<sup>82</sup> the complainant took a claim for discrimination on the marital status ground against the first respondent, a travel agent, and the second respondent, a tour operator, arising from their refusal to provide her with a single occupancy cabin on an Antarctic cruise operated by the second respondent. The complainant had sourced the tour operator's brochure from the travel agent's website and had engaged with both respondents in relation to the booking. The second respondent objected to the Tribunal's jurisdiction on the basis that it was a company incorporated in the United Kingdom and a wholly owned subsidiary of a Norwegian company, neither of which had a subsidiary or trading office within the State. Referring to section 46 of the Acts, it claimed that the Oireachtas could not have intended that the Acts to apply to persons not resident in the State and that its only connection with the State was that its products and services were sold or supplied here by another company.

The Tribunal noted that the complainant had sourced the second respondent's brochure, which advertised a service to the Irish public, through an Irish website, belonging to the respondent. On the basis of articles 5 and 15 of the Council Regulation (EC) No. 44/2001, the Brussels I Regulation, the Tribunal held that the complainant, domiciled in Ireland, was entitled to bring proceedings against the second respondent, as a company incorporated in another Member State, in relation to this matter.

The Tribunal adopted a similar approach to jurisdiction in *Dr X v. A University*.<sup>83</sup> In this case, the complainant, who suffered from anxiety, alleged that the respondent, an institution based in the United Kingdom, had failed to provide him with reasonable accommodation in the completion of assignments which formed part of a course of study which the institution offered. The respondent submitted that, because it was based in the United Kingdom and the complainant had purchased the service at issue while he was domiciled in the United Kingdom, the Tribunal had no jurisdiction to investigate the complaint. However, the Tribunal accepted the complainant's evidence that he was in fact domiciled in Ireland when he registered for the course of study and concluded, on the basis of articles 5 and 15 of the Brussels I Regulation, that it did have jurisdiction to investigate the complaint under the Equal Status Acts. Thus,

81 The Tribunal also referred to *Callan v. United Travel and Neill v. Joe Walsh Tours*, noting that, although the complaints involved incidents which took place outside the jurisdiction, in both instances the service in question was obtained in Ireland and through a company whose main place of business was in Ireland.

82 *Comerford v. Trailfinders Ireland Ltd. and Hurtigruten Ltd.*, DEC-S2011-013.

83 *Dr X v. A University*, DEC-S2011-005.

the Tribunal has taken the view that complaints under the Equal Status Acts, and presumably the Employment Equality Acts, fall within the broad definition of civil and commercial proceedings under the Brussels I Regulation.<sup>84</sup>

## G. The Jurisdiction of the Tribunal to Order Redress

The forms of redress which the Tribunal may order are set out in section 27 of the Equal Status Acts and section 82 of the Employment Equality Acts respectively. In practice, the most important forms of redress under the Acts are orders for compensation for the effects of the discrimination or other prohibited conduct under the Acts, on the one hand, and orders requiring the respondent to take a specified course of action, on the other hand.<sup>85</sup>

In line with the requirements of European Union law, as initially laid down in the seminal *Von Colson* case<sup>86</sup> and now provided for in the Directives themselves, the sanctions for breach of the obligations arising under equality law must be “effective, proportionate and dissuasive.”<sup>87</sup> Although EU law does not underpin the Equal Status Acts to the same extent as the Employment Equality Acts, this test has nonetheless formed the touchstone for the Tribunal’s redress under both pieces of legislation.

In the vast majority of cases, where a finding of discrimination or victimisation or harassment is made, the Tribunal will award compensation.<sup>88</sup> While section 27 of the Equal Status Acts places a cap of €6,348.69 on compensation, under section 82 of the Employment Equality Acts, the Tribunal may *inter alia* make an award of compensation up to a maximum of two years’ remuneration or, in equal pay cases, arrears of remuneration for a period not earlier than three years prior to the date of referral of the claim.<sup>89</sup> While respondents have increasingly pleaded their incapacity to pay awards of compensation, this has not generally affected

84 See also to this effect de Schutter, “The liability of legal persons in anti-discrimination law” (2008) 6/7 *European Anti-Discrimination Law Review* 33, 39.

85 While section 27 of the Equal Status Acts is confined to these two categories of redress, it will be noted that section 82 of the Employment Equality Acts provides for a more extensive list of forms of possible redress. In particular, section 82 makes provision for equal pay orders: see e.g. *Muziene v. Noonan Services Group Ltd.*, DEC-E2011-225.

86 Case 14/83 *Von Colson* [1984] ECR 1891.

87 See e.g. Recital 35 to Council Directive 2000/78/EC (the Framework Directive).

88 For an exception, see e.g. *A Couple v. The Intercountry Adoption Services*, DEC-S2010-002.

89 See the notable recent case of *O’Brien v. Persian Properties*, DEC-E2012-010 (where the Tribunal made an award of compensation in the sum of €315,000).

the making of awards by the Tribunal. However, in at least one case during the reporting period, the Tribunal took account of the respondent's financial situation by permitting an award of compensation to be paid in four quarterly instalments.<sup>90</sup>

The case law during the reporting period demonstrates the diversity of courses of action which the Tribunal may order a respondent to take, most frequently in addition to an award of compensation. The importance of this jurisdiction under the legislation is that, whereas an award of compensation is of benefit to the complainant alone, an order directing the respondent to take a specified course of action may have a radiating or more systematic effect in combating discriminatory practices. Common orders made by the Tribunal include orders requiring the respondent to develop an equality policy or to undertake equality training for staff,<sup>91</sup> to undertake a review of existing policies, procedures or practices,<sup>92</sup> or to implement a policy on harassment and sexual harassment in accordance with the Code of Practice on Sexual Harassment and Harassment issued by the Equality Authority.<sup>93</sup> However, in some cases, the Tribunal orders much more specific courses of action: from the provision of a key for access to a halting site barrier,<sup>94</sup> or the provision of a P45 to a former employee,<sup>95</sup> or the reassessment of entitlement to an allowance,<sup>96</sup> to much more detailed and onerous steps such as the reorganisation of the respondent's activity in a particular field or the putting in place of systems to prevent similar incidents of discrimination arising

90 *Senhofa v. Molina Properties Ltd t/a Justyne Flowers*, DEC-E2010-13.

91 *Kenny v. Sufi's Café*, DEC-S2008-029; *McGuffin & Anor v. Eyre Square Hotel*, DEC-S2008-051; *Mr. Gabriel Moloney v. Park House Hotel*, DEC-S2008-073; *Brooks v. BRC Shooting Club*, DEC-S2010-042; *Lindberg v. Press Photographers Association of Ireland*, DEC-S2011-041.

92 *Flanagan Talbot v. Casino Cinemas Limited t/a Killarney Cineplex Cinema*, DEC-S2008-053; *Ward v. Keane*, DEC-S2008-119; *Thompson v. Iarnrod Eireann/ Irish Rail*, DEC-S2009-015; *A Post Leaving Certificate Student v. An Educational Institution* DEC-S2009-043; *Mrs. Kn (on behalf of her son Mr. Kn) & Ors v. The Minister for Education & Science*, DEC-S2009-050; *A Patient v. The Mater Misericordiae University Hospital*, DEC-S2009-057; *A Complainant v. An Irish Language College*, DEC-S2010-027; *A Separated Complainant v. A Hospital*, DEC-S2010-046; *A Separated Father v. A Community School*, DEC-S2010-049; *Ms A v. A Hotel and Leisure Centre*, DEC-S2011-012; *McGreal v. Cluid Housing*, DEC-S2011-004.

93 *A Female Employee v. A Recruitment Company*, DEC-E2008-015; *A Construction Worker (SIPTU) v. A Construction Company (CIF)*, DEC-E2008-048.

94 *McCann v. Dun Laoghaire - Rathdown County Council*, DEC-S2008-004.

95 *Boyle v. Ely Properties Group Ltd.*, DEC-E2009-013. See also *An Employee v. A Broadcasting Company*, DEC-E2011-195 (ordering *inter alia* the expunging of recording of absence as sick leave).

96 *A Complainant v. Health Service Executive*, DEC-S2009-011 (ordering a reassessment by the respondent of entitlement to mobility allowance).

in the future.<sup>97</sup> However, this power is not without its limits and there may be a question about the extent to which the Tribunal should make orders which go beyond the facts of the specific case before it. In *Deans v. Dublin City Council*,<sup>98</sup> the Circuit Court, while affirming the decision of the Tribunal, tailored the order in such a way as to limit the course of action to be taken by the Council to the specific case at hand rather than imposing a general obligation on the Council.

In one recent case, the Labour Court upheld the Tribunal's decision to make an order that the respondent take a specified course of action – in this case, putting in place a policy on harassment – even though it overturned the Tribunal's finding that there had been discrimination, apparently doing so on the basis of the respondent's acknowledgment that it had no policy in place.<sup>99</sup> Nevertheless, it is questionable whether the Court, or the Tribunal at first instance, would have any power to make such an order, as opposed to a recommendation, in the absence of a substantive finding of discrimination or other prohibited conduct.

In addition to making orders for redress, the Tribunal has also developed a practice of making recommendations in certain cases. Unlike the orders for redress, such recommendations are not binding on the respondents and thus are not capable of enforcement under the Acts.<sup>100</sup> Moreover, the Tribunal often makes such recommendations in cases where it has not found any discriminatory or other prohibited conduct under the Acts.<sup>101</sup>

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97 *Fogarty v. Employment Appeals Tribunal*, DEC-S2009-087 (provision of special facilities at hearings for people with disabilities, including provision of a sign language interpreter; under appeal); *Mrs. X (on behalf of her son Mr. Y) v. A Post Primary School*, DEC-S2010-009 and *Mrs K (on behalf of her son) v. A Primary School*, DEC-S2011-003 (putting in place a system to facilitate compliance with statutory obligations under the Education (Welfare) Act 2000); *McKeever v. Board of Management Knocktemple National School and the Minister for Education*, DEC-E2010-189 (ordering that the respondent follow good practice in the recruitment of staff by following procedures it had laid down and keeping adequate records of interviews and decisions).

98 *Dublin City Council v. Deans* (Circuit Court (Judge Hunt), unreported judgment, 15th April 2008), Transcript (on file with the author), pp.38-39.

99 *An Employer v. A Worker*, Labour Court, Case EDA1113.

100 *Kudryavitsky v. Ballyfermot Resource Centre*, DEC-S2008-07; *A Complainant v. Health Service Executive*, DEC-S2009-011; *An Employee v. A Broadcasting Company*, DEC-E2011-195.

101 *Croghan v. Xtratherm Ltd.*, DEC-E2009-060; *Kukajs v. Technical Support Services Ltd.*, DEC-E2009-009; *Kelly v. Panorama Holiday Group Limited*, DEC-S2008-007; *Doherty v. Letterkenny Institute of Technology*, DEC-S2010-039; *Releting v. Edmund Rice International Heritage Centres Ltd.*, DEC-E2011-020; *A Complainant v. A Food Manufacturer*, DEC-E2009-066; *Walczak v. Community Welfare Services HSE West*, DEC-S2011-056; *Beirne v. An Post National Lottery*, DEC-E2011-132; *Jurksa v. Greencaps Ltd.*, DEC-E2011-248.

Finally, while the Tribunal may award interest on an award in appropriate circumstances,<sup>102</sup> it is an important characteristic of its activity that it has no jurisdiction to make any award in respect of costs. In a recent decision rejecting a complainant's appeal on quantum, the Labour Court also noted that it had no jurisdiction to increase the level of the award "in order to allow for recovery of all or part of those costs".<sup>103</sup>

## H. Jurisdiction under European Union Law

The jurisdiction of the Equality Tribunal, as discussed above, is confined to the investigation and adjudication on complaints in respect of discrimination and other forms of prohibited conduct under the Equal Status Acts and the Employment Equality Acts. However, because the Acts, and in particular the Employment Equality Acts, give effect to an important body of European Union law, in many cases, the Equality Tribunal is not simply acting as a statutory tribunal under Irish law but it is also acting as a court or tribunal interpreting and applying European Union law. While the case law during the reporting period illustrates the important role of the Tribunal in this respect, it also draws attention to some of the challenges which this poses for the Tribunal as a tribunal of limited jurisdiction under Irish law.

European Union law forms part of the everyday activity for the Equality Tribunal and manifests itself in numerous ways. In its decisions, the Tribunal takes account of Ireland's obligations under European Union law, the relevant provisions of the Directives in the equality field, as well as the significant body of jurisprudence of the Court of Justice of the European Union interpreting this law. In particular, it interprets the Acts in light of the relevant EU law on equality,<sup>104</sup> an approach supported by the recent *Barska* case, where the High Court (Kearns P.) held that section 78(7) of the Employment Equality Act 1998 (as amended) must be read in conformity with the relevant EU Directive and in accordance with EU law and referred the matter back to the Tribunal on this basis.<sup>105</sup>

102 *Hannon v. First Direct Logistics Limited*, DEC-E2011-066. But see Noel Corcoran *Auctioneering v. Martin*, Labour Court, Case EDA1133 (overturning the Tribunal's decision to award interest on the award of compensation on the basis that "the delay in processing the claim was not due to any delay on the part of either the Respondent or the Complainant").

103 *Frylite Dublin Ltd. v. Silgalis*, Labour Court, EDA108.

104 *A Complainant v. An Employer*, DEC-E2008-068; *Ms. Z v. A Chain Store*, DEC-E2009-111; *Millman v. Blackrock Medical Services (Cavan) t/a Dial A Medic (in liquidation)*, DEC-E2011-150. See also *An Employer v. A Worker*, Labour Court, Case EDA0915 and *Tara Contracts Limited (In Liquidation) v. Jonylaite*, Labour Court, Case EDA102.

105 *Barska v Equality Tribunal & Anor* [2011] IEHC 239.



The Tribunal may also make references to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (TFEU) which confers jurisdiction on the Court of Justice to give preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of acts of the Union institutions, bodies, offices or agencies. Article 267 TFEU provides that, where such a question is raised before “any court or tribunal of a Member State”, that court or tribunal “may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon”. The definition of a “court or tribunal” for the purposes of Article 267 TFEU is a question of EU law alone, with the Court of Justice taking account of a number of factors, such as “whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.<sup>106</sup> While Equality Officers under the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977 took the view that they had no power to refer questions under this provision, the Equality Tribunal, established under the Employment Equality Acts and Equal Status Acts, clearly satisfies the criteria laid down by the Court of Justice and comes within the concept of “court or tribunal” for the purposes of Article 267 TFEU.<sup>107</sup> In a significant development, the Equality Tribunal has recently made its first ever reference to the Court of Justice for a preliminary ruling under Article 267 TFEU. In Case C-363/12, entitled *Z v. A Government Department and the Board of Management of a Community School*, the Tribunal has referred a number of questions to the Court of Justice relating to whether the refusal to afford women who have become mothers to their genetic children through an international surrogacy agreement paid leave equivalent to maternity or adoptive leave constitutes discrimination on the grounds of sex and/or disability contrary to European Union law.<sup>108</sup> As well as relying on Council Directives 2000/78 and 2006/54 (the Framework and Recast Directives), the complainant has also invoked the equality provisions of the Treaties, the Charter on Fundamental Rights and the United Nations Convention on the Rights of Persons with Disabilities.<sup>109</sup>

Notwithstanding this important role of the Tribunal in interpreting and applying European Union law, its jurisdiction in this regard has recently been called into question. In the case of *Minister for Justice, Equality and Law Reform*

106 See e.g. Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para. 23.

107 See e.g. *Keady v. Bank of Ireland*, EP-1998-19; *Quigley v. Bank of Ireland*, EP-1998-20.

108 Case C-363/12, *Z v. A Government Department and the Board of Management of a Community School*, Application, 28th September 2012.

109 During the reporting period, the High Court also made a reference for preliminary ruling on equality issues in the case of Case C-104/10, *Kelly v. National University of Ireland*. In *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180, the High Court (Hogan J.) refused to make a reference under Article 267 TFEU on the basis that the issue – whether the farming community constituted an ethnic group for the purposes of the Race Directive – was *acte clair* and covered by the doctrine in Case 283/81 *CILFIT* [1982] ECR 3415.

*& Commissioner of An Garda Síochána v. Director of the Equality Tribunal*,<sup>110</sup> the applicants sought an order prohibiting the Tribunal from investigating the complaints of three notice parties who had complained to the Tribunal that the regulations governing the age limits on admission to An Garda Síochána were inconsistent with the Employment Equality Acts and with Council Directive 2000/78/EC. As defined by the Court (Charleton J.) at the outset of its judgment, the issue was “whether the Equality Tribunal, as a body whose powers are defined by statute, is entitled to commence a hearing that has the result that it assumes a legal entitlement to overrule a statutory instrument made by the first applicant where by law it is not entitled so to do.”<sup>111</sup>

The Court noted that, under European law, it was “the duty of every administrative and legal tribunal to implement European legislation” but stated that this could not be done “without a legal framework.”<sup>112</sup> It recognised that, in circumstances where an ambiguity arises, “both this court and any administrative body, including the respondent, is obliged to construe national legislation in the light of the obligation under European law in which it had its origin.”<sup>113</sup> However, Charleton J. said that this obligation did not “extend to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language.”<sup>114</sup> The Court then quoted a lengthy section of the judgment of the Court of Justice in the *Impact* case reaffirming the basic principle of national procedural autonomy subject to the twin requirements of effectiveness and equivalence.<sup>115</sup> In the central passage of the judgment, the Court made the following statement:

There is no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation. The limit on jurisdiction is of primary importance to the exercise of authority, whether the court be one established as an administrative body, or is one of the courts under the Constitution. In the event that a view emerges that national legislation has not properly implemented European legislation, this is no more than an opinion. The respondent does not have the authority to make a binding legal declaration of inconsistency or insufficiency on a comparison of European and national legislation. The High Court has that power as this has been expressly reserved to it by Article 34 of the

110 *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* [2010] 2 IR 455.

111 [2010] 2 IR 455, 457.

112 [2010] 2 IR 455, 458.

113 [2010] 2 IR 455, 459.

114 [2010] 2 IR 455, 459.

115 Case C-268/06 *Impact* [2008] ECR I-2483.



Constitution. The respondent is bound by the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2004 fixing the upper age for admission to training as a member of An Garda Síochána at 35 years.<sup>116</sup>

On this basis, the Court granted the applicants an order prohibiting the Tribunal from investigating the complaint.

There are a number of aspects of this judgment which warrant scrutiny. First, the decision is curious in that it involves an early intervention on the part of the High Court, in advance of the Tribunal's full investigation, hearing and decision-making in relation to the complaint.

Secondly, the Court's reliance on the *Impact* judgment is also curious and perhaps even contradictory where the effect of Charleton J.'s decision is to remove an issue of EU law from the jurisdiction of the Equality Tribunal to that of the High Court in a manner which arguably falls foul of the principles of effectiveness and equivalence.

Finally, and most fundamentally, while the Court states that there is "no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result," this statement appears to ignore or at least sideline the fundamental principle of supremacy which is one of the foundations of EU law. In accordance with the seminal decision of the Court of Justice in *Simmenthal*, "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."<sup>117</sup> Furthermore, the Court in *Simmenthal* underlined the incompatibility with EU law of any national rule or practice which impairs this principle by withholding from the national court having jurisdiction to apply such law the power to do everything necessary to set aside national legislative provisions which might prevent EU law from having full force and effect.<sup>118</sup>

As the later decisions of the Court of Justice in *Larsy* and *CIF* make clear, this duty to disapply conflicting national rules applies not alone to national courts but also to all relevant tribunals and administrative agencies.<sup>119</sup> While it is undoubtedly true that the Tribunal has no authority to make "a binding legal declaration of inconsistency or insufficiency" or to re-order Irish legislation "in ideal form," in performing its statutory function and exercising its jurisdiction under the Acts, it has the power and duty to set aside or disapply Irish legislation which conflicts with EU law. The constitutional grant

116 [2010] 2 IR 455, 461.

117 Case 106/77 *Simmenthal* [1978] ECR 629, para. 21.

118 [1978] ECR 629, para. 22.

119 Case C-118/00 *Larsy* [2001] ECR I-5063, paras. 52-53, and C-198/01 *CIF* [2003] ECR I-8055, para. 49.

of jurisdiction in Article 34 of the Constitution must now be understood in the broader context of Ireland's obligations under the European Treaties.

It is hoped that the position will be rectified, or at least clarified, on appeal to the Supreme Court. However, for so long as the High Court judgment stands, it gives rise to, on the one hand, concerns about Ireland's acceptance of the doctrine of supremacy of EU law<sup>120</sup> and, on the other hand, further debates as to the scope of the Tribunal's jurisdiction in complaints pending before the Tribunal.<sup>121</sup> While this case is particularly important in the equality field, its significance extends beyond the Equality Tribunal to all lower courts, tribunals and other bodies which may be required to interpret and apply European Union law in the exercise of their functions.<sup>122</sup>

## I. Conclusion

The scope of the Equality Tribunal's jurisdiction has featured prominently in the case law between 2008 and 2011. While this case law emphasises the limits of the Tribunal's jurisdiction, it also confirms in many respects the radical reach of the Employment Equality Acts and the Equal Status Acts. This includes the Tribunal's important role in interpreting and applying EU law, exemplified by its first-ever reference under Article 267 TFEU during the reporting period. While the High Court's decision in the case of *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* arguably represents the most serious challenge to the Tribunal's jurisdiction since its establishment, it is vitally important that the jurisdiction of the Tribunal to interpret and apply the European Union law to which the Acts give effect is not compromised. While the Equality Tribunal is soon to be replaced by the proposed Workplace Relations Commission,<sup>123</sup> many of the jurisdictional issues, which have been examined in this chapter, will remain relevant for any forum responsible for the interpretation and application of the Acts.

120 See Fahey, "A Constitutional Crisis in a Tea-Cup: The Supremacy of EC law in Ireland" (2009) *Articles*, Paper 19 and Murphy, "Ireland & the UK in the European Union and European Convention on Human Rights: A Tale of Two Island Legal Systems?" in Martinico and Pollicino, *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Perspective* (Europa Law Publishing, 2010).

121 *Nowak v. The Law Society Of Ireland*, DEC-E2010-051; *Saunders v. CHC Ireland*, DEC-E2011-142; *Murphy v. An Garda Síochána*, DEC-E2011-170; *Eircom Ltd v. McGovern*, Labour Court, Case EDA1114.

122 See also *An Taoiseach v Commissioner for Environmental Information & Fitzgerald* [2010] IEHC 241.

123 The Workplace Relations Commission would form part of the broader Workplace Relations Service and would replace the existing bodies dealing with first instance complaints in employment, industrial relations and related fields. See the Submission to the Oireachtas Committee on Jobs, Enterprise and Innovation, *Legislating for a World-Class Workplace Relations Service July 2012* (Department of Jobs, Enterprise and Innovation, 2012), available online on the Workplace Relations website, [www.workplacerelations.ie](http://www.workplacerelations.ie) (last accessed 7 November 2012). At the time of writing, while it is thought that complaints under the Equal Status Acts would also come within the Service's remit, no decision has been taken on this important issue.



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## Chapter 3

# Assessment of the Burden of Proof in Discrimination Claims

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## A. Introduction

Irish equality case law during the period 2008–2011 confirms that, while relatively few cases which go to hearing are dismissed on the grounds that they are misconceived or frivolous or vexatious,<sup>1</sup> very many complaints – even complaints raising genuine grievances which are taken in good faith – fail because the complainant is unable to adduce the necessary evidence to prove that he or she has been afforded less favourable treatment on a discriminatory ground.<sup>2</sup> In most cases, there will be little or no overt evidence of discrimination. As the High Court stated in the recent case of *Iarnród Éireann v. Mannion*, “it is well recognised that special evidential difficulties may arise from the very nature of discrimination itself”, which is “often hidden or unrecognised by the party alleged to discriminate”.<sup>3</sup> These very real difficulties of proof are a distinctive feature of discrimination claims. The law has recognised these difficulties by providing for the partial shifting of the burden of proof in discrimination claims. This burden of proof is now enshrined in section 38A(1) of the Equal Status Acts and section 85A(1) of the Employment Equality Acts which provide that where, in any proceedings, facts are established by or on behalf of a complainant “from which it may be presumed that prohibited conduct has occurred in relation to him or her”, “it is for the respondent to prove the contrary”. This chapter explores how this test for the assessment of the burden of proof has been assessed and applied during the reporting period, in particular in the case law of the Tribunal and Labour Court.

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1 See in this regard Chapter 5.D.

2 See generally the Annual Reports and Annual Legal Reviews of the Equality Tribunal, available online at <http://www.equalitytribunal.ie/Publications/> (last accessed 11 November 2012). At the time of writing, the Annual Reports for 2010 and 2011 and the Annual Legal Review for 2011 were outstanding.

3 *Iarnród Éireann v. Mannion* [2010] IEHC 326, 9.



## B. The Burden of Proof in Context

The general rule in civil proceedings is that the burden of proof lies on the party asserting a particular claim; he or she who asserts must prove.<sup>4</sup> This burden of proof will be reversed only in exceptional circumstances and, in particular, where “it would be fundamentally unjust to require the plaintiff to prove a positive averment when the particular circumstances show that fairness and justice call for disproof by the defendant.”<sup>5</sup>

In the field of discrimination, since its seminal judgment in *Danfoss*, the European Court of Justice has recognised that, while it is in principle for the complainant to prove the existence of discrimination, national rules on the burden of proof may need to be adapted if they are not to deprive the principle of equality of its effectiveness.<sup>6</sup> Building on the Court’s jurisprudence, the Council adopted Directive 97/80 on the Burden of Proof in Cases of Discrimination Based on Sex, which has now been incorporated in Directive 2006/54<sup>7</sup> and which is also replicated in the other European Union Directives in the field of equality.<sup>8</sup> Initially given effect in Ireland by way of statutory instrument,<sup>9</sup> the relevant European rules on the burden proof have since been enshrined in section 85A(1) of the Employment Equality Acts and extended to the Equal Status Acts through the inclusion of a similar provision in section 38A(1), both of which formed part of the amendments contained in the Equality Act 2004.

Although the test for the assessment of burden of proof now enshrined in the Acts did not form part of Irish law at the time of their enactment, by the time of the 2004 amendments, that test had already become well established in the practice and case law of the Equality Tribunal, both under the Equal Status Acts and the Employment Equality Acts, and the Labour Court.<sup>10</sup> During the reporting period, the Tribunal and the Labour Court have shed further light on the application of this test in practice.

4 See, for example, *Walsh & Cassidy v. Sligo County Council* [2011] 2 IR 260, 282. See also *McGrath, Evidence* (Thomson Round Hall, 2005), 50-56.

5 *Hanrahan v. Merck, Sharp & Dohme* [1988] ILRM 629, 635 (*per Henchy J.*).

6 See especially Case 109/88 *Danfoss* [1989] ECR I-3199 and Case C-127/92 *Enderby* [1993] ECR I-5535.

7 Article 19, Council Directive 2006/54/EC (the Recast Directive).

8 Article 8, Council Directive 2000/43/EC (the Race Directive); Article 10, Council Directive 2000/78/EC (the Framework Directive).

9 S.I. No. 337/2001, European Communities (Burden of Proof in Gender Discrimination Cases) Regulations 2001. As noted by McKechnie J. in *Kelly v. National University of Ireland* [2008] IEHC 464, para. 12, the 2001 Regulations applied to the Employment Equality Acts but not to the Equal Status Acts.

10 See e.g. *Mitchell v. Southern Health Board* [2001] ELR 201; *Citibank v. Ntoko*, Labour Court, EED045. See also the discussion in Bolger, “Employment Equality” in Regan ed, *Employment Law* (Tottel Publishing, 2009), 481.

## C. The Test in the Practice of the Equality Tribunal

In its discussion of the burden of proof in its decisions, the Tribunal continues to refer to the 2001 Labour Court determination in *Mitchell v. Southern Health Board*.<sup>11</sup> After referring to the Burden of Proof Directive which, at that point, had yet to be transposed into Irish law but which, it considered, formalised in legislation the existing jurisprudence of the Court of Justice, the Labour Court in *Mitchell* emphasised that, in the first instance, the claimant “must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.” It continued:

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.

The formulation of the test by the Labour Court in *Mitchell* remains that which is most frequently cited by the Tribunal and the Labour Court. In some more recent cases, such as *HSE North Eastern Area v. Sheridan*,<sup>12</sup> the Labour Court has described the test as involving the following three-step process of analysis:

- First, the complainant must prove the primary facts upon which he or she relies in alleging discrimination.
- Second, the Court or Tribunal must evaluate those facts and satisfy itself that they are of sufficient significance in the context of the case as a whole to raise a presumption of discrimination.
- Third, if the complainant fails at stage 1 or 2, he or she cannot succeed. However, if the complainant succeeds at stages 1 and 2, the presumption of discrimination comes into play and the onus shifts to the respondent to prove, on the balance of probabilities, that there is no discrimination.

In addition, in its assessment of the burden of proof, the Tribunal has frequently drawn on the persuasive authority of the courts of England and Wales and, in particular, the judgment of the Court of Appeal in the case of *Wong v. Igen Ltd.*<sup>13</sup> In an appendix to its judgment, the Court of Appeal set out guidance for courts and tribunals in assessing the burden of proof which adapted that which had been laid down in the earlier case of *Barton v. Investec Securities Ltd.*<sup>14</sup> While the Tribunal and indeed the Labour Court continue to invoke the *Mitchell* determination as the key formulation of the test, with its reference to

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11 *Mitchell v. Southern Health Board* [2001] ELR 201.

12 *HSE North Eastern Area v. Sheridan*, Labour Court, Case EDA0820.

13 *Wong v. Igen Ltd.* [2005] IRLR 258.

14 *Barton v. Investec Securities Ltd.* [2003] ICR 1205.

facts “of sufficient significance” to raise a presumption of discrimination,<sup>15</sup> it is important to emphasise, as the Court of Appeal did in *Igen*, that ultimately the test is that which is laid down in the express language of the legislation itself.

### **i. Establishing a *prima facie* case of discrimination**

In order to determine whether the complainant has established a *prima facie* case of discrimination, the Tribunal has commonly employed a three-stage test:

- First, the complainant must establish that he or she is covered by the relevant discriminatory ground.
- Second, he or she must establish that the specific treatment alleged has actually occurred.
- Third, it must be shown that the treatment was less favourable than the treatment which was or would have been afforded to another person in similar circumstances not covered by the relevant discriminatory ground.<sup>16</sup>

While satisfying the first two stages of the test tends not to be problematic, this is not enough in itself to shift the burden of proof.<sup>17</sup> It is generally the third stage which poses most difficulty for complainants by requiring them, in essence, to make the connection between the adverse treatment they complain of and the discriminatory ground which they invoke.<sup>18</sup>

In *Dyflin Publications Ltd. v. Spasic*,<sup>19</sup> the Labour Court, referring to its decision in *Cork City Council v. McCarthy*,<sup>20</sup> pointed out that the complainant must not only establish the primary facts upon which he or she relies but, echoing the *Mitchell* formulation, must also satisfy the Court that they are of sufficient significance to raise an inference of discrimination. The Labour Court also noted that the “type or range of facts which may be relied upon by a complainant

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15 It may be questioned whether this formula of words (“facts of sufficient significance”) is such as to suggest a higher burden of proof than is actually the case: see e.g. *O’Connor v. Iarnrod Eireann*, Dec-S2010-048 (where the Tribunal referred to the “high threshold” required to establish a *prima facie* case).

16 See e.g. *Mr. F v. A Financial Institution*, DEC-S2008-003; *Kelly -v- Panorama Holiday Group Limited*, DEC-S2008-007; *Hallinan v. Moy Valley Resources I.R.D. North Mayo-West Sligo Ltd.*, DEC-S2008-025.

17 *A Student v. An Educational Establishment*, DEC-S2009-084; *Farkas v. Crumlin College of Further Education*, DEC-S2010-017.

18 *Rescon Ltd. v. Scanlan*, Labour Court, Case EDA085.

19 *Dyflin Publications Ltd. v. Spasic*, Labour Court, Case EDA0823.

20 *Cork City Council v. McCarthy*, Labour Court, EDA0821.



can vary significantly from case to case". Where the primary facts alleged are proved, it remains for the Court or Tribunal to "decide if the inference or presumption contended for can properly be drawn from those facts":

This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a *prima facie* case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.

The Court then referred to the decision of the Court of Appeal for England and Wales in *Madarassy*,<sup>21</sup> noting that there was nothing to prevent the Court or Tribunal at the stage of considering whether there was a *prima facie* case from hearing, accepting or drawing inferences from the evidence adduced by the respondent which sought to dispute or rebut the complainant's evidence of discrimination.

These comments demonstrate the extent to which the assessment of the test of burden of proof under the Acts depends on the particular facts and circumstances of the individual case. While the evidence of the complainant alone will not necessarily be fatal to a claim of discrimination,<sup>22</sup> for example, if it is substantiated by appropriate documentation<sup>23</sup> or if it relates to particularly extraordinary or egregious conduct of the part of the respondent,<sup>24</sup> in many cases, the decision will turn on the credibility of the parties' evidence and, specifically, which party has given the more compelling account of the facts.<sup>25</sup> The Tribunal's decisions can often only be explained by deferring to its assessment of the oral evidence and the credibility of witnesses who have been heard *viva voce*.<sup>26</sup> Moreover, while statistics may sometimes assist in proving a complaint, this will not always be the case.<sup>27</sup>

21 *Madarassy v Nomura International plc* [2007] IRLR 246.

22 *Solvjova v. Whispers Entertainment Ltd.*, DEC-E2010-236.

23 See e.g. *Czyzycki v. Mark Fegan, Apple Orchard Carpentry & Joinery*, DEC-E2011-260.

24 *McGreal v. Cluid Housing*, DEC-S2011-004.

25 *Ms. W v. A Hotel*, DEC-E2008-049; *A Bus Conductor v. A Bus Company*, DEC-S2011-006; *Seifu v. Irish Wheelchair Association*, DEC-S2010-005; *A Receptionist v. A Hotel*, DEC-E2011-096.

26 *McDonagh v. McHale*, DEC-S2011-025.

27 *Oliver v. Permanent TSB Ltd.*, DEC-S2011-028.

## ii. Rebutting a *prima facie* case of discrimination

Where the complainant has established a *prima facie* of discrimination, the burden shifts to the respondent to prove that the conduct complained of was not discriminatory. In an increasing number of cases, respondents have failed to appear at hearings before the Equality Tribunal and, where the complainants have established a *prima facie* case, this makes rebuttal practically impossible.<sup>28</sup> Similarly, the complaint of discrimination will succeed if the respondent, although represented, has adduced no rebuttal evidence.<sup>29</sup> In line with the guidance of the Court of Appeal in *Wong*, based on the Burden of Proof Directive,<sup>30</sup> if there is any discrimination whatsoever (or, in other words, it is clear that discrimination is more than a trivial influence on the respondent's conduct), this will be fatal to the respondent's rebuttal of a *prima facie* claim of discrimination.<sup>31</sup>

In the particular context of rebutting a *prima facie* case of discrimination in cases concerning access to and/or promotion in employment, the emphasis is very much on the process followed by the respondent. It is not for the Tribunal to examine "whether the most meritorious candidate was successful in a selection process"; rather its role is to examine and determine "whether or not the selection process is tainted by discrimination."<sup>32</sup> The respondent must show that its processes for selecting persons for employment and promotion are transparent. Where the selection process, as in *Fagan*,<sup>33</sup> is "wholly lacking in transparency," the Tribunal will be satisfied with nothing less than cogent evidence to discharge the burden of proof which has thereby shifted to the employer. In that case, the dearth of records relating to the application for promotion influenced the Tribunal's conclusion that the respondent had failed to discharge the burden of proof. In *Roche*,<sup>34</sup> the Tribunal found that the respondent had rebutted a *prima facie* case of discrimination – on the ground of disability where the complainant was a hearing aid user – on the basis that it had shown that the interview process had been conducted in an open and transparent manner.

28 See e.g. *Michael Joyce v. Superquinn (in receivership)*, DEC-S2011-062.

29 See e.g. *Olajide v. Buck Properties Ltd.*, DEC-S2010-021 and *A Complainant v. A County Council*, DEC-S2009-009 (where the respondent adduced no rebuttal evidence at first instance but where, having adduced such evidence on appeal, successfully overturned the Tribunal's decision).

30 *Wong v. Igen Ltd.* [2005] IRLR 258, paragraphs 11 to 13 of the Guidance set out in the Appendix to the Judgment.

31 *Lionbridge Technologies (Ireland) Ltd. v. Rosella Vila*, Labour Court, Case EDA0912; *Ely Property Group Ltd. v. Boyle*, Labour Court, Case EDA0920. But see *Story v. Erne Mineral Water Co. Ltd.*, DEC-E2009-016.

32 *Dr. A. v. The Health Service Executive*, DEC-E2011-133. See also *Department of Environment v. O'Higgins*, Labour Court, Case EDA088.

33 *Fagan v. Revenue Commissioners*, DEC-E/2008/004. See also *Jones v. Trinity College Dublin*, DEC-E2010-114; *Kelly v. Nevinar Cosmetics Ltd.*, DEC-E2010-063; *Walsh v. Webprint Concepts Ltd.*, DEC-E2009-027.

34 *Roche v. The Office of Public Works*, DEC-E2008-044.



In claims of indirect discrimination specifically, where a *prima facie* case has been established, evidence adduced to rebut the complainant's case will frequently be considered alongside any argument of objective justification on which the respondent seeks to rely, even though the concepts are theoretically distinct.<sup>35</sup>

### iii. Analysis

While the test of burden of proof under the Acts tends to be repeated in almost every decision of the Equality Tribunal and the Labour Court, as a kind of mantra, the statutory text and the case law which has developed in this area both make it clear that the application of the test requires the assessment of a number of distinct elements in discrimination cases. In order to succeed, the complainant must be able to adduce evidence establishing a link between the adverse treatment which he or she has suffered and the discriminatory ground being invoked. If the complainant succeeds in doing so, the burden of proof passes to the respondent to show that the treatment in question was not discriminatory. While these distinct stages of analysis are well recognised in theory, in practice decision-makers frequently consider both elements together.<sup>36</sup> While this may make sense in some cases, for example, where no specific arguments have been advanced to rebut any finding of a *prima facie* case of discrimination, it is preferable for the different stages in the analysis to be individually identified and analysed. While each case turns on its own facts, and it is difficult to draw any general conclusions on the assessment of the burden of proof in the Tribunal's case law, it is instructive to consider its application in a number of different contexts which illustrate the difficulties which the test entails in practice. In the following sections, the assessment of the burden of proof will be examined, first, in the context of complaints of discrimination on the grounds of gender and/or family status arising from pregnancy and, second, in the context of complaints of discrimination on the ground of race.

## D. Burden of Proof in the Context of Complaints on the Grounds of Gender and/ or Family Status arising from Pregnancy

The potential effectiveness and utility of the burden of proof laid down in section 85A of the Employment Equality Acts is perhaps most clearly demonstrated in the context of gender and family status discrimination arising from pregnancy. Recent case law confirms that, where a pregnant female employee is dismissed or otherwise unfavourably treated in the context of her employment, the requirement of a *prima facie* case of discrimination is readily satisfied and the burden of proof shifts to the employer which may find it difficult to rebut the inference of discrimination. This is reflected in

35 See e.g. *Lazar v. Dublin Bus*, DEC-E2010-150.

36 See e.g. *Moriarty v. Rabo Direct*, DEC-S2010-051.

the relatively high success rates of complaints of discrimination relating to pregnancy.<sup>37</sup> In *Intrum Justitia v. McGarvey*, Ms. McGarvey had been an employee of Intrum Justitia since 2003 and was seven months pregnant at the time she was selected for redundancy in 2006.<sup>38</sup> She claimed that the matrix used for selecting employees for redundancy was a sham, the object of which was to achieve her dismissal. Citing the leading cases of the European Court of Justice on discrimination in the context of pregnancy, including *Dekker*, *Webb*, and *Brown*,<sup>39</sup> the Equality Tribunal found in her favour, awarding her €30,000 in compensation for discriminatory dismissal on the family status and gender grounds. On appeal by the employer, the Labour Court observed:

It is settled law that special protection against dismissal exists during pregnancy. Only the most exceptional circumstances not connected with the condition of pregnancy allow for any deviation from this. It is equally settled law that the dismissal of a pregnant woman (which can, obviously, only apply to women) raises a *prima facie* case of discrimination on the gender ground. Once such a case has been raised the burden of proof shifts and it is for the respondent employer to prove that discriminatory treatment on the stated grounds did not take place.

Describing the matrix used here as “complex, opaque, subjective and open to manipulation in order to achieve a particular result” and finding it to be significant - in the context of earlier complaints about the employee’s family status - that the matrix was concluded by the finance manager as opposed to the employee’s line manager, the Labour Court concluded that the employer had failed to discharge the burden of proof and upheld the finding of the Equality Tribunal, while reducing the award of compensation to a sum of €20,000.

A similar approach is evident in the case law of the Equality Tribunal during the reporting period.<sup>40</sup> Where it is proved that an employee has been dismissed or treated unfavourably during the specially protected period of pregnancy, the Tribunal will scrutinise very closely any explanation put forward by the employer. Such an explanation must be supported by credible evidence and is unlikely to succeed in circumstances where, for example, an employer

37 See Banks and Russell, *Pregnancy Discrimination in the Workplace: Legal Framework and Review of Legal Decisions 1999 to 2008* (HSE Crisis Pregnancy Programme/Equality Authority, 2011), 28.

38 *Intrum Justitia v. McGarvey*, Labour Court, Case EDA095.

39 Case C-177/88 *Dekker* [1990] ECR I-3941; Case C-32/93 *Webb* [1994] ECR I- 3567; Case C- 394/96 *Brown* [1998] ECR I-4185.

40 See e.g. *Curley v. Amax Aviation Limited*, DEC-E2009-036; *An Employee v. An Employer*, DEC-E2011-070; *Luzak v. Sales Placement Ltd (in Liquidation)*, DEC-E2011-010; *A Complainant v. An Auctioneer*, DEC-E2011-054; *Zareckaite v. James O’ Carroll t/a Hillcrest Nurseries & Plant Centre*, DEC-E2011-154; *Collins v. Brown*, DEC-E2011-182.

is unable to produce any supporting documentation,<sup>41</sup> has not followed the disciplinary procedure laid down in the contract of employment,<sup>42</sup> or has failed to raise disciplinary or restructuring issues prior to becoming aware of the employee's pregnancy.<sup>43</sup> While these issues arise most frequently in the context of dismissal, the same principles apply across the employment field, including access to, and the conditions of, employment.<sup>44</sup>

However, if the complaint on this ground is to succeed, the employer must be aware of the pregnancy prior to effecting the dismissal of the employee.<sup>45</sup> Furthermore, where an employer can clearly demonstrate that there are exceptional circumstances wholly unconnected with an employee's pregnancy which explain its conduct, it may succeed in rebutting the inference of discrimination. An important example of such a situation, which has been a common feature of the employment scene between 2008–2011, is where an employer is required to make redundancies because of financial difficulties. In *Cilinska-Snepste v. Rye Valley Foods Ltd.*,<sup>46</sup> the Tribunal was satisfied that the reason for the complainant's dismissal was the financial difficulty resulting from the respondent's loss of a number of significant contracts. In these circumstances, the employer made a number of employees, including the complainant, redundant but it carried out this process in a transparent manner in accordance with the Last-In-First-Out rule. In *A Solicitor v. A Statutory Body*,<sup>47</sup> the Tribunal concluded that the reason why the complainant's fixed-term contract of employment had not been extended was because vacancies had to be filled through a competition panel for which the complainant was not qualified.

In conclusion, the case law on complaints of discrimination arising from pregnancy undoubtedly demonstrates the potential value and effectiveness of the partially shifted burden of proof. Nevertheless, this is to a large extent a result of the specific characteristics of such claims and, in particular, the relative ease with which a link can be drawn between the

41 See *Healy v. Trailer Care Holdings Ltd.*, DEC-E2011-124, upheld by the Labour Courton appeal, Case EDA128. But see *Dabkowska v. Gilesview Ltd.*, DEC-E2011-194, overturned on appeal by the Labour Court, Case EDA1212.

42 *Watson v. BPP Professional Education Ltd.*, DEC-E2011-236.

43 *Ms A v. A Company*, DEC-E2011-038.

44 See e.g. *Ryan v. Moog Limited*, DEC-E2011-027 (where the Tribunal was satisfied that a job offer to the complainant in relation to a ten-month fixed contract was withdrawn because of her pregnancy and rejected the respondent's argument that the decision to withdraw was essential to the functioning of its business). See also *Larke v. Balcas Kildare Ltd.*, DEC-E2011-238 (where the respondent discharged the burden of proof by showing that the reason for non-payment of a bonus to the complainant was in no way related to her pregnancy).

45 *Pacekova v. Daybreak Convenience Store*, DEC-E2011-134.

46 *Cilinska-Snepste v. Rye Valley Foods Ltd.*, DEC-E2009-001. See also *Koclova v. Hanley Clothing (Waterford) Limited t/a Tommy Hilfiger*, DEC-E2011-180.

47 *A Solicitor v. A Statutory Body*, DEC-E2011-213.

ground of discrimination and the less favourable treatment in question. The same cannot be said for many other grounds of discrimination, as the next section illustrates in relation to discrimination on the race ground.

### E. Burden of Proof in the Context of Complaints on the Ground of Race

The difficulties in proving discrimination on the ground of race have long been recognised<sup>48</sup> and make the partial shifting of the burden of proof in this context especially important.<sup>49</sup> The case law during the reporting period of 2008–2011 in this area has built on earlier case law, particularly of the Labour Court, but has also developed against the backdrop of an extremely sharp rise in the number of complaints of discrimination on the ground of race or nationality.

Before considering the case law for 2008–2011, it is important to refer briefly to a number of earlier decisions. First, in *Citibank v. Ntoko*,<sup>50</sup> the Labour Court noted that the partially shifted burden of proof was based on “the empiricism that a person who discriminates unlawfully will rarely do so overtly and will not leave evidence of the discrimination within the complainant’s power of procurement” and that the normal rules of evidence had to be adapted “so as to avoid the protection of anti-discrimination laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondent’s capacity of proof”. Secondly, in the case of *Campbell Catering v. Rasaq*,<sup>51</sup> the Labour Court found that, in not affording the complainant fair procedures in the investigation of serious misconduct alleged against her, the respondent had treated her less favourably than other employees facing similar allegations and concluded that this finding was sufficient in itself to shift the probative burden on the respondent, which it was unable to discharge. The Court acknowledged the special difficulties faced by many non-national workers arising from a “lack of knowledge concerning statutory and contractual employment rights together with differences of language and culture” and stated that, in the case of disciplinary proceedings, employers had a positive duty to ensure that all workers “fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence, including the right to representation”. The Court concluded that, in such cases, “applying the same procedural standards to a non-national worker as would be applied to an Irish national could amount to the application of the same rules to different situations and could in itself amount to discrimination”.

48 See e.g. *King v Great Britain China Centre* [1992] ICR 516; *Glasgow City Council v Zafar* [1998] 2 All ER 953.

49 The test for the burden of proof found in the Framework Directive is also replicated in Article 10 of Council Directive 2000/43 (the Race Directive).

50 *Citibank v. Ntoko*, Labour Court, EED045.

51 *Campbell Catering v. Rasaq*, Labour Court, EED048.

In the wake of rulings such as *Rasaq*, the Equality Tribunal and Labour Court have witnessed a very significant increase in complaints of race discrimination, most notably during the period under scrutiny in this report, 2008–2011. In many cases, similar issues to those in *Rasaq* have arisen and the Tribunal has followed the determination of the Labour Court in that case. For example, in *Daugintiene*, the respondent failed entirely to follow proper procedures and to ensure that the complainant understood the allegations against her in relation to dismissal.<sup>52</sup> Similarly, in *Goode Concrete v. Shaskova*,<sup>53</sup> the Labour Court confirmed that, while the mere coincidence of the complainant's nationality and dismissal were not sufficient to shift the burden of proof to the respondent, on the facts of the case before it, the additional facts - that no Irish workers were considered for dismissal at the time and that no credible reason or explanation for dismissal was given - were sufficient to raise a *prima facie* case of discrimination and therefore to shift the burden of proving the absence of discrimination to the respondent.

However, much of the recent case law points to increased caution and scrutiny of complaints of race discrimination. Thus, in *Mulleadys Ltd. v. Gedrinas*, the Court referred to its experience of dealing with cases where employers dismissed workers without resorting to the appropriate disciplinary procedures and noted that such cases were by no means confined to non-Irish workers. In the case at hand, the Court overturned the decision of the Equality Tribunal which had found that the dismissal was discriminatory. While accepting that there were certain procedural defects in the procedure leading up to dismissal, the Court considered that, because there were no policies or procedures in place either for nationals or non-nationals (although such policies and procedures had since been put into place), there was no evidence from which to infer that the complainant had been treated differently because of his nationality. In *Elephant Haulage Ltd. v. Garbacevs*,<sup>54</sup> the Labour Court stressed that facts based on credible evidence were necessary to prove a *prima facie* case of discrimination and that "mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn". It observed that the language of section 85A admitted of no exceptions to the evidential rule it laid down. In *Toker*,<sup>55</sup> the Labour Court, citing the judgment of the Court of Appeal of England and Wales in the *Madarassy* case,<sup>56</sup> emphasised that the mere fact of a difference in status (such as race) and a difference in treatment was insufficient to shift the burden of proof to the respondent.

52 *Daugintiene v. Faughan Foods Ltd.*, DEC-E2009-012. See also *Guze v. D & D Performance Roofing Ltd.*, DEC-E2010-151, *Samuel v. Alliance Nursing Agency*, DEC-E2011-193 and *Stukonis v. Coalport Building Company Ltd.*, DEC-E2009-122.

53 *Goode Concrete v. Shaskova*, Labour Court, Case EDA0919.

54 *Elephant Haulage Ltd. v. Garbacevs*, Labour Court, Case EDA 1025. See also *IBM Ireland Product Distribution Ltd. v. Svoboda*, Labour Court, Case EDA1116.

55 *Toker Developments Limited v. Grods*, Labour Court, Case EDA105.

56 *Madarassy v. Nomura International plc* [2007] IRLR 246.

In one of the leading recent cases, *Melbury Developments Ltd. v. Valpeters*,<sup>57</sup> the complainant, a Latvian national, alleged that he had been treated less favourably than Irish nationals and later dismissed on the grounds of race. The Equality Tribunal had rejected most of the complainant's case including his arguments that he had been improperly classified as self-employed, that he had received no written contract of employment or pay-slips, that he had not been paid in accordance with the Registered Employment Agreement for the construction industry and that he was dismissed without the benefits which would have been available to Irish workers. However, it found that the respondent had discriminated on the ground of race in not providing the complainant with a safety statement in a language in which he was competent.

On appeal to the Labour Court, the complainant's representative pointed to the difficulty of obtaining evidence concerning how other persons in the employment of the respondent were treated for the purposes of comparison and submitted that the respondent should therefore be required to prove that others were treated similarly to the complainant. It was also argued that such evidence fell within the peculiar knowledge of the respondent. However, the Court rejected this submission, taking the view that it would amount to placing "the entire probative burden" on the respondent and would therefore involve "an impermissible departure from the plain language and clear import" of section 85A and the EU law on which it was based.<sup>58</sup> Evidence of how other employees were treated was also "plainly within the knowledge of those other workers" who could, if necessary, have been required to attend at the hearing and testify. Furthermore, it noted that section 76 of the Acts made provision for obtaining information from the respondent. Where the respondent failed to reply or provided misleading or equivocal information under this section, the Court could draw adverse inferences. Although this procedure had been utilised in the instant case, the complainant's representative had not put any questions to the respondent about the employment status of other employees. Distinguishing *Rasaq*, the Labour Court held that, because Mr. Valpeters had not been accused of any form of misconduct and no question of an investigative or disciplinary procedure arose, the underlying rationale of that decision was "inapplicable to the facts of the instant case".

In relation to the complaint that Mr. Valpeters had been erroneously classified as an independent contractor, the Court rejected the complainant's submission that it should accept, as a notorious fact, that an Irish worker would not have been similarly treated and noted that, from its own experience, many employers in the construction industry wrongly classified employees "as a device to avoid their responsibilities under employment, tax and social welfare legislation". In conclusion, the Labour Court concluded by upholding

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57 *Melbury Developments Ltd. v. Valpeters*, Labour Court, Case EDA0917.

58 See also *Fedotovs v. Codd*, DEC-E2009-119; *Nyando v. Medical Laboratory Scientists Association*, DEC-E2010-044; *Kildownet Utilities Ltd. v. Manolijs*, Labour Court, Case EDA1026; *Kirwan t/a Spectrum Painting and Decorating v. Kadisevskis*, Labour Court, Case EDA1117.



the findings of the Equality Tribunal, noting that the complainant failed to adduce any evidence which showed that the complainant was treated differently from how workers of other nationalities were treated.<sup>59</sup>

As this review of the case law illustrates, the critical task is therefore to demonstrate that the treatment of the complainant has been different and less favourable than that which would have been given to a person of another race or nationality (most frequently, in the case of non-Irish national employees, an Irish employee). In very many of the cases in which decisions were handed down during the reporting period, the complaint has failed because of the inability of the complainant to do just that. The position is very much fact-specific and varies considerably from case to case. For example, while the failure to provide health and safety training was found to be discriminatory in *Nikolais*<sup>60</sup> and *Stukonis*,<sup>61</sup> it was found not to be discriminatory in *Silgalis* where the complainant had a good command of English and understood the safety instructions given to him.<sup>62</sup> Difference in treatment, and less favourable treatment specifically, is the key element in establishing a *prima facie* case of discrimination.<sup>63</sup> In a small number of cases, the complainant has satisfied the Tribunal that there was some kind of systemic discrimination by the employer insofar as all Irish workers were treated in a particular way (for example, provided with written contracts of employment or, more fundamentally, retained in employment) while all non-Irish workers were treated in another, less favourable way.<sup>64</sup> However, in other cases, the Labour Court, drawing on its own knowledge and experience, has emphasized that the alleged less favourable treatment – for example, a failure to apply the appropriate Registered Employment Agreement – is by no means confined to non-Irish workers and that it therefore has no reliable basis on which to assume that the treatment occurred on the ground of the complainant's race or nationality.<sup>65</sup>

59 The finding in relation to the failure to provide a safety statement had not been appealed except on quantum; this part of the appeal was also unsuccessful.

60 *Nikolais & Celdako v. Wholey*, DEC-E2011-112.

61 *Stukonis v. Coalport Building Company Ltd.*, DEC-E2009-122.

62 *Silgalis v. Frylite Dublin Ltd.*, DEC-E2009-068.

63 *Stratulat v. M&J Recycling Ltd.*, DEC-E/2008/037 (where there was discrimination in the treatment of Moldovan driver vis-à-vis other drivers with respect to the obtaining of an Irish driving licence); *Stirbyte v. Degfag Ltd.*, DEC-E2010-105 (where the employer never told the complainant that the employment was seasonal); *Levasev v. Gregory t/a SMG Transport*, DEC-E2010-068; *Petrauskas v. Wyebridge Company Limited*, DEC-E2011-151; *Bacak v. Office and Industrial Cleaners Ltd.*, DEC-E2011-249.

64 *Vaicikauskas & Anor v. Ashfield Builders Ltd.*, DEC-E2010-156; *Kvostiene & Ryzgas v. Cullen Decor Limited*, DEC-E2010-038; *Sungaila & Ors v. Corlin Developments Ltd.*, DEC-E2011-245.

65 *Barnmac Contracting Ltd. v. Zilys and Volkovas*, Labour Court, Case EDA 1022.

Sometimes, credible testimony on the part of the complainant alone, supported by relevant documentation, will be sufficient to raise a *prima facie* case of discrimination. In *Czyzycki*, the Tribunal distinguished the case of *Melbury* on the basis that the complainant, who was a credible witness whose detailed evidence included evidence against his own interest, had “provided a great level of detail in oral testimony, supported by a large array of the documentation that he had in his possession or that he was able to obtain from a variety of official sources”, drawing a link between his treatment and his nationality and thereby establishing facts of sufficient significance to shift the burden of proof to the respondent.<sup>66</sup>

While the majority of the race discrimination cases during the reporting period have failed because of the failure of the complainant to satisfy the Tribunal or the Labour Court that there has been no less favourable treatment, there have been a number of extremely serious cases where the very nature of the conduct of the employer has been such as to satisfy the requirement for a *prima facie* case of discrimination. For example, in *Golovan*, the retention by the employer of the complainant’s passport until a week before her dismissal was held to be sufficient in and of itself raise a *prima facie* case of discrimination, which the respondent then failed to rebut.<sup>67</sup> In *Kuda & Others*,<sup>68</sup> the complainants were required to take accommodation from the employer as a condition of their employment and to work an extra day compared to other workers for this accommodation, which effectively amounted to their paying high rates for “exceptionally cramped accommodation in a rural location where the going rate for rent would have been a fraction of what they paid”. The Tribunal, being satisfied that Irish employees in a similar situation would not have been treated in the same way, found “the extraordinary manner and effect of their dismissal, which also resulted in their eviction, to be discriminatory on the ground of race”.

In *Kazolailis*,<sup>69</sup> the Tribunal, while acknowledging that there were undoubtedly Irish employees who were subjected to poor working conditions, described the conditions of the complainant, who had accepted the position as his first job upon arrival in Ireland, as being “on the extreme end of the scale”. The complainant was regularly subjected to verbal and racial abuse and other forms of humiliation and his employer showed no concern for his welfare, as demonstrated, for example, by his requiring the complainant to continue to work as a driver even though the brakes of his vehicle had failed. Satisfied that no hypothetical Irish comparator would have accepted such conditions, the Tribunal considered this conduct to constitute both discrimination and harassment on the ground of race.

Finally, in a recent case involving a domestic worker, the complainant had entered into a contract of employment with the respondent in South Africa which did not conform with Irish employment in important respects. The contract did

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66 *Czyzycki v. Mark Fegan, Apple Orchard Carpentry & Joinery*, DEC-E2011-260.

67 *Golovan v. Porturlin Shellfish Ltd.*, DEC-E2008-032.

68 *Kuda & Others v. MJ Quay Developments Ltd.*, DEC-E2010-154.

69 *Kazolailis v. Winegate Haulage Limited*, DEC-E2010-164.

not include details of hours of work, granted 15 days' annual leave after the completion of one year's work and provided for security searches, urine, blood, polygraph and other forms of testing, monitoring of premises, equipment and vehicles, and surveillance of telephones, email and internet access which the employer could undertake at any time.<sup>70</sup> The complainant was also placed in a vulnerable position because she was present in Ireland without appropriate documentation or any support network and entirely dependent on the respondent for employment and accommodation. The complainant was later dismissed without notice or any explanation, and required to remove her belongings and leave the premises immediately against the backdrop of threats made by the respondent. Taking account of these conditions, the Tribunal was satisfied that no Irish employee would have been subjected to such treatment and concluded that the complainant had been discriminated against on the ground of race.

Issues of race discrimination are by no means confined to the Employment Equality Acts. For example, in *Bisayeva v. Westend Management Ltd.*,<sup>71</sup> the complainant was a Muslim woman, originally from Chechnya, who wore a headscarf and traditional clothing which was often mistaken as being from the Roma tradition. When trying on shoes in a shopping centre in Dublin, a security guard approached her and escorted her out of the shop. When the security guard's supervisor arrived, he claimed that this was because the complainant had previously been involved in an altercation at the centre. The Tribunal found that there had been no such incident and that the behaviour of the security staff was not consistent with this claim insofar as they permitted her to return to the shop after her son had queried their behaviour. Concluding that the reason for this conduct was the complainant's ethnicity, the Tribunal held that the burden of proof shifted to the respondent, which had offered no convincing or credible explanation. In *Oladapo*,<sup>72</sup> the Tribunal found that the respondent had discriminated against the complainant when the bus driver and passenger assistant had made no enquires about the removal of the complainant's bag from his seat on his leaving the bus momentarily and made no effort to accommodate the complainant with a seat, despite the fact that the complainant was a passenger who had pre-booked his ticket and, according to the respondent's boarding procedures, therefore took priority over passengers who had bought a ticket from the driver. In *Ghetau v. New Ross Coarse Angling Limited*,<sup>73</sup> the Tribunal found that the respondent had discriminated against the complainant – who was from Romania – on the ground of race by refusing him permission to fish on its grounds like other members of the public who purchased the relevant day pass because of concerns that Eastern European nationals would take fish home rather than return them to the lake as required. This case law illustrates the extent to which, in the context of

70 *A Domestic Worker v. An Employer*, DEC-E2011-117.

71 *Bisayeva v. Westend Management Ltd.*, DEC-S2011-030.

72 *Oladapo v. Irish Citylink Comfort Delgro Ltd.*, DEC-S2011-063.

73 *Ghetau v. New Ross Coarse Angling Limited*, DEC-S2011-059.  
See also *Oladoyin & Others v. Abby/Ecp Taxis*, DEC-S2011-009;  
*Jia Yue Wang v. Yo Yo Paris Angel*, DEC-S2010-025.

race discrimination, each case turns on its own facts. However, in cases where there is at least some evidence of racial motivation for the adverse treatment, the Tribunal has shown its readiness to make a finding of discrimination.

## F. Access to Information under the Acts

In practical terms, discharge of the initial burden of proof will be less difficult for the complainant if he or she has access to relevant information from the respondent. To this end, the Acts provide mechanisms through which complainants can seek information in support of their case and the Tribunal can draw inferences where a respondent fails to supply information.

Under the Equal Status Acts, a potential complainant may, at the time of notifying the respondent of its claim, “question the respondent in writing so as to obtain material information” and the respondent may reply, if the respondent so wishes.<sup>74</sup> Section 27 of the Acts allows the Tribunal, in the course of an investigation, to draw “such inferences, if any, as seem appropriate from the failure to reply or, as the case may be, the supply of information” under section 21.

Under the Employment Equality Acts, section 76, entitled ‘right to information’, confers a similar right on a potential complainant to question a potential respondent so as to obtain material information. Section 81 allows the Tribunal or the Court, as the case may be, to draw “such inferences as seem appropriate from the failure to supply the information or, as the case may be, for the supply of information” under section 76. In addition, under section 94 of the Acts, the Tribunal and the Labour Court are granted wide-ranging powers to enter premises, to require the production of books and records, and to inspect such books, records and other work which is in progress at the premises. Furthermore, under section 95, the Tribunal and the Labour Court may require any person to furnish information to, or to attend before, the Tribunal or the Court.

The High Court considered section 76 of the Acts in the recent case of *Iarnród Éireann v. Mannion*.<sup>75</sup> In that case, the complainant before the Tribunal had requested information from *Iarnród Éireann* by way of a questionnaire under section 76 which the company failed to supply. The Equality Officer assigned to the case had also requested certain information from the company which it also failed to supply. Following the Tribunal’s decision in favour of the complainant, the company challenged by way of judicial review the Equality Officer’s decision to draw inferences from its failure to supply information on the basis that this decision was *ultra vires* and in breach of fair procedures. The High Court (Hedigan J.) rejected the challenge, finding that the inferences formed only one part of the grounds on which the Tribunal had found for the applicant and that there was ample additional evidence to support that finding.<sup>76</sup> While the Court considered

74 Section 21(2), Equal Status Acts.

75 *Iarnród Éireann v. Mannion* [2010] IEHC 326.

76 [2010] IEHC 326, 7-8.

that this finding on its own disposed of the case, it went to reject the company's argument that there was a duty on an Equality Officer to revert to a defaulting party before drawing any inferences from its failure to supply information.<sup>77</sup> The Court acknowledged that there were limits to the power of the Tribunal to draw references but stressed that, before the Court could intervene, it would have to be shown that the inference drawn by the Tribunal was clearly wrong and that it was an essential part of the ultimate decision.<sup>78</sup> In the case at hand, the Court found that the company had concealed the evidence from both the Tribunal and the Court and rejected the application as being entirely devoid of merit.<sup>79</sup>

In addition to the relevant provisions of the Acts, efforts have been made to invoke EU law in support of complainants' right to information. In *Kelly v. National University of Ireland*, the High Court referred a number of questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU relating to the interpretation of the Burden of Proof Directive.<sup>80</sup> In the main proceedings, the applicant, Mr. Kelly, sought to challenge the respondent's refusal to offer him a place on its postgraduate social work programme on the basis that the respondent had discriminated against him on the gender *inter alia* by offering places to lesser-qualified female candidates. In the course of these proceedings, the applicant had sought disclosure of the retained applications for the programme and supporting documentation as well as the scoring sheets for those applications. After the President of the Circuit Court refused the application, the applicant appealed the matter to the High Court which, after completing its examination as to whether the documents could be granted under Irish law, made the preliminary reference. In the questions referred to the Court of Justice, the High Court asked, *inter alia*, whether the applicant was entitled under the Burden of Proof Directive to information on the respective qualifications of other applicants for the programme, in particular the successful applicants, in order that the applicant could establish facts from which it may be presumed that there has been direct or indirect discrimination.

In its judgment, the Court of Justice noted that the appreciation of the facts from which discrimination may be presumed was essentially a matter for national judicial or other competent bodies in accordance with national law and practice and thus it was for the Irish court to determine whether Mr. Kelly had established the facts from which discrimination might be presumed.<sup>81</sup> However, the objective of the Burden of Proof Directive was to ensure that the measures taken by Member States to implement the principle of equal treatment were made more effective so that all persons who "consider themselves wronged because the principle of equal treatment has not been applied to them" could

77 [2010] IEHC 326, 8.

78 [2010] IEHC 326, 10.

79 [2010] IEHC 326, 11.

80 Case C-104/10, *Kelly* [2011] ECR nyr (Judgment of the Court (Second Chamber), 21st July 2011).

81 [2011] ECR nyr, paras. 31-32.

assert their rights.<sup>82</sup> This being the case, the Court observed that Article 4(1) of the Directive did not specifically entitle persons who consider themselves wronged to information in order that they may establish ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in accordance with that provision. Nevertheless, the Court stated that “the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.”<sup>83</sup> The Court then referred to the duty of loyal cooperation laid down in Article 4(3) TEU and to the duty of Member States not to apply rules which would be liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.<sup>84</sup> While the Court concluded that the Directive did not entitle the applicant to information held by the course provider on the qualifications of the other applicants, it nonetheless stated that it could not be ruled out that a refusal of disclosure “could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness” but confirmed that this was a matter for the national court to determine.<sup>85</sup> Finally, the Court stated that, if the Directive was relied upon to obtain access to information held by the course provider, such access must take account of the EU law rules relating to confidentiality.<sup>86</sup>

In summary, while it did not recognise any right of entitlement to disclosure of documents deriving from the provisions of the Burden of Proof Directive, the Court of Justice nonetheless made it clear that this answer was subject to the important caveat that a refusal of disclosure could risk compromising the objectives of the Burden of Proof Directive. On the return of the *Kelly* case to the High Court, Hedigan J. made final the provisional order of McKechnie J. refusing to disclose the documentation in question in unredacted form.<sup>87</sup> In conclusion, European Union law may provide some limited support for a complainant seeking access to information in support of his or her complaint but, as *Kelly* illustrates, thus far such support is limited in nature and these matters are considered to be primarily for the national courts to decide.

82 [2011] ECR nyr, para. 33.

83 [2011] ECR nyr, para. 34.

84 [2011] ECR nyr, paras. 35-36.

85 [2011] ECR nyr, paras. 38-39. Barnard has described the Court’s conclusion in this respect as rather weak: see Barnard, *EU Employment Law* (4th ed., Oxford University Press, 2012), 396. See, in a similar vein, Case C-415/10 *Meister* [2012] ECR nyr (Judgment of the Court (Second Chamber), 19th April 2012).

86 [2011] ECR nyr, para. 56.

87 *Kelly v. National University of Ireland* [2012] IEHC 169.



## G. Conclusion

While there has been limited consideration by the Irish courts of the burden of proof under the Acts, the case law for the period 2008–2011 confirms that the test is firmly embedded in the practice of the Equality Tribunal and the Labour Court in relation to complaints under the Acts. Assessment of the burden of proof is a critical piece of equality decision-making. In this regard, it is important that decision-makers take care to break the test down into its constituent parts in order to ensure clarity and consistency in the decision-making process. It is also important never to lose sight of the text of the test as it is enshrined in section 38A of the Equal Status Acts and section 85A of the Employment Equality Acts. The test is undoubtedly a flexible one which depends to a large extent on the facts of the particular case. If the test has demonstrated its value in certain contexts, such as discrimination claims arising from pregnancy, the case law on the race ground during the reporting period highlights some of the challenges in developing a consistent approach to the assessment of the test of burden of proof in many other areas. That case law also emphasises the importance for complainants of obtaining information enabling them to demonstrate the link between the grounds of discrimination they invoke and the less favourable treatment they allege. Ultimately, the test for the assessment of burden of proof under the Acts reduces, but does not remove, the difficulties for complainants in proving their case under the Acts and the initial burden of proof continues to rest on complainants. In order to satisfy this burden, however, the Acts also provide a range of information-gathering mechanisms which, if used effectively, can assist in this difficult task.

## Chapter 4

# The Equality Tribunal's Evolving Case Law: Selected Substantive and Procedural Issues 2008–2011

## A. Introduction

Between 2008 and 2011, the Equality Tribunal delivered over a thousand decisions on complaints made under the Employment Equality Acts and the Equal Status Acts.<sup>1</sup> In doing so, the Tribunal has continued to develop its case law and practice on issues arising under the Acts. In the preceding chapters, the Tribunal's case law has been examined from two specific perspectives: the jurisdiction of the Tribunal and the assessment of the burden of proof. In this chapter, the report examines the Tribunal's case law as it evolved during the reporting period from a more general perspective. Having regard to the volume of decisions delivered by the Tribunal, it is not possible, within the confines of this report as a whole or this specific chapter, to undertake an extensive or exhaustive examination of the Tribunal's case law.<sup>2</sup> Instead, this chapter focuses on a selection of noteworthy substantive and procedural issues which have arisen in the case law and which give a more complete picture of the Tribunal's case load and case law during the reporting period. It will first consider the case law on the core concepts of discrimination underlying the Acts, with a focus on the different grounds of discrimination and forms of prohibited conduct. However, the Acts cannot be understood fully without reference to the exceptions, defences and other forms of exemption built into the statutory regime. For this reason, the chapter will also look briefly at some of the most topical exemptions under the Acts during the reporting period. Finally, for the Tribunal itself and those appearing before it, issues of procedure can be just as important for the success or failure of a complaint as issues of substance. This is particularly so in a system, such as the Tribunal's, which is characterised by a very heavy case load relative to

1 In 2008, it delivered 84 decisions under the Employment Equality Acts (EEA) and 126 under the Equal Status Acts (ESA); in 2009, 123 decisions (EEA) and 87 decisions (ESA); in 2010, 262 decisions (EEA) and 56 decisions (ESA); in 2011, 268 decisions (EEA) and 67 decisions (EEA).

2 For a more extensive treatment of the case law of the Tribunal, see Walsh, *Equal Status Acts 2000–2011* (ICCL/Blackhall Publishing, 2012) and Bolger, Bruton and Kimber, *Employment Equality Law* (Thomson Round Hall, forthcoming, 2012/2013).

the available resources and by resultant lengthy delays in the processing of complaints. Thus, the chapter will conclude with an examination of some salient procedural issues in the Tribunal's case law during the period 2008–2011.

## B. Prohibited Conduct under the Acts

The focus of the Equal Status Acts and the Employment Equality Acts is the prohibition of discrimination on nine listed grounds: gender, marital (now civil) status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. The Acts prohibit both direct and indirect discrimination although complaints of indirect discrimination feature far less frequently than complaints of direct discrimination in the case law. In addition, the Acts prohibit victimisation as a distinct ground of discrimination as well as harassment and sexual harassment related to any of the discriminatory grounds.

Although the case law during the reporting period involved complaints on each of these grounds, there were marked variations in the number of complaints on the different grounds.<sup>3</sup> Gender, age, disability and race were the most common grounds invoked. As noted in Chapter 3, there was a very sharp rise in the number of complaints on the race ground under the Employment Equality Acts, especially in 2010 and 2011 when such complaints dominated the Tribunal's body of decisions.<sup>4</sup> Much less common were complaints on the grounds of marital status and family status, particularly as standalone grounds of discrimination, and, in particular, complaints on the grounds of sexual orientation and religion. In respect of the final ground, membership of the Traveller community, the number of complaints under the Equal Status Acts has dropped considerably as a result of the transfer of jurisdiction in relation to licensed premises effected by section 19 of the Intoxicating Liquor Act 2003 while there continue to be very few cases brought under the Employment Equality Acts on this ground.

Many cases coming before the Tribunal involve complaints made on a number of different grounds. For example, in a recent case taken under the Equal Status Acts, the complainant alleged that she had been discriminated against on the grounds of gender, disability and family status when a Government Department refused to recognise her entitlement to leave analogous to maternity or adoptive leave following the birth of her genetic child through an internationally surrogacy

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3 For comprehensive information and statistics on the breakdown of the Tribunal's case law, see the Annual Reports and Annual Legal Reviews of the Equality Tribunal, available online at <http://www.equalitytribunal.ie/Publications/> (last accessed 11 November 2012). At the time of writing, the Annual Reports for 2010 and 2011 and the Annual Legal Review for 2011 were outstanding.

4 See Chapter 3.E.

arrangement.<sup>5</sup> In the Hannon case, which will be discussed presently, the Tribunal considered the complaint and found for the complainant on the grounds of gender and disability.<sup>6</sup> However, in most cases of this kind, the Tribunal does not explicitly consider the intersection between the different grounds of discrimination.<sup>7</sup> The recent *Lindberg* case is an exception to this.<sup>8</sup> In that case, the complainant was a US national who was working as a press photographer in Ireland and who claimed that her unsuccessful application for membership of the Press Photographers Association of Ireland constituted discrimination on the race and gender grounds. In the course of its consideration of the complaint, the Tribunal expressed the view that “the combination of the complainant’s circumstances” – being both female and non-national and attempting to join an association whose membership was predominantly Irish male – was significant. The Tribunal continued:

While this is not discriminatory *per se* and in fact it is more likely that it simply reflects the industry itself, it means in practice that the complainant is automatically outside the group in certain ways.

Thus, the Tribunal considered that the complainant was an “outsider” and that this status had an impact on the respondent’s decision to refuse her application for membership for the second time. On this basis, the Tribunal concluded that the complainant had been discriminated against on the race and gender grounds and, as well as awarding compensation of €1,000, it ordered the respondent to put in place an equality policy within 6 months of the decision and recommended that it make its admission policy more open and transparent in future.

Although cases of multiple or intersectional discrimination are extremely important and it is hoped that the legal implications of such discrimination will be examined more thoroughly in future decisions, much of the Tribunal’s case law focuses on one or other of the nine statutory grounds of discrimination. In the following sections, each discriminatory ground, as well as the other forms of prohibited conduct under the Acts, will be examined in turn.

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5 *A Complainant v. Department of Social Protection*, DEC-S2011-053 (where the Tribunal ultimately rejected the claim for leave analogous to maternity or adoptive leave for the genetic mother of a child born through an international surrogacy arrangement on the basis that the service sought by the complainant did not exist). This decision was the subject of an appeal: *R.G. v. D.S.P.* (unreported judgment of Judge Lindsay, 5th July 2012).

6 *Hannon v. First Direct Logistics Limited*, DEC-E2011-066.

7 See e.g. McColgan, “Reconfiguring Discrimination Law” (2007) *Public Law* 74.

8 *Lindberg v. Press Photographers Association of Ireland*, DEC-S2011-041.

**(i) Gender**

Gender remains one of the most common grounds of discrimination invoked in complaints coming before the Tribunal, particularly under the Employment Equality Acts. While the Tribunal's case law during the reporting period confirms that gender discrimination continues to arise in well-established contexts such as pregnancy in the workplace,<sup>9</sup> it also illustrates the sheer variety of circumstances in which the Acts may be invoked on this ground.

For example, under the Equal Status Acts, the Tribunal considered a number of cases between 2008 and 2011 relating to whether certain school rules governing dress and appearance amounted to gender discrimination contrary to the Equal Status Acts. In the case of *A*,<sup>10</sup> the complainant was the mother of a male student who had been suspended from school for refusing to cut his hair which, the school contended, was contrary to its neat dress and presentation policy. The Tribunal found that the application of policy to the issue of hair length placed a disproportionate burden on male students and constituted discrimination on the ground of gender. It also found that the manner in which the school had sought to enforce its policy amounted to victimisation. In the *Carr* case, the Tribunal had to consider whether a school dress code for communions under which girls were to wear white dresses while boys were to wear their school uniforms was discriminatory on the ground of gender. The Tribunal rejected the complaint, stating that the difference in dress code between the two sexes was not in itself discriminatory and noting that the code was nothing more than a guideline, deviation from which did not result in any sanctions.<sup>11</sup> In yet another case of this kind, the Tribunal found that a prohibition on boys wearing earrings in a secondary school's uniform policy did not constitute gender discrimination.<sup>12</sup> Distinguishing the case from the earlier cases relating to hair length, the Tribunal noted that the case before it concerned "a single earring that can be easily removed by the complainant and replaced when outside the school setting" and which therefore had "no impact on the manner in which the complainant chooses to dress outside the school". While observing that a school must have in place procedures which allow for a change in the dress code in line with changing patterns and lifestyles, the Tribunal in this case emphasised the school's right to determine its own uniform codes and concluded that it was not discriminatory to have different rules for males and females in relation to the wearing of earrings as part of the overall school dress code. These cases not only illustrate the far-reaching scope of the prohibition on gender discrimination under the Acts but also the extent to which the Tribunal, in its evolving case law, is required to draw what are often quite fine lines between the different factual circumstances coming before it.

9 See chapter 3.D.

10 *Ms A (on behalf of her son Mr B) v. A Community School*, DEC-S2009-008.  
See, to similar effect, *A Male Student v. A Secondary School*, DEC-S2009-010.

11 *Carr on behalf of his Son v. Gaelscoil Mhainistir Na Corann*, DEC-S2009-023.

12 *A Complainant v. A Secondary School*, DEC-S2009-074.

Under the Employment Equality Acts, one of the most significant developments during the reporting period was the Tribunal's first consideration of the issue of transgender discrimination. In *Hannon v. First Direct Logistics Limited*,<sup>13</sup> the complainant was a male to female transsexual who claimed that she had been discriminated against in her working conditions and in her dismissal on the grounds of her gender and/or disability. In its decision, the Tribunal accepted that transsexualism or gender identity disorder was a recognised medical condition and that the complainant was suffering from a disability within the meaning of the Acts at all material times and that she had notified the respondent of this in late 2006. Following the approach of the European Court of Justice in *P v S*,<sup>14</sup> the Tribunal was also satisfied that it was well established in law that the gender ground protected transgender persons from discrimination. Having described the necessary treatment for transsexualism, including the importance of 'real life experience' living as a member of the other sex, the Tribunal stated that the Acts imposed an obligation on an employer of a person with gender identity disorder to accommodate, within the confines of the workplace, such real life experience. In this case, while the employer had been initially supportive during the employee's period of transition from male to female, the Tribunal concluded that its conduct – including its failure to discuss the complainant's needs adequately with her and its request for the complainant to work from home and to continue to use her male identity in work – constituted discrimination on the grounds of gender and disability and moreover that, in the circumstances, the complainant had been discriminatorily dismissed. At a time when legislation on transgender persons is still awaited, notwithstanding Government commitments following its decision not to pursue its appeal in the *Foy* case,<sup>15</sup> the decision in *Hannon* illustrates the potential utility of equality legislation for vindicating the rights of transgender persons.

13 *Hannon v. First Direct Logistics Limited*, DEC-E2011-066.

14 Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143.

15 *Foy v. An t-Ard-Chlaratheoir* [2007] IEHC 470



**(ii) Marital status**

During the reporting period, there were a handful of decisions each year considering discrimination on the marital status ground and, in many of these cases, that ground was invoked alongside other grounds such as gender and family status. With the coming into force of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, this ground is now known as the civil status ground under the Acts, which means "being single, married, separated, divorced, widowed, in a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 or being a former civil partner in a civil partnership that has ended by death or been dissolved".<sup>16</sup>

In a number of decisions in 2010, the Tribunal considered the application of this ground under the Equal Status Acts to separated parents in their interactions with the schools and hospitals which their children attended. In one case, the Tribunal found that a hospital's decision to request a separated father to go through a solicitor in order to obtain information relating to his daughter's medical treatment constituted discrimination on the marital status ground.<sup>17</sup> Similarly, in another case, the Tribunal found that a school's failure to provide the complainant, a separated father who was joint guardian of his children, with information and documentation in relation to his children's progress in school constituted discrimination on the ground of marital status.<sup>18</sup> In both cases, the Tribunal, in addition to awarding compensation, ordered the institutions to review their procedures for dealing with parents and guardians of children in such circumstances.

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16 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 102 and 103. Under S.I. No. 648/2010, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010, the Act (with the exception of section 5 and related provisions which took effect from 23rd December 2010) came into force on 1st January 2011.

17 *A Separated Complainant v. A Hospital*, DEC-S2010-046.

18 *A Separated Father v. A Community School*, DEC-S2010-049.

### (iii) Family status

Although the definition of family status under the Acts is quite broad,<sup>19</sup> this ground was also considered in very few decisions of the Tribunal, particularly as a standalone ground, and its invocation was rarely successful during the reporting period.<sup>20</sup> However, where such a complaint is upheld, it can result in a significant award of compensation. For example, in *Long v. The Hanly Group*,<sup>21</sup> the complainant, who was sales and marketing manager at one of the respondent's hotels, alleged that changes to her duties arising from the appointment of a group-level manager with responsibility for a number of hotels and her subsequent dismissal constituted discrimination, harassment and discriminatory dismissal on the family status ground. The effect of the changes to the complainant's role which the respondent implemented was to require the complainant to undertake travel within Ireland, the UK and the USA in a manner which was incompatible with her family commitments. Having compared the treatment of the complainant to that of another named employee who did not have children at the time, the Tribunal found that the respondent had discriminated against the complainant and ultimately dismissed her for reasons directly related to her family status and awarded the complainant the sum of €50,000 as compensation.

### (iv) Sexual Orientation

Very few decisions of the Tribunal have addressed discrimination on the ground of sexual orientation and indeed the number of decisions has actually decreased over the course of the reporting period.

Under the Equal Status Acts, there were five Tribunal decisions on this ground in 2008, in one of which the complainant was successful, but there were no decisions in either 2009 or 2010.<sup>22</sup> In 2011, there were only two decisions on this ground and, while both were partially successful, they succeeded on the ground of harassment rather than discrimination *simpliciter*.<sup>23</sup>

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19 Employment Equality Acts, section 2; Equal Status Acts, section 2. Family status means being pregnant or having 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.

20 See e.g. *Talbot v. Casino Cinemas Limited t/a Killarney Cineplex Cinema*, DEC-S2008-053; *Kelly v. Nevinar Cosmetics Ltd.*, DEC-E2010-063; *Jones v. Trinity College Dublin*, DEC-E2010-114.

21 *Long v. The Hanly Group*, DEC-E2010-015.

22 *A Complainant v. A Fast Food Franchise*, DEC-S2008-036; *McGuffin & Harte v. Eyre Square Hotel*, DEC-S2008-051 (in which case the Tribunal found for the complainants); *Woodhead & Sparkes v. Swinford Garda Station*, DEC-S2008-064; *Gloria (Ireland's Lesbian & Gay Choir) v. Cork International Choral Festival Ltd.*, DEC-S2008-078; *Dalton v. Glynn*, DEC-S2008-084.

23 *A Hotel Guest v. A Dublin Hotel*, DEC-S2011-040; *Merriman v. O'Flaherty's Ltd t/a Reads Print Design & Photocopying Bureau*, DEC-S2011-049.

Under the Employment Equality Acts, there were two decisions in 2008, in both of which the complaint was unsuccessful.<sup>24</sup> There were no decisions on this ground in 2009. In both 2010 and 2011, there were two decisions each year, only one of which in each year bearing fruit for the complainant. In the case of *A Complainant v. A Contract Logistics Company*, the Tribunal found that the complainant had been sexually harassed in the course of employment, particularly arising from comments made by colleagues in relation to his sexual orientation, and made a substantial award of compensation in the sum of €40,000.<sup>25</sup> In *Cullen v. Department of Foreign Affairs*, the complainant was a career diplomat who alleged that she had been discriminated against on the ground of sexual orientation and victimised following her complaint to the Tribunal.<sup>26</sup> While concluding that the documentary evidence supported the respondent's argument that the difference of treatment complained of was based on her performance and not her sexual orientation, the Tribunal held that victimisation could be inferred from the manner in which her performance assessment was downgraded while her complaint was being investigated by the Tribunal and made an award of €20,000 on this basis. However, on appeal by the complainant and cross-appeal by the respondent, the Labour Court held that the complainant had not only failed to establish a *prima facie* case of discrimination on the sexual orientation ground but also that she had not been victimised. In light of the uncontested evidence before the Court that the person who had conducted the performance assessment had been unaware of the complaint at the time of the assessment, the Tribunal took the view that there was no causal connection between the performance assessment and the complaint under the Acts, which was fatal to the claim of victimisation.<sup>27</sup>

What is striking about claims on this ground during the reporting period is that, in the very small number of complaints which have been at least partially successful, the complainant has succeeded not on the basis that the impugned conduct was discriminatory but that it constituted harassment or, as in the *Cullen* decision which was subsequently overturned by the Labour Court, victimisation.

24 *A Worker v. A State Agency*, DEC-E2008-042; *A Construction Worker v. A Construction Company*, DEC-E2008-048.

25 *A Complainant v. A Contract Logistics Company*, DEC-E2011-265.

26 *Cullen v. Department of Foreign Affairs*, DEC-E2010-006.

27 *Department of Foreign Affairs v. Cullen*, Labour Court, Case EDA116.

### (v) Religion

The Tribunal considered discrimination on the ground of religion in only a handful of cases during the reporting period, two of which are of particular interest.

In *McKeever v. Board of Management Knocktemple National School and the Department of Education*,<sup>28</sup> the complainant, who was a member of the Church of Ireland, had been offered and accepted a job at the respondent school when she was asked whether she had a Catholic religious certificate. The complainant informed the chairperson of the Board of Management that she did not have such a certificate but that she was familiar with and willing to teach the Alive-O religious programme. The complainant was later informed that the offer of employment had been made in error and that the position had to be advertised. Although invited to interview, the complainant did not attend but received a letter from the chairperson which stated that the earlier offer of employment had been a procedural error on her part and that only the Board of Management had the right to appoint a teacher. The respondent maintained this position at the hearing. It did not seek to invoke section 37(1) of the Acts. On the balance of the evidence, the Tribunal concluded that the complainant's religion had been discussed by the Board of Management and influenced its decision to withdraw the offer of employment which had been made to the complainant. It awarded her compensation in the sum of €12,697, the maximum figure which can be awarded where the complainant is not in receipt of remuneration and also ordered the respondent to follow good practice in its recruitment process.

In *Mackeral v. Monaghan County Council*,<sup>29</sup> the complainant, who was a part-time fire fighter with the respondent and a member of the Church of Ireland, alleged that he had been discriminated against, harassed and victimised on the ground of his religion. In particular, he alleged that he had been subjected to verbal abuse because of his religion including when, on passing a hall belonging to the Orange Order, the station master had asked him if that was "the Orange Hall" he belonged to. The complainant later made a complaint about the verbal abuse. This resulted in an investigation arising from which the complainant's employment was terminated on the ground of gross misconduct. The Tribunal concluded that the alleged verbal abuse had not taken place and that the respondent was entitled to rely on the defence to the claim of harassment in section 14A(2) of the Acts because it had taken reasonable steps to prevent harassment. While the Tribunal accepted that the complainant had established a *prima facie* case of victimisation in respect of the manner in which his complaint and the termination of his employment were linked, it concluded that the respondent had rebutted the inference of discrimination which thereby arose by satisfying the Tribunal that the reason for his dismissal was gross misconduct on the complainant's part, not his complaint. However, on appeal, the Labour Court recently overturned the Tribunal's decision on the

28 *McKeever v. Board of Management Knocktemple National School and the Department of Education*, DEC-E2010-189.

29 *Mackeral v. Monaghan County Council*, DEC-E2011-266.

issue of victimisation. Noting, by way of background, that the Council had failed to afford the complainant even the most rudimentary form of fair procedure, the Court considered that the juxtaposition in the employer's report of the conclusions in relation to the complaints made by the complainant and those made against him made it impossible for the Court to discount the possibility that, but for those complaints, the complainant may not have been treated as he was ultimately treated. Having regard to all the circumstances, the Court found that the respondent had failed to prove that the dismissal was not a reaction to the complaints of harassment on the ground of religion which had been made and awarded the complainant €17,000 as compensation for victimisation.

### (vi) Age

During the reporting period, complaints of discrimination on the ground of age were much more frequently made under the Employment Equality Acts than under the Equal Status Acts. In particular, the issue of mandatory retirement ages featured prominently in the jurisprudence of the European Court of Justice and of the Irish High Court. While the Court of Justice continued to refine its jurisprudence in this area,<sup>30</sup> the High Court was called on to consider the issue of age discrimination on a number of occasions and in a number of different contexts, including in the cases of *Calor Teo v. McCarthy*,<sup>31</sup> *Donnellan v. Minister for Justice, Equality and Law Reform*,<sup>32</sup> and in *Minister for Justice, Equality and Law Reform v. Director of Equality Tribunal*.<sup>33</sup>

In the case of *Five Named Complainants v. Hospira Ltd.*,<sup>34</sup> the respondent had employed the complainants for periods ranging from 16 to 25 years. Following the respondent's announcement of its intention to close the plant where the complainants worked, it entered into negotiations with the relevant trade unions on a redundancy package for the employees. The outcome of these negotiations was a package containing a formula which resulted in the complainants, as employees close to the age of retirement, receiving the lesser of (a) the terms of the redundancy package or (b) the amount of salary which those employees would have earned if they had continued in employment until the normal retirement age of 65. The complainants claimed that this constituted less favourable treatment on the ground of age contrary to the Acts. The respondent rejected the complainants' assertion, claiming that the complainants had accepted

30 See e.g. Case C-45/09 *Rosenbladt* [2010] ECR nyr; Case C-250/09 and C-268/09 *Georgiev* [2010] ECR nyr; Case C-159/10 and C-160/10 *Fuchs* [2011] ECR nyr.

31 *Calor Teoranta v. McCarthy* [2009] IEHC 139.

32 *Donnellan v. Minister for Justice, Equality and Law Reform* [2008] IEHC 467.

33 *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* [2010] 2 IR 455.

34 *Five Named Complainants v. Hospira Ltd.*, DEC-E2011-083.

the pay in full and final settlement of all claims emanating from their employment and, without prejudice to this, that the manner in which the payments were calculated was covered by the exemption in section 34(3)(d) of the Acts.

In its decision, the Tribunal first rejected the respondent's argument that the complaints were not validly before it on the basis that the complainants had entered into a binding and enforceable agreement which precluded them from pursuing their complaints. Proceeding to consider the substantive claim of discrimination, the Tribunal was satisfied that the application of the impugned formula, which had resulted in a cap on the complainants' employment and a shortfall in their employments, was a direct consequence of their age and, in particular, their proximity to the respondent's normal retirement age. The complainants had therefore established a *prima facie* case of discrimination and the burden of proof shifted to the respondent to rebut the inference of discrimination. While the Tribunal was satisfied that the payment came within the exclusion provided for in section 34(3)(d) of the Acts, it nonetheless considered that it had a duty to interpret Irish law in light of EU law and, in particular, the Framework Directive. Taking account of the High Court decision in the *Donnellan* case, the Tribunal concluded that, construing section 34(3)(d) in light of article 6(1) of the Framework Directive, it was necessary for the respondent to satisfy the Tribunal that the cap placed on the complainants' entitlements was objectively and reasonably justified by a legitimate aim, the means for achieving which were proportionate. Applying this test to the facts before it, the Tribunal concluded that the cap on the complainants' entitlements could not be objectively justified and that the complainants were therefore entitled to succeed. It awarded the respondent to pay the complainants the shortfall amount as well as €4,000 as compensation for the effects of discrimination.

At a time when the Tribunal's jurisdiction to interpret and apply EU law has been challenged before the courts,<sup>35</sup> the decision in *Hospira* highlights the difficulties arising from the interaction between the Acts and EU law and vividly illustrates the important role which EU law can play in the Tribunal's case law. While the complex issues arising from the relationship between Irish equality law and EU law have featured most prominently in the context of age discrimination during the reporting period, they are issues of broader relevance and applicability across most, if not all, of the grounds of discrimination protected under the Acts.

### **(vii) Disability**

During the reporting period, the Tribunal considered a large number of complaints on the disability ground, both under the Employment Equality Acts and the Equal Status Acts, and clarified the scope of the obligation to provide reasonable accommodation under the Acts.

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35 *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* [2010] 2 IR 455.



The case law for 2008–2011 confirms the very broad definition of disability laid down in section 2 of the Equal Status Acts. As well as novel cases such as *Hannon* concerning gender identity disorder,<sup>36</sup> the Tribunal has considered a wide range of psychological, learning and other disabilities during the reporting period.<sup>37</sup> It has also considered a number of cases in which the alleged discrimination arose in the context of a disability imputed to the complainant by the respondent.<sup>38</sup>

At the same time, the Tribunal has affirmed its existing case law that the onus lies on the complainant to establish his or her disability.<sup>39</sup> While disability is broadly defined under the Acts, its definition is not without limits and does not extend to transient pain or other minor injuries.<sup>40</sup> In *O'Rourke*, the Tribunal considered that the complainant's case – that stomach cramps which he suffered on a particular day constituted a disability within the meaning of the Acts – was misconceived and dismissed the complaint. In doing so, the Tribunal referred to the judgment of the European Court of Justice in *Chacón Navas*,<sup>41</sup> in which the Court had held that, in order to constitute a disability within the meaning of Directive 2000/78/EC, it must be probable that the condition will last for a long time. While the Tribunal accepted that the definition of disability under the Acts was "much broader" than under the Directive, it was of the view that, in light of *Chacón Navas*, that definition did not extend to the short-term illness suffered by the complainant.<sup>42</sup>

As is well-known, the Acts also impose a duty on service providers and employers to provide reasonable accommodation to persons with a disability by putting in place measures to enable to access the services or to undertake the employment duties in question.<sup>43</sup> Described as "special treatment or facilities" under the Equal Status Acts and "appropriate measures" under

36 *Hannon v. First Direct Logistics Limited*, DEC-E2011-066.

37 *Mr. X v. A Town Council*, DEC-S2008-042 (depression), on which see also *An Employer v. A Worker*, Labour Court, Case EDA094 and *Connacht Gold Co-operative Society v. A Worker*, Labour Court, Case EDA0822; *Surridge v. Coláiste Bhríde School*, DEC-S2008-050 (dyslexia); *Mr A v. A Life Assurance Company*, DEC-S2011-008 and *Buckley v. Board of Management St Josephs Junior School*, DEC-E2011-014 (diabetes); *A Government Employee v. A Government Department*, DEC-E2010-055 (hypertension); *Flynn v. Emerald Facility Services*, DEC-E2009-065 and *A Worker v. A Department Store*, DEC-E2011-048 (alcoholism); *Goulding v. O'Doherty*, DEC-S2009-073 (HIV infection).

38 *Langford v. An Grianan Hotel*, DEC-E2011-220; *Wynne v. Bus Éireann*, DEC-E2011-227; *An Employee v. A Retailer*, DEC-E2011-229.

39 *A Worker v. A Department Store*, DEC-E2011-048; *Guinane v. Tesco Ireland Limited*, DEC-E2011-081. See also *Connacht Gold Co-operative Society v. A Worker*, Labour Court, Case EDA0822.

40 *Colgan v. Boots Ireland Ltd.*, DEC-E2010-008 (citing the decision of the Court of Justice in Case C-13/05 *Chacon Navas* [2006] ECR I-6467).

41 Case C-13/05 *Chacón Navas* [2006] ECR I-06467.

42 *O'Rourke v. JJ Red Holdings Limited t/a Dublin City Hotel*, DEC-E2010-045

43 Section 16(3) of the Employment Equality Acts 1998–2011 and section 4(1) of the Equal Status Acts 2000–2011.

the Employment Equality Acts, the taking of such measures is subject to the condition that such measures would not impose, under the Equal Status Acts, a cost other than a nominal cost on the service provider or, under the Employment Equality Acts, a disproportionate burden on the employer.<sup>44</sup>

During the reporting period, the judgment of the Circuit Court in the case of *Dublin City Council v. Deans*<sup>45</sup> provided important general guidance for the Tribunal in the interpretation of reasonable accommodation under the Equal Status Acts, which was not limited to the housing context in which the specific complaint arose and which has been frequently referred to across many areas of the Tribunal's case law.<sup>46</sup> That case also highlighted the importance of oral evidence in cases of this kind because the nature of reasonable accommodation being sought in a particular case can often only be fully understood after hearing the complainant and any experts who may be able to shed light on the complainant's disability, its effects and the complainant's resulting needs. The case law confirms that the Tribunal adopts a nuanced approach in complaints of this kind<sup>47</sup> and undertakes a careful scrutiny of the reasons put forward by service providers to justify their failure to provide special treatment or facilities.<sup>48</sup> However, the Tribunal has also emphasised, in the context of cases where the respondent has taken measures which exceed what would be required as a matter of reasonable accommodation, that the statutory provisions do not confer an entitlement on complainants to perfection.<sup>49</sup> In a number of cases, the Tribunal has rejected a complaint on the basis that the special measures or facilities sought – such as the installation of a lift in the premises or the provision of certain forms of special assistance in educational contexts – are such as would give rise to a cost other than a nominal cost, bringing them within the exception provided for in section 4(2) of the Acts.<sup>50</sup>

In the employment context, the Tribunal has emphasised that there are cases where, because of the nature of the complainant's disability and the requirements of the job, no appropriate measures can be taken in order to

44 Section 16(3) of the Employment Equality Acts 1998–2011 and section 4(2) of the Equal Status Acts 2000–2011.

45 *Dublin City Council v. Deans* (unreported judgment of Judge Hunt, 15th April 2008).

46 *Doherty v. Bus Eireann*, DEC-S2011-052.

47 *Harrington v. The Talbot Hotel*, DEC-S2008-057; *Harrington v. Cavan Crystal Hotel*, DEC-S2008-117.

48 *Madigan v. Peter Mark*, DEC-S2010-023; *Duyn v. Aer Arann Group*, DEC-S2011-023; *A Patient v. The Mater Misericordiae University Hospital*, DEC-S2009-057.

49 *Wellard v. Killester College*, DEC-S2008-024; *Wellard v. Eircom*, DEC-S2008-098; *Wellard v. Tesco Ireland*, DEC-S2009-047.

50 *O Riain v. HMV Ireland*, DEC-S2008-034; *Harrington v. The National Concert Hall*, DEC-S2008-048; *Mrs A (on behalf of her son, B) v. A Childcare Facility*, DEC-S2009-041; *Connolly v. Hughes & Hughes*, DEC-S2009-064; *Regan v. Old Bawn Community School*, DEC-S2010-043.

enable the complainant to undertake the duties involved.<sup>51</sup> However, the Tribunal has also built on the existing case law of the Labour Court – in particular in *A Health and Fitness Club v. A Worker and A Government Department v. A Worker*<sup>52</sup> – by emphasising the proactive duty on an employer to consult with the employee and to carry out an appropriate assessment of the needs of the person with the disability and of the measures which would be necessary to accommodate this disability.<sup>53</sup> Failure to do so is often fatal to an employer's defence of such a complaint.<sup>54</sup>

### (viii) Race

While complaints of discrimination on the ground of race were relatively few in number in the early years of the Tribunal,<sup>55</sup> the numbers of complaints on this ground, particularly under the Employment Equality Acts, has risen dramatically in recent years to the point where it is the single most common ground of discrimination invoked by complainants. In Chapter 3, dealing with the assessment of burden of proof, the report examined complaints on this ground under both the Employment Equality Acts and the Equal Status Acts in some detail. While most of the complaints on this ground have been unsuccessful – many of which appearing to be referred to the Tribunal without any detailed consideration of the facts of the particular case or the need to establish a link between the impugned conduct and the complainant's race – nonetheless an examination of the minority of successful cases is enough to displace any sense of complacency that there might continue to be about the existence of racism in Ireland.

### (ix) Membership of the Traveller community

The number of complaints on the ground of membership of the Traveller community under the Equal Status Acts has, as already noted, dropped considerably as a result of the transfer of jurisdiction in relation to licensed premises under section 19 of the Intoxicating Liquor Act 2003. Because of

51 *McN v. A Charity*, DEC-E2011-246; *Corbett v. Bus Eireann*, DEC-E2011-184.

52 *Labour Court*, EED037 and *Labour Court*, ADE0516.

53 *Mr A. v. A Government Department*, DEC-E2008-023; *Rattigan v. Connacht Gold Co-operative Society*, DEC-E2008-026; *Bus Éireann v. A Worker*, Labour Court, EDA0811.

54 *A Worker v. A Hotel*, DEC-E2011-076; *Sullivan v. Murphy's Store (Berehaven) Limited*, DEC-E2011-111; *Mrs X v. A Nursing Home*, DEC-E2010-090. Note that, while the case law is somewhat different under the Equal Status Acts, similar considerations may also be relevant: *Doherty v. Bus Eireann*, DEC-S2011-052.

55 See e.g. Reid, *Annual Report 2001: Legal Review (Equality Tribunal)*, 6 (referring to four decisions); Reid, *Legal Review 2002 (Equality Tribunal)*, 8 (referring to five decisions); Reid and McHugh, *Legal Review 2003 (Equality Tribunal)*, 7 (referring to thirteen decisions).

the delays in the hearing of complaints, it was only at the early stages of the reporting period that the final cases pre-dating this transfer of jurisdiction were eventually heard.<sup>56</sup> Nevertheless, complaints have continued to be made on this ground under the Equal Status Acts, most frequently in relation to housing issues,<sup>57</sup> which stands in contrast to the position under the Employment Equality Acts where such complaints have been virtually non-existent.<sup>58</sup> The most high profile case during the reporting period was undoubtedly the *Stokes* case, discussed in detail in Chapter 5, where the Tribunal initially concluded that the admissions policy of the Christian Brothers High School, Clonmel was indirectly discriminatory against members of the Traveller community but where this decision was subsequently overturned on appeal to the courts.<sup>59</sup>

In a number of cases during the reporting period, the Tribunal has also been called on to consider whether complainants raising issues of discrimination on the ground of membership of the Traveller community can also advance their claim on the ground of race, an issue which has also come before the courts but which has not been the subject of an authoritative decision. In *Mrs. X (on behalf of her son Mr. Y) v. A Post Primary School*, the Tribunal took the view that the race ground was designed to afford protection against discrimination to “those of a different colour, nationality or ethnic or national origins who reside within the State” and held that the argument of the complainant, a member of the Traveller community acting on behalf of her son, on this ground was

56 See e.g. *Joseph Kerry v. Fox's Bar, Galway*, DEC-S2008-001; *Michael Ward v. The Fiddler's Elbow Pub, Ballaghderreen*, DEC-S2008-002; *Breda Berry & Ors v. Sheldon Park Hotel*, DEC-S2008-008; *Grogan v. Crocketts on the Quay, Ballina*, DEC-S2009-001.

57 In particular, in 2008 and 2009, in *Mongan* and related cases, the Tribunal was faced with a flood of complaints against Ennis Town Council and Clare County Council: see e.g. *Mongan v. Clare County Council*, DEC-S2008-039. This body of litigation came before the High Court on two occasions during the reporting period: the first, a successful application for judicial review relating to the Circuit Court's handling of an appeal of one of the cases (*Clare County Council v. Kenny* [2009] 1 IR 22); the second, an unsuccessful application for judicial review relating to the Equality Officer's case management of the proceedings (*Clare County Council v. Director of Equality Investigations & Ors* [2011] IEHC 303).

58 For example, in 2010 and 2011, there were 12 and 9 complaints respectively under the Equal Status Acts. The only complaints on this ground under the Employment Equality Acts during the reporting period were: *McCorry v. Southside Partnership*, DEC-E2009-055 (where the Tribunal rejected a claim of discrimination by association with members of the Traveller community by a community development worker who had worked with Travellers for a number of years); *Croghan v. Xtratherm Ltd.*, DEC-E2009-060 (where the Tribunal rejected an equal pay claim in which the complainant invoked as comparators other employees who were members of the Traveller community and argued *inter alia* that he had been discriminated against because he was not a member of the Traveller community); *Stralkowski v. Primeline Logistics Ltd.*, DEC-E2011-216 (where the Tribunal rejected a complaint on this ground made by the complainant who claimed that, as a political refugee from East Germany, he was of Traveller community heritage).

59 Chapter 5.B.

inadmissible.<sup>60</sup> In a later decision, the Tribunal took a similar approach albeit based on a somewhat different and more nuanced rationale, finding that “members of the Traveller community are specifically protected as a separate discriminatory ground under the Equal Status Acts” and concluding that, in the context of the case before it, there was “no protection against discrimination on the ground of race” which was not available on the Traveller community ground.<sup>61</sup>

### (x) Victimisation

Victimisation – which is where a person suffers adverse treatment as a result of making a complaint of discrimination – is prohibited under section 74(2) of the Employment Equality Acts and is listed as a distinct ground of discrimination under section 3(2) of the Equal Status Acts. As the Labour Court recently commented in the *Barrett* case, protection against victimisation is “a vital component in ensuring the effectiveness of anti-discrimination law”: it “enables those who considered themselves wronged by not being afforded equal treatment to raise complaints without fear of retribution.”<sup>62</sup>

The case law of the Tribunal during the reporting period underlines the critical importance of the link between the conduct of the complainant – for example, a direct complaint about discrimination or the initiation of proceedings under the Acts – and the adverse treatment by the respondent. Many complaints on this ground do not succeed because of the failure to prove this critical link between these two elements of the claim.<sup>63</sup> As the Tribunal has recently commented, many complainants use the term victimisation “in the colloquial sense rather than within the meaning of the Acts.”<sup>64</sup>

However, where the complainant is in a position to establish such a link and demonstrate that he or she has been victimised, the Equality Tribunal, as it emphasised in the recent case of *Kapitanovas*, takes such a finding “very seriously” and its award of compensation will be “reflective of this.”<sup>65</sup>

60 *Mrs. X (on behalf of her son Mr. Y) v. A Post Primary School*, DEC-S2010-009.

61 *Mrs Z (on behalf of her three children) v. A National School*, DEC-S2010-055.

62 *Department of Defence v. Barrett*, Labour Court, Case EDA1017. See also *Watters Garden Sheds Ltd. v. Panuta*, Labour Court, Case EDA098 (referring to the EU law context and the relevant jurisprudence of the Court of Justice).

63 See e.g. *King v. Dublin Bus*, DEC-S2008-019; *Kudryavitsky v. Ballyfermot Resource Centre*, DEC-S2008-079; *Dalton v. Citizens Information Centre Dún Laoghaire and Comhairle*, DEC-S2010-040.

64 *Olaijde v. Buck Properties Ltd.*, DEC-S2010-021.

65 *Kapitanovas v. Martin Tate Ltd.*, DEC-E2011-046. See also *Dubina v. Gergal Brodigan t/a FB Groundworks*, DEC-E2011-077, *A Traveller v. A Local Authority*, DEC-S2010-052, and *Toker Developments Ltd. v. Grods*, Labour Court, Case EDA105 (where the act of victimisation was admitted and, on appeal, the Labour Court increased the award of compensation for victimisation).



**(xi) Harassment**

The Acts also prohibit harassment, including sexual harassment,<sup>66</sup> on discriminatory grounds while providing a defence for an employer or other responsible person where it can be proven that that person “took such steps as are reasonably practicable” to prevent the harassment.<sup>67</sup> During the reporting period, the Tribunal dealt with many claims of harassment, in particular in the context of complaints on the ground of race, gender, and sexual orientation,<sup>68</sup> as well as a number of important cases of sexual harassment.<sup>69</sup> In a number of cases, the complaint of harassment has succeeded even though other complaints of discrimination and victimisation have not, which emphasises the distinctive character of harassment as a form of prohibited conduct under the Acts.<sup>70</sup>

The Tribunal has shed important light on the operation of the defence in complaints of harassment. In the case of *Brooks v. BRC Shooting Club*, taken under the Equal Status Acts, the Tribunal noted that, while the case law on the investigative duties of employers in relation to allegations of harassment in the workplace could not be directly applied to voluntary clubs such as the respondent, nevertheless such a club, as a service provider, had to take complaints of this kind seriously and investigate them in a manner that is consistent with the principles of natural justice.<sup>71</sup> In the employment case of *Moodley v. Counter Product Marketing Ltd.*, the Tribunal found that the complainant had been harassed within the meaning of the Acts but that, because the employer had conducted an investigation and had attempted to reverse the effects of harassment, the employer was entitled to avail “of part of the defence provided in section 14A(2)”. However, it was not entitled to avail of the full defence because the initial investigation had not been sufficiently objective, thereby conflicting with the anti-harassment policy in place, and because one of the main perpetrators had been the complainant’s supervisor who had not received any staff management training prior to taking the role.<sup>72</sup>

66 Section 14A(1) of the Employment Equality Acts 1998–2011 and section 11(1) of the Equal Status Acts 2000–2011.

67 Section 14A(2) of the Employment Equality Acts 1998–2011 and section 11(3) of the Equal Status Acts 2000–2011.

68 See e.g. on the race ground, *Chasi v. J & JI Security Ltd.*, DEC-E2011-016 and *Manning v. Limerick City Council*, DEC-E2010-116; on the gender ground, *Brenda Farrell -v- Irish Youth Promotions (in liquidation)*, DEC-E2011-002; on the sexual orientation ground, *A Hotel Guest v. A Dublin Hotel*, DEC-S2011-040.

69 *Marshfield v. MSC Fire Products Limited t/a Omada Fire*, DEC-E2011-099; *A Complainant v. A Contract Logistics Company*, DEC-E2011-265.

70 See e.g. *Kane v. Eirjet Limited*, DEC-S2008-026; *Merriman v. O’Flaherty’s Ltd t/a Reads Print Design & Photocopying Bureau*, DEC-S2011-049.

71 *Brooks v. BRC Shooting Club*, DEC-S2010-042.

72 *Moodley v. Counter Product Marketing Ltd.*, DEC-E2011-025.



## C. Exceptions or Exemptions under the Acts

While the general rule laid down in the Equal Status Acts and the Employment Equality Acts is that discrimination and other forms of prohibited conduct on any of the nine listed grounds are unlawful, the Acts are also characterised by a complex array of exceptions, defences, and other exemptions which are extremely important in the practice of the Equality Tribunal.

Under the Equal Status Acts, after setting out the general prohibition on discrimination in section 5(1), the Acts then provide that, in section 5(2), that this prohibition does not apply to the thirteen categories of activity set out in that subsection. Of these categories, the exemption in relation to insurance policies is perhaps the most topical in light of developments at EU level during the reporting period. Accordingly, this exemption will be examined briefly below. In a similar manner to section 5, while section 6(1) prohibits discrimination in disposal of premises and the provision of accommodation, section 6(2) sets out a number of categories of activity to which that prohibition does not apply. In the *Portmarnock Golf Club* case,<sup>73</sup> discussed in detail in Chapter 5, the Supreme Court considered the interpretation of section 9 of the Equal Status Acts which qualifies the definition of discriminating clubs in section 8 of the Acts. Sections 14 to 16 then set out some further exemptions from the general prohibition of discrimination in the provision of goods and services contained in the Acts, with section 14 notably providing an exemption for conduct which is required by law. As illustrated by the Tribunal's case law during the reporting period, this is one of the most important and far-reaching exemptions in the legislative scheme and, for this reason, will be considered below.

Exempting provisions of this kind feature less prominently in the Employment Equality Acts, which is at least in part due to the greater significance of obligations under European Union law in the field of employment equality. Nevertheless, there are some significant qualifications to the general prohibition of discrimination in the Acts. For example, sections 24 and 33 permit positive action in the employment field. Section 25 provides for the exclusion of gender discrimination in certain employments by reason of the particular occupational activities concerned while section 27 qualifies the prohibition on gender discrimination to some extent in respect of employment in the Garda Síochána and the prison service. Section 34 makes certain savings and exceptions in relation to the family, age and disability grounds. For example, section 34(4) of the Acts – which will be examined by way of example below – provides that, without prejudice to subsection (3) on occupational benefits schemes, it shall not constitute discrimination on the age ground “to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees”. Section 35 provides cover *inter alia* for certain requirements relating to residence, nationality or proficiency in the Irish language for certain public offices or positions. Section 37(1) – one of the most controversial exemptions under the Acts – allows religious institutions and educational or

73 *Equality Authority v. Portmarnock Golf Club* [2010] 1 IR 671.  
See generally Chapter 5.D of this report.

medical institutions under the direction or control of religious bodies to give more favourable treatment on the ground of religion to an employee or prospective employee where it is reasonable to do so in order to maintain the religious ethos of the institution or to take action reasonable necessary to prevent an employee or prospective employee from undermining the religious ethos of the institution. Section 37(2) provides that, in certain circumstances, differences of treatment on the discriminatory grounds (except the gender ground which is covered by section 25) by reason of the particular occupational activities concerned shall not constitute discrimination, with further subsections making specific provisions in respect of employment in the Garda Síochána, prison or emergency services.

### **(i) Section 5(2)(d), Equal Status Acts: Insurance**

Section 5(2)(d) of the Equal Status Acts provides that the general prohibition on discrimination does not apply to differences in the treatment of persons "in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk" where the treatment is effected by reference to reasonably reliable actuarial or statistical data or other relevant underwriting and commercial factors and where it is reasonable having regard to those data and factors. Section 5(2)(da) and Section 5(3) make special provision for this exemption in the context of discrimination on the ground of gender.

In a trilogy of recent cases, the Tribunal has applied this exemption in the context of alleged discrimination on the ground of disability. In the first case, the complainant who had suffered from reactive depression after a road traffic accident applied for a mortgage and related life insurance which was refused by the respondent.<sup>74</sup> After examining the evidence submitted by the respondent, the Tribunal was satisfied that the respondent's practice was reasonable based on the information it had relating to the complainant's health status and, accordingly, that it fell within the scope of section 5(2)(d) of the Acts. In the second case, the complainant who was suffering from a disability challenged the respondent's refusal to allow him to increase the level of cover under his existing income protection policy.<sup>75</sup> After considering all of the evidence, the Tribunal concluded that, in accordance with section 5(2)(d), this decision had been effected by reference to actuarial or statistical data obtained from a source on which it was reasonable to rely as well as by reference to underwriting and commercial factors and that it was reasonable having regard to the data and other factors in question.

In the third case, the complainant, who was diagnosed with alcohol dependency and depression, had applied for life assurance cover with the respondent which decided to postpone cover for a year based on the evidence provided to it in relation to the complainant's medical condition.<sup>76</sup> Having examined the evidence, the Tribunal was satisfied that the respondent had based its conclusion on reliable medical research to the effect that the risks associated with cover in

74 *A Complainant v. A Life Insurance Provider*, DEC-S2009-033.

75 *Mr A v. A Life Assurance Company*, DEC-S2011-008.

76 *A Complainant v. A Life Assurance Provider*, DEC-S2011-064.

such a case were “so high as to make it untenable to provide cover to such persons while they were still affected by both disorders simultaneously,” with the Tribunal noting that this was a decision essentially based on commercial factors. The Tribunal then proceeded to consider whether it was reasonable for the respondent to conclude that the complainant was suffering from both disorders and concluded on the basis of the medical evidence that it was indeed reasonable for it to do so, thereby entitling the respondent to rely on section 5(2)(d).

The recent case law therefore illustrates that section 5(2)(d) has been an important and useful exemption for insurance companies in defending their assessment of risk against discrimination claims. While that case law concerned alleged discrimination on the ground of disability, different considerations apply in relation to the discrimination on the ground of gender in light of the judgment of the Court of Justice in the *Test-Achats* case.<sup>77</sup> In that case, the Court of Justice found that the indefinite character of a similar exemption contained in article 5(2) of Directive 2004/113/EC – which allowed for extension of the exemption beyond 21 December 2012 – was incompatible with the equality provisions of the Charter of Fundamental Rights. In light of *Test-Achats*, the Minister for Justice and Equality has recently published the general scheme of a Bill to effect the necessary amendments to the Equal Status Act.<sup>78</sup> While this is a necessary development, it would also be prudent, as Walsh has suggested, to extend the coverage of this reform to matters falling within the scope of the Race Directive.<sup>79</sup> This development is yet another example of the extremely important influence of EU law in the evolution of Irish equality law.

### **(ii) Section 14, Equal Status Acts: Conduct Required by Law**

Section 14 is perhaps the most significant limitation on the reach of the Equal Status Acts, operating as a saver for what would otherwise be prohibited conduct under the Acts where such conduct is required by or under any enactment or order of court or by an obligation on the State under European Union or international law.

The case law during the reporting period highlights the far-reaching effect of this exemption from the protection against discrimination laid down elsewhere in the Equal Status Acts. While the exemption does not provide cover for measures

77 Case C-236/09 *Test Achats* [2011] ECR I-000.

78 See the General Scheme of the Equal Status (Amendment) Bill 2012, available online at <http://www.justice.ie/en/JELR/Pages/PB12000290> (last accessed 12 November 2012). The Department of Justice and Equality has also published an Information Note for consumers on the mandatory introduction of unisex insurance from 21st December 2012, which is available online at <http://www.justice.ie/en/JELR/Pages/PB12000296> (last accessed 12th November 2012).

79 See Walsh, *Equal Status Acts 2000–2011* (ICCL/Blackhall Publishing, 2012), 77 (taking the view that the race and Traveller community grounds should be removed from the scope of the provision).

taken on foot of administrative instruments,<sup>80</sup> such as departmental circulars, it applies to any other measures "required by or under" primary legislation,<sup>81</sup> statutory instruments,<sup>82</sup> or EU law.<sup>83</sup> For example, in *King v. Voluntary Health Insurance Board*,<sup>84</sup> the complainant alleged that it was discriminatory for the respondent to require him to pay for a benefit as part of his insurance, in this case a maternity related benefit, of which he could not possibly avail due to his gender. However, because the respondent was legally required to offer a minimum range of benefits, including maternity related benefit, to all subscribers under the Health Insurance Acts, 1994 to 2003 and Health Insurance Act, 1994 (Minimum Benefit) Regulations, 1996, the respondent was entitled to rely on section 14 to resist the complaint.

In relation to measures taken on foot of decisions of the Government, while the Circuit Court in *Pobal v. Hoey* has suggested that such matters would fall outside the scope of Acts,<sup>85</sup> the rationale and scope of that judgment are open to question, at least insofar as the statement of principle in the judgment might be considered as extending beyond the policy decisions of the Government taken as a collective body which are not ordinarily reviewable by any courts, tribunals or other bodies. However, unless the decision of the Government or one of its organs has been given expression through legislation or another form of enactment, it is difficult to see how such a decision could be excluded from the general prohibition of discrimination laid down in the Acts by virtue of section 14.

On occasion, the Tribunal has emphasised the limits of section 14. Obviously, it cannot provide cover for conduct required by the legislation of other jurisdictions.<sup>86</sup> More significantly, the Tribunal will not permit reliance on very general provisions of legislation to exempt conduct, which would otherwise constitute discrimination under the Acts, from their scope where those provisions do not impose a clear or specific requirement on the respondent to take the measures which it seeks to stand over.<sup>87</sup>

80 *A Complainant v. Health Service Executive*, DEC-S2009-011.

81 *A Complainant v. Department of Social and Family Affairs*, DEC-S2008-013;  
*A Complainant v. Department of Social Protection*, DEC-S2011-053.

82 *Gahan v. Valour Investments T/A Shell Mulhuddart*, DEC-S2009-021; *Dowd v. Gilvarry & HSE West*, DEC-S2011-060 and *Dowd v. Minister for Finance*, DEC-S2011-061.

83 *Kane v. Eirjet Ltd.*, DEC-S2008-026.

84 *King v. Voluntary Health Insurance Board*, DEC-S2008-116.

85 *Pobal v. Hoey* (Circuit Court (Judge Reynolds), unreported judgment, 14th April 2011).

86 *Sabherwal v. ICTS (UK) Ltd.*, DEC-S2008-037.

87 See e.g. *Ms A (on behalf of her son Mr B) v. A Community School*, DEC-S2009-008 (rejecting arguments that section 14 provided cover either for the school's code of behaviour or for the decision of the Appeals Committee of the Department of Education and Science, which was required to act in accordance with its obligations under the Education Act 1998) and *A Couple v. The Intercountry Adoption Services*, DEC-S2010-002 (criticising the attempt "to place an over-reliance on very general provisions" of the Child Care Act and the Adoption Act in order to circumvent the anti-discrimination provisions of the Acts).

Yet, even within these limits, section 14 constitutes a very significant restriction on the scope of application of the Equal Status Acts. Indeed, as Walsh has noted, insofar as EU law contains no analogous exemption for discrimination in the provision of goods and services on the grounds of gender, race and membership of the Traveller community, the compatibility of section 14 with EU law "remains in question".<sup>88</sup> More generally, in an area of ever-increasing legislation and regulation, section 14 serves to insulate whole areas of goods and services provision, particularly those within the public sector, from challenge on equality grounds. If primary and secondary legislation were subject to some form of equality proofing prior to their enactment, it might be easier to justify such a provision. In its absence, the legitimacy of section 14 is open to doubt.

### (iii) Section 34(4), Employment Equality Acts: Retirement Ages

Section 34(4) of the Employment Equality Acts provides that, without prejudice to subsection 3, it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees. As already noted, the issue of mandatory retirement ages featured prominently in the case law both of the Equality Tribunal and the High Court during the reporting period, as well as in the jurisprudence of the Court of Justice.<sup>89</sup> While some of the High Court decisions touched upon issues relating to the potential incompatibility of the Acts with EU law in this area, they did not decide those issues which thus await clarification in an appropriate case. In the meantime, and against this backdrop, the Equality Tribunal has had to interpret and apply section 34.<sup>90</sup> In addition to cases under section 34(4), the Tribunal has considered discrimination in relation to retirement ages in the important recent case of *Hospira*, also discussed above, in which the Tribunal concluded that the respondent was not entitled to rely on the related exception in section 34(3) of the Acts.<sup>91</sup>

In *Saunders v. CHC Ireland*,<sup>92</sup> the complainant was a winch operator with the respondent whose contract of employment provided for his retirement at the age of fifty-five. In response to the complainant's challenge to this retirement age under the Acts, the respondent invoked section 34(4) of the Acts. Faced with an argument that, in light of the judgment in the *Minister for Justice, Equality and Law Reform v. Director of the Equality Tribunal* case, it could

88 See Walsh, *Equal Status Acts 2000–2011* (ICGL/Blackhall Publishing, 2012), 55.

89 See e.g. Case C-45/09 *Rosenbladt* [2010] ECR nyr; Case C-250/09 and C-268/09 *Georgiev* [2010] ECR nyr; Case C-159/10 and C-160/10 *Fuchs* [2011] ECR nyr.

90 Section 34(4) was invoked but did not need to be considered by the Tribunal in the case of *Harrington v. South Dublin County Council*, DEC-E2010-077.

91 See also *Hogan & 23 Others v. Coillte Teo*, DEC-E2009-084; *McPhillips v. Monaghan County Council*, DEC-E2011-257 (considering and applying the exceptions laid down in sections 37(2) and 37(3) of the Acts).

92 *Saunders v. CHC Ireland*, DEC-E2011-142.



not use article 6 of Directive 2000/78 to effectively re-write section 34(4) of the Acts, the Tribunal instead drew on the judgment of McKechnie J. in the *Donnellan* case, concluding that it should interpret section 34(4) in light of article 6(1) of the Directive 2000/78 and that the respondent thus had to satisfy it that its approach was "objectively and reasonably justified by a legitimate aim ... and the means of achieving that aim are appropriate and necessary".

The evidence before the Tribunal was that the complainant's role involved the rescue of persons who found themselves in life-threatening emergency situations at sea or on dangerous terrain, a role which was physically demanding in nature and entailed a significant risk of injury. The Tribunal concluded that the respondent's aims in setting its retirement age at fifty-five, which were based on health and safety and operational capacity considerations, were justified and that the measure itself was appropriate and necessary for achieving this aim. Thus, the respondent was entitled to rely on the exemption in section 34(3), with the Tribunal noting for completeness that the respondent would also have been able to rely on the exemptions in sections 37(2) and 37(3) of the Acts in the circumstances of the case.

## D. Practice and Procedure

The Tribunal is an informal tribunal which, to a large extent, is the master of its own procedures. As the number of complaints referred to the Tribunal under the Acts has increased substantially, the Tribunal has come under increasing pressure to investigate and determine complaints within a reasonable period of time.<sup>93</sup> During the reporting period, the number of decisions handed down by the Tribunal under the Acts increased considerably, from 210 decisions in both 2008 and 2009 to 318 in 2010 and 335 in 2011. While there were more decisions under the Equal Status Acts than the Employment Equality Acts in 2008 and 2009, in 2010 and 2011 the number of decisions under the Employment Equality Acts was significantly higher than under the Equal Status Acts, reflecting the sharp increase in employment equality complaints on the race ground coming before the Tribunal. While the Tribunal has made considerable efforts to reduce delays and clear its substantial backlog of complaints in recent years, delay remains a problem in the investigation of complaints under the Acts. With this in mind, this section will focus on a number of important procedural tools available to parties and the Tribunal.

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<sup>93</sup> In *Kelly v. Director of the Equality Tribunal* [2008] IEHC 112, the High Court (Gilligan J.) rejected the plaintiff's claim, pursuant to section 3 of the European Convention on Human Rights Act 2003, that the delay by the Equality Tribunal in processing his complaint under the Equal Status Acts, which took a total of four years and six months, constituted a breach of his right to have that claim determined within a reasonable period of time under Article 6(1) of the European Convention on Human Rights.



**(i) Dismissal of Cases Not Pursued**

First, both Acts make provision for the dismissal of cases which are no longer being pursued. Section 38(1) of the Equal Status Acts provides that, where a case is referred to the Director of the Equality Tribunal and at any time after the expiry of one year from the date of the reference, it appears to the Director that “the complainant has not pursued, or has ceased to pursue, the reference”, the Director may dismiss the reference. Notice of such a decision must be given to the parties to the case. In a similar vein, section 102 of the Employment Equality Acts grants the Director of the Equality Tribunal and the Labour Court the power to strike out cases which are not being pursued while once again it requires that notice of such a decision be given to the parties to the case.<sup>94</sup> As these provisions make clear, the decision to dismiss or strike out cases on this basis is for the Tribunal or Labour Court alone and, from the case law during the reporting period, it is clear that respondents have only rarely requested the Tribunal to dismiss a complaint on this basis. For example, in the *Mongan* case, the Tribunal rejected an application to dismiss a complaint under section 38 of the Equal Status Acts because the time period stipulated in that provision had not been met.<sup>95</sup>

In the *Eagle Star* case, the High Court (Hedigan J.) considered an argument that section 38 imposed a positive obligation on the Tribunal to actively monitor the status of complaints referred to it and further that the Equality Tribunal was guilty of a manifest error of law in failing to exercise its power under section 38 of the Act to dismiss the complaint at issue in that case.<sup>96</sup> Hedigan J. observed that section 38 appeared “to create a procedure for the removal from the Tribunal’s lengthy list... claims which have become moribund, for whatever reason.”<sup>97</sup> It was a “house-keeping section” devised by the Oireachtas for the purposes of administrative efficiency within the Tribunal and did not impose a requirement on individual complainants “to continuously inquire as to the status of their complaint and thereby impose pressure on the Tribunal to accelerate the adjudicative process.”<sup>98</sup> While it might come into effect where a complainant “fell out of contact for extended periods or failed to furnish the Tribunal with important information at its request”, these considerations did not apply to the facts of the instant case in which the complainant had complied with all time limits imposed on her and had furnished the Tribunal with

94 Information on the number of cases dismissed on these grounds can be found in the Annual Reports of the Equality Tribunal: see e.g. *Annual Report 2009* (Equality Tribunal), 12 (referring to 88 cases in 2008 and 29 cases in 2009 as “not pursued” under the Equal Status Acts and to 19 cases in 2008 and 26 cases in 2009 as “not pursued” under the Employment Equality Acts), available online at <http://www.equalitytribunal.ie/Publications/Annual-Reports/> (last accessed 12th November 2012).

95 *Mongan v. Clare County Council*, DEC-S2008-039. See also *O’Reilly & Ors v. Auburn Lodge Hotel*, DEC-S2008-023.

96 *Eagle Star Assurance Co. of Ireland Ltd. v. Director of Equality Tribunal & Anor* [2009] IEHC 124, para. 18.

97 [2009] IEHC 124, para. 29.

98 [2009] IEHC 124, para. 29.

information required by it in a prompt and efficient manner.<sup>99</sup> As the Court went to note, the fundamental cause of the delay in the case was “the backlog of cases for hearing by the Tribunal” as well as the administrative impediments to securing the appointment of a temporary equality officer to hear the complaint which had been referred to the Tribunal by one of its Equality Officers in her personal capacity.<sup>100</sup>

### (ii) Dismissal of Unfounded Claims

Second, both legislative regimes also make provision for dismissal of claims at any stage if the Director of the Equality Tribunal is of opinion that the claim “has been made in bad faith or is frivolous, vexatious or misconceived or relates to a trivial matter”.<sup>101</sup> As the case law makes clear, this sets a very high threshold for dismissal of unfounded complaints under the Acts.

Insofar as section 22 of the Equal Status Acts is concerned, the most detailed consideration of this provision is to be found in the case of *Mongan v. Clare County Council*,<sup>102</sup> one of a flood of cases in which a lay representative sought to advance the cause of a large number of complainant members of the Traveller community in relation to the respondent's housing duties. After considering the various elements of section 22 – bad faith, frivolous, vexatious, or misconceived, a trivial matter – by reference to the case law of the Irish superior courts, the Tribunal concluded that the complaints could not be dismissed on the basis of that provision and accordingly that the complaints were valid and admissible. Similarly, in *Egan v. Young Fine Gael*,<sup>103</sup> the Tribunal rejected the respondent's argument that the complaint – a challenge by a man in his fifties to the membership rules of Young Fine Gael on the age ground – was misconceived because, it said, the complaint was directly related to the complainant's age and the respondent's refusal to accept him as a member on this ground. The Tribunal also observed that the refusal of membership of a political party could not be regarded as a trivial matter, although it is not clear from the decision if the respondent had specifically advanced this point.

However, the case law during the reporting period shows that there are cases in which the Tribunal will consider it appropriate to make an order of dismissal under section 22. For example, in *Neary v. Louth County Council*,<sup>104</sup> the complainant was a volunteer coxswain in the Civil Defence who challenged the respondent's requirement that he would have to undergo a medical upon reaching the age

99 [2009] IEHC 124, para. 30.

100 [2009] IEHC 124, para. 31.

101 Section 77A(1), Employment Equality Acts and section 22(1), Equal Status Acts.

102 *Mongan v. Clare County Council*, DEC-S2008-039. See also *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180, discussed at Chapter 5.B of this report.

103 *Egan v. Young Fine Gael*, DEC-S2011-001.

104 *Neary v. Louth County Council*, DEC-S2011-020.

of 65 in order to continue in his role. Accepting the respondent's argument that the concept of employment under the Employment Equality Acts encompassed the voluntary work undertaken by the complainant, the Tribunal concluded that the complaint should have been made under those Acts and not the Equal Status Acts and therefore, drawing on a definition of a "misconceived" claim as being one "incorrectly based in law", the Tribunal considered that the complainant's case was just that and dismissed it under section 22.<sup>105</sup>

Insofar as section 77A(1) of the Employment Equality Acts is concerned, the Tribunal has found complaints, or elements thereof, appropriate for dismissal under this provision. For example, in *Kalinin*, after the complainant acknowledged that he was not contending that he had suffered any adverse treatment as a reaction to his complaint of discrimination, the Tribunal dismissed his claim of victimisation as misconceived.<sup>106</sup> In *Canniffe*, the complaint was dismissed on the ground that it was misconceived in circumstances where the complaint of discrimination related to discrimination in the conditions of employment at a time when the complainant's employment had in fact ceased.<sup>107</sup> Finally, in *Giblin*, where the complainant had been out of employment for over three years before he made a complaint which lacked any sound evidentiary basis, the Tribunal found the complaint to be frivolous and vexatious and dismissed it under section 22.<sup>108</sup>

### (iii) Impeding or Obstructing Investigations

Third, section 37A(1) of the Equal Status Acts and section 99A(1) of the Employment Equality Acts confer jurisdiction on the Director of the Equality Tribunal, "if of opinion that a person is obstructing or impeding an investigation", to make an award against that person in respect of the travelling or other expenses incurred by another person in connection with the investigation.

In *Mongan* and a number of related cases, the Tribunal made orders under section 37A of the Equal Status Acts requiring the complainants' representative to pay the sum of €200 to the respondent for obstructing and impeding the investigation of the complaint.<sup>109</sup> The complainants' representative had, despite numerous warnings, failed to cooperate with the Tribunal over a lengthy period of time – for example, by continuously objecting to procedural decisions it had made and by failing to provide contact details of complainants who had failed to attend – with the effect of wasting a considerable amount of time and incurring costs for the respondent and the taxpayer.

105 See also *O'Neill v. Garda Síochána Ombudsman Commission*, DEC-S2010-037.

106 *Kalinin v. TMF Management (Ireland) Limited*, DEC-E2011-243.

107 *Canniffe v. University College Dublin*, DEC-E2011-210.

108 *Giblin v. Bank of Ireland Asset Management Ltd.*, DEC-E/2011/161.

109 See the main decision in *Mongan v. Clare County Council*, DEC-S2008-039.

In *Byrne*, the Tribunal made a similar order, on foot of an application by the respondent, in circumstances where the complainant had failed to attend the hearing without any explanation.<sup>110</sup> Noting the time and expense wasted in the aborted hearing, in the particular circumstances of the case, the Tribunal described the non-attendance of the complainant as “a wilful abuse of the opportunity provided to him to present his case”. Although it could not make an award of respect of the expenses of the respondents’ representatives, the Tribunal was able to make an award in respect of the travelling expenses submitted by one of their witnesses. Similarly, in *Olamimeji v. Fingal County Council*,<sup>111</sup> the complainants failed to attend the hearing of their complaints despite having been granted an adjournment on medical grounds at very short notice prior to an earlier listing of the case. Noting that it could not make any orders for costs or for the expenses of the respondent’s representatives, the Tribunal stated that it could make an award in relation to the vouched travelling expenses of the respondent’s witnesses and in relation to other expenses such as time spent collating materials, photocopying meals, telephone calls and the salaries in respect of the time witnesses spent at hearing. However, taking account of the apparently limited means of the complainants, it considered an award of €150 appropriate in the circumstances.<sup>112</sup>

## E. Conclusion

This chapter has sought to focus attention on certain noteworthy developments in the Tribunal’s case law during 2008 and 2011 in order to give a more complete picture of the Tribunal’s work. In many areas, such as those relating to disability and reasonable accommodation, the Tribunal has built upon its existing case law. In other areas, it has had to confront novel issues – such as transsexualism and surrogacy, to take two prominent examples – for the first time with and without assistance from the jurisprudence of the Irish or European courts. As the Tribunal’s case law has developed, it has inevitably become more nuanced and complex. While this is largely a positive development, it does, however, present the potential danger that the case law will become less accessible for parties appearing before the Tribunal, including those without legal representation or indeed any representation at all. At a time when the replacement of the Tribunal by the proposed Workplace Relations Commission is imminent, it must be emphasised that the case law of the Equality Tribunal – from its establishment to date, including during the period of 2008–2011 – will continue to play an important role in Irish equality law long after the Tribunal itself ceases to exist in its current form.

110 *Byrne v. Ms. A & National University of Ireland, Galway*, DEC-S2009-077.

111 *Olamimeji v. Fingal County Council*, DEC-S2010-008.

112 See also *An Applicant v. An Potential Employer*, DEC-E2010-049 (the Tribunal considering it appropriate to make such an order but deciding against doing so because the respondent had declined to make a request for such an order); *Gorniakov v. Economy Property Management*, DEC-E2011-110 (awarding the respondent the costs incurred in collating the various documents required for its defence of the complaint).



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## Chapter 5

# Equality Legislation before the Irish Courts

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## A. Introduction

If the number of cases coming before the Irish courts under the Employment Equality Acts and the Equal Status Acts remains modest, the period of 2008–2011 has nonetheless witnessed a larger number of decisions by the Irish courts under the Acts than in any comparable period since their enactment. These cases fall into two principal categories: appeals from the Equality Tribunal and the Labour Court and applications for judicial review of the decisions of the Equality Tribunal. Although the District Court also exercises jurisdiction under the Equal Status Acts in relation to registered clubs and licensed premises, no written judgments of that Court were available for the purposes of this report and, accordingly, it has not been possible to analyse its decisions during the reporting period.<sup>1</sup> As well as the appeals and applications for judicial review, there have been a number of other important cases considering the Acts during the reporting period, including the high profile case of *Equality Authority v. Portmarnock Golf Club*.<sup>2</sup> The Supreme Court decision in that case highlights the difficulties of interpretation inherent in novel and complex legislation of the kind embodied in the Employment Equality Acts and the Equal Status Acts. While the courts are not specialised in equality matters in the same way as the Equality Tribunal and, to a lesser extent, the Labour Court, their jurisprudence nonetheless provides authoritative guidance for those bodies, and indeed for others including the Equality Authority, complainants, respondents and their representatives, on the proper interpretation and application of Irish equality legislation. This chapter will look first at the decisions of the Irish courts on appeals from the Equality Tribunal before considering the courts' decisions in the context of applications for judicial review and finally the remaining cases which have come before the courts but which fall outside these categories.

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1 See, however, the notes of the District Court decisions referred to in the Equality Authority's Case-work Activity Reports, discussed at Chapter 2.C of this report.

2 *Equality Authority v. Portmarnock Golf Club* [2010] 1 IR 671.



## B. Appeals from the Equality Tribunal

While the Acts both provide for appeals from decisions of the Equality Tribunal, the appeals process is different in each case. Section 83(1) of the Employment Equality Acts allows for an appeal by either party to the Labour Court not later than 42 days from the date of the decision of the Tribunal under the Acts. Section 90(1) then provides for an appeal to the High Court “on a point of law” from a determination of the Labour Court. Section 28(1) of the Equal Status Acts allows for an appeal by either party to the Circuit Court not later than 42 days from the date of the decision of the Tribunal under the Acts. Section 28(3) provides that no further appeal lies, “other than an appeal to the High Court on a point of law”.

On the basis of the publicly available information, the number of appeals from the decisions of the Equality Tribunal is extremely low.<sup>3</sup> Insofar as the Equal Status Acts are concerned, there have been a handful of judgments on appeals from the Equality Tribunal to the Circuit Court under section 28(1) of the Acts<sup>4</sup> and even fewer appeals on a point of law to the High Court.<sup>5</sup> Insofar as the Employment Equality Acts are concerned, while there have been

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3 In addition to the judgments which are available on the website of the Courts Service and through databases such as Justis and Westlaw IE, the Report has drawn on other resources including, in particular, the Annual Reports on the Case Work Activity of the Equality Authority for 2008–2011.

4 The following judgments on appeal have been identified in the research undertaken for this Report: in 2008, *Dublin City Council v. Deans* (Circuit Court (Judge Hunt), unreported judgment, 15th April 2008); for 2010, *HSE v. Quigley* (Circuit Court (Judge Linnane), unreported judgment, 26th April 2010); for 2011, *Pobal v. Hoey* (Circuit Court (Judge Reynolds), unreported judgment, 14th April 2011); *Christian Bros. High School Clonmel v. Stokes* [2011] IECC 1; *O’Brien v. Kerry County Council* (Circuit Court (Judge O’Sullivan), unreported judgment), noted in Equality Authority Report, 2011 and ‘Equality Tribunal ruling overturned’, *Irish Times*, 6th July 2011. There was also an appeal under section 22(2) in *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* which came before Judge Teehan on 14th April 2010 although there does not appear to have been a written judgment. The judgments in *Ramos*, *Quigley* and *O’Brien* were not available for the purpose of preparing this report. Since the end of the reporting period, there has also been a judgment on appeal in *R.G. v. D.S.P.* (Circuit Court (Judge Lindsay), unreported judgment, 5th July 2012).

5 Just two appeals have been identified: in 2010, under section 28(3), *Cahill v. Minister for Education and Science* [2010] IEHC 227; and in 2011, under section 22(4), *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180. Since the end of the reporting period, judgment was delivered in *Stokes v. Christian Bros. High School Clonmel* (High Court (McCarthy J.), unreported judgment, 3rd February 2012).



numerous appeals from the Equality Tribunal to the Labour Court during the reporting period,<sup>6</sup> there were just two appeals from the Labour Court to the High Court<sup>7</sup> and a single appeal from the Circuit Court to the High Court.<sup>8</sup>

The most obvious explanation for this very low level of appeals is that, unlike the Equality Tribunal and the Labour Courts, the ordinary courts have the power to award costs against an unsuccessful appellant. As the low number of appeals suggests, this is a serious deterrent for individual appellants and it is a notable feature of many of the appeals brought during the reporting period that the appellants have been represented or supported by the Equality Authority.<sup>9</sup>

### (i) Appeals under the Employment Equality Acts

In the context of a number of appeals to the High Court under the Employment Equality Acts, the High Court has clarified the Court's role on an appeal on a point of law. In *Calor Teo. v. McCarthy*,<sup>10</sup> Clarke J. referred to the decisions of the Supreme Court in *Henry Denny*<sup>11</sup> and *Ahern*.<sup>12</sup> While noting that the Court should not interfere with a legitimate and sustainable judgment of the facts by the lower court which was based on a proper consideration of all relevant materials, and that it should pay particular deference to the lower court's judgment on matters within its own special expertise, in relation to questions of law such as whether there was discrimination, the High Court could "scrutinise the extent to which the Labour Court considered all necessary matters and excluded from its consideration any matters that were not appropriate."<sup>13</sup> After a detailed examination of the factual position and the Labour Court determination in that case, Clarke J. concluded that the Labour Court had more than sufficient evidence before it to enable it to come to the view that the employee, Mr. McCarthy, had agreed to a retirement age of sixty-five with the appellant and that this retirement age had not been varied at any later stage. The Court also rejected the appellant's argument that the Labour Court had breached fair procedures in failing to re-convene the hearing for further evidence after Mr. McCarthy had

6 In 2008, there were 23 appeals from the Equality Tribunal to the Labour Court; in 2009, 23 appeals; in 2010, 26 appeals; and in 2011, 32 appeals.

7 *Calor Teo v. McCarthy* [2009] IEHC 139; *King v. Minister for Finance* [2010] IEHC 307.

8 *Whooley v. Millipore Ireland BV* [2010] IEHC 314. This case was taken under section 77(3) of the Employment Equality Acts. Note also the appeal under former section 77(2) of the Acts from the Labour Court to the Circuit Court in *Ramos v. Promowear/Caramba Ltd.* (Circuit Court (Judge Linnane), unreported judgment, 6th November 2008).

9 This is so in the cases of, for example, *Deans, Cahill, O'Brien* and *R.G.*

10 *Calor Teoranta v. McCarthy* [2009] IEHC 139.

11 *Henry Denny and Sons Ireland Ltd. v. Minister for Social Welfare* [1988] 1 IR 34.

12 *National University of Ireland Cork v. Ahern & Others* [2005] 2 ILRM 437.

13 [2009] IEHC 139, para. 3.6.

testified about assurances given to him by representatives of the employer in relation to his retirement age, which evidence, the appellant claimed, had taken it by surprise. While acknowledging that there may be cases “” where the principles of constitutional justice would require that there be an adjournment of proceedings or a facility given to a party taken by surprise to have an opportunity to present further evidence”, in the circumstances of this case – where the appellant had been on notice of Mr. McCarthy’s claim, at least in general terms, and where it had not raised the issue at the hearing of the case itself – the High Court considered that the Labour Court had a discretion to allow or not to allow a re-opening of evidence. On this basis, Clarke J. concluded that its failure to do so was not an error of law which would justify allowing the appeal.<sup>14</sup>

In *King v. Minister for Finance*,<sup>15</sup> an equal pay claim, the High Court (O’Keeffe J.) also referred to the High Court’s more limited role in an appeal on a point of law, relying on the earlier decision of Clarke J. in *Ashford Castle v. SIPTU*.<sup>16</sup> O’Keeffe J. rejected the appellant’s argument that there had been an error of law in the manner in which the Labour Court, in its determination, had presented its gender analysis in circumstances where there was no challenge to the figures underlying the analysis. After considering the evidence and taking account of the “specialised expertise” of the Labour Court, the Court concluded that it was “open to the court to express its conclusions in the manner it did on the basis of the statistics as stated by it” and that the Labour Court was also entitled to come to the conclusion, on the basis of those statistics, that the claimant had established a *prima facie* case of discrimination.<sup>17</sup>

These cases point to an important distinction between the appellate processes under the Employment Equality Acts and the Equal Status Acts. Whereas under the former, the first avenue of appeal is to another relatively specialised tribunal, the Labour Court, under the Equal Status Acts, the first avenue of appeal is to the Circuit Court. Thus, if the matter is the subject of a further appeal on a point of law, in cases under the Employment Equality Acts, the High Court may pay more deference to the decision under appeal than would be the case under the Equal Status Acts insofar as the matters at issue fall within the specialist expertise of the Labour Court. While in practice the level of scrutiny undertaken by the High Court of the lower court’s decision may vary considerably from case to case, regardless of the Acts under which the case is taken, it is nonetheless significant that there are two relatively specialist layers of decision-making in place for

14 [2009] IEHC 139, para. 7.9.

15 *King v. Minister for Finance* [2010] IEHC 307.

16 *Ashford Castle v. SIPTU* [2006] ELR 201.

17 [2010] IEHC 307, paras. 43-45.

employment cases as opposed to one for equal status cases.<sup>18</sup> As appears from some of the decisions under the Equal Status Acts which will now be examined, this difference in appellate procedure may not be without consequence.

### **(ii) Appeals under the Equal Status Acts**

The appeals under the Equal Status Acts during the reporting period have engaged with substantive issues of discrimination law to a far greater extent than those under the Employment Equality Acts but, unfortunately, they have done so with, at best, mixed results.

The judgment of the Circuit Court in *Dublin City Council v. Deans*<sup>19</sup> is perhaps the best example of a decision during the reporting period which has provided useful guidance on the interpretation of the Equal Status Acts and which, as a result, has been influential in the decisions of the Equality Tribunal.<sup>20</sup> In *Deans*, Judge Hunt upheld the Tribunal's finding that the Council had failed to provide reasonable accommodation to Ms. Deans, who suffered from a number of phobic disorders including agoraphobia, and who for this reason needed more spacious accommodation than that which was offered to her in accordance with the Council's scheme of priority for housing applicants. At the centre of the case was section 6(6) of the Equal Status Acts which provides that nothing in the Acts shall be construed as prohibiting housing authorities "from providing in relation to housing accommodation, different treatment to persons based on family size, family status, civil status, disability, age or membership of the Traveller community". In the course of a detailed judgment, Judge Hunt adopted the following approach to interpretation of the Equal Status Acts:

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18 While the process for dealing with cases under the Equal Status Acts under the Workplace Relations Service is not yet clear, it may well be that a common appellate structure will be established for complaints brought under both Acts: see the Submission to the Oireachtas Committee on Jobs, Enterprise and Innovation, *Legislating for a World-Class Workplace Relations Service July 2012* (Department of Jobs, Enterprise and Innovation, 2012), available online on the Workplace Relations website, [www.workplacereactions.ie](http://www.workplacereactions.ie) (last accessed 7 November 2012).

19 *Dublin City Council v. Deans* (Circuit Court (Judge Hunt), unreported judgment, 15th April 2008, transcript on file with the author).

20 By way of example, the Tribunal has followed or been influenced by the decision in the following cases: *Mr. X v. A Town Council*, DEC-S2008-042; *Boland v. Killarney Town Council*, DEC-S2008-069; *Maughan & Daughter v. Clare County Council*, DEC-S2009-037; *Compagno v. Kinsale Town Council*, DEC-S2009-052; *Cleary v. Waterford City Council*, DEC-S2010-003; *Mr & Mrs x (on behalf of their son Mr y) v. A Post Primary School*, DEC-S2010-024; *Dr X v. A University*, DEC-S2011-005.

I adopt the starting point for the construction of this statute, which is a statute intended to confer rights on the citizens, that I should adopt the construction and proceed on the basis of an interpretation which is consistent with the broadest possible application of the statutory rights to the citizen, or indeed to give effect to a European directive, if necessary.<sup>21</sup>

Responding to the Council's argument that section 6(6) of the Acts provided housing authorities with an exemption from the Acts, the Court continued:

I cannot construe subsection 6 of that section as exempting a housing authority in its entirety from all application of the equality legislation. It appears to me simply to provide that a housing authority is entitled to base its priorities and its housing plan on different treatment to persons based on family size, family status and the other considerations set out in the subsection. It does not expressly say that there is no further room for the application of section 4 of the Act in relation to the provision of a reasonable accommodation in relation to the needs of a disabled person who is an applicant for housing facilities from a Local Authority.<sup>22</sup>

The Court further noted that section 4 of the Acts – which states that a failure to provide reasonable accommodation can constitute discrimination on the disability ground – did not provide “any specific exemption in relation to housing authorities” and concluded that section 6(6) was “enabling rather than prohibitory”.<sup>23</sup> On the substantive issue of reasonable accommodation, the Court noted that “reasonableness must be judged according to the context of the individual case”:

The housing authority is not obliged to submit to every wish expressed by a disabled person in the context of an application for facilities. It undoubtedly enjoys a very substantial and generous measure of appreciation in dealing with individual applications for reasonable accommodation. All that it is commanded to do by the equality legislation is to devise a “reasonable” solution to a problem, not to achieve perfection and not to give in to every demand that it ...<sup>24</sup>

On the facts before it, the Court found that, while the Council appeared to be perfectly willing and able to meet its obligations, “the highly unusual and particular disability suffered by Ms. Deans did not fit comfortably into the general scheme adopted by the City Council in relation to such matters...”<sup>25</sup> Noting that there was a procedural as well as a substantive aspect to reasonableness in this context, Judge Hunt concluded that there had not been a proper degree of

21 Transcript, p. 28.

22 Transcript, p. 29.

23 Transcript, p.30.

24 Transcript, p.34.

25 Transcript, p.35.

consultation or evaluation of the material submitted on behalf of Ms. Deans in this particular case which by its nature required the Council to go further than a simple desk-based review of her needs.<sup>26</sup> While it upheld the basic finding of the Tribunal and its award of compensation, the Circuit Court considered that it should make an order solely in respect of the particular case before it rather than any broader order imposing a general obligation on the Council.<sup>27</sup>

In *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs*,<sup>28</sup> the High Court affirmed the decision of the Circuit Court, itself affirming the Tribunal, to dismiss the complainant's case under section 22 of the Equal Status Acts. The complainant argued that he was being discriminated against on the ground of race, as a member of the farming community. Noting that there was no statutory definition of the term "ethnic origins," Hogan J. referred to the definition crafted by Lord Fraser in *Mandla v. Dowell Lee*<sup>29</sup> before concluding that it was "self evident that members of the farming community are not an ethnic group in that sense"; insofar as farmers had their own proud traditions and history, this was no more than could be said for other occupational groups and they did not share "immutable or quasi-immutable characteristic that it is one of the triggering factors" for discrimination on the ground of race or ethnicity.<sup>30</sup> The Court also refused to refer a question to the Court of Justice of the European Union under Article 267 TFEU on the basis that the issue was "so plainly *acte clair* that it obviously falls within the CILFIT exception."<sup>31</sup>

However, in many of the recent appeals under the Equal Status Acts, the courts have shown little deference to the analysis of the Equality Tribunal. For example, the case of *Cahill v. Minister for Education and Science* raised the question of whether the practice of annotations on the Leaving Certificate – to reflect that the candidate had not been assessed in respect of certain elements of a Leaving Certificate examination – discriminated against persons with disabilities contrary to the Equal Status Acts.<sup>32</sup> The Equality Tribunal initially upheld the complaint. However, the Circuit Court set aside that decision on appeal and this decision was in turn affirmed by the High Court. The High Court decision illustrates the challenges which can face the ordinary courts in grappling with the relatively unfamiliar and often complex framework of equality law. The Court

26 Transcript, pp. 36-37. *Deans* highlights in a vivid way the important role that oral evidence can play in discrimination claims, with the Court candidly acknowledging that it had been initially sceptical, believing that the claim was a "ruse to get around a housing allocation made in good faith" but, having heard Ms. Deans, the Court accepted her evidence as totally genuine.

27 Transcript, pp.38-39.

28 *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180.

29 *Mandla v. Dowell Lee* [1983] AC 548.

30 [2011] IEHC 180, para. 13.

31 [2011] IEHC 180, para. 19.

32 *Cahill v. Minister for Education & Science* [2010] IEHC 227.

stated that the issue before it was whether the annotation system amounted to “unfavourable treatment” of those students who seek and obtain exemptions from certain elements of the examination on the ground of disability or whether it amounted to a failure to provide reasonable accommodation.<sup>33</sup> Unfortunately, the Court largely bypassed any detailed or step-by-step analysis of the tests for discrimination and reasonable accommodation under the Acts. It noted that the exemption in question brought with it the fact of annotation and that any other scenario would be unacceptable, unprecedented internationally, and could affect the integrity of the Leaving Certificate examination. It concluded that the accommodation granted in this case was “in all the circumstances, a reasonable accommodation” and it followed that “an annotation to reflect that accommodation was also reasonable.”<sup>34</sup> The Court continued:

The nature of an accommodation in any given case is important in terms of whether or not annotation will be required in the resulting certificate. Some accommodations will require annotations and others will not. That is not discriminatory, that is a matter of common sense and a reasonable approach to take to the issue of accommodations generally.<sup>35</sup>

Laying emphasis on the Department’s compliance with international best practice in this area, the Court also commented more generally that the case law relied upon by the appellant, which related to the constitutional equality clause, did not suggest “that equality rights must be absolutely guaranteed without limitation in the name of reasonableness even in cases where the requirements of reason and common sense require the taking of some action which may not be to complete satisfaction of the person asserting them, in this matter the plaintiff.”<sup>36</sup> While many of the arguments relied upon by the Court are sensible and one might sympathise with the conclusion reached, the failure of the Court to articulate clearly the framework of analysis – in particular, to clarify whether a particular argument went to the existence of discrimination or to its justification or to the issue of reasonable accommodation or to set this analysis within the context of the test of burden of proof under the Acts – is disappointing and does little to assist future courts or tribunals in grappling with similar issues arising under the legislation.

Similar concerns emerge from an analysis of the path of the Stokes case through the system. In this case, a member of the Traveller community, John Stokes, represented by his mother and assisted by the Equality Authority, challenged the admissions policy of the Christian Brothers High School Clonmel (‘the school’). The school’s admissions policy had a number of stages: places were automatically given to a small number of applicants with exceptional needs and to applicants with a brother or brothers already in the school; then, places were

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33 The Court appears to use the concepts of “unfavourable treatment” and “less favourable treatment” interchangeably in its judgment.

34 [2010] IEHC 227, 19.

35 [2010] IEHC 227, 20.

36 [2010] IEHC 227, 21.



granted to applicants whose fathers were past pupils of the school; finally, the remaining places were filled by way of a lottery. Not having gained admission through the lottery, John Stokes' mother unsuccessfully appealed the school's decision to the Department of Education and then referred a complaint to the Equality Tribunal. The Equality Tribunal concluded that the parental rule – whereby applicants whose fathers were past pupils of the school were given a certain priority in admission to the school – put members of the Traveller community at a particular disadvantage compared to non-Travellers because of the traditionally low level of Travellers in second level education.<sup>37</sup> It further concluded that this rule was not objectively justified. While the Tribunal accepted that the objective of strengthening bonds between parents and the school was a legitimate aim, it concluded that the blanket nature of the rule was not appropriate and necessary. Therefore, it held, the school had indirectly discriminated against John Stokes and ordered the school to offer him a place immediately and to review its admissions policy to ensure that it did not indirectly discriminate against members of the Travelling Community or any other protected categories, albeit without prejudice to its status as a Roman Catholic school for boys only.

On appeal by the school to the Circuit Court, Judge Teehan declared that it could be “stated unequivocally that the “parental rule” ... [was] discriminatory against Travellers” who were “particularly disadvantaged by such rule.”<sup>38</sup> Like the Tribunal, Judge Teehan accepted the school's aim in laying down the rule was legitimate. However, in contrast to the Tribunal, the Court found, “not without hesitation”, that the rule was both appropriate and a “necessary step in creating an admissions policy which is proportionate and balanced.”<sup>39</sup> The Court therefore allowed the appeal.

This decision was in turn appealed to the High Court which took yet another approach to the case.<sup>40</sup> The Court (McCarthy J.) acknowledged that there was no dispute that “for generations Travellers have not participated to any real degree in second level education” and that this was “especially so where male Travellers are concerned”. McCarthy J. observed that it was against “that background of grave educational deprivation” that John Stokes' father had not enjoyed secondary education.<sup>41</sup> The Court then noted that John Stokes had to show that he was at a “particular disadvantage” in order to succeed in his claim of indirect discrimination. In analysing this concept, the Court had recourse to the dictionary definition of ‘particular’. Curiously, in the context of an appeal on a point of law only, the Court declared without nuance or qualification that

37 *Stokes v. Christian Brothers High School, Clonmel*, DEC-S2010-056.

38 *Christian Brothers High School Clonmel v. Stokes* [2011] IECC 1, para. 15.

39 [2011] IECC 1, para. 19.

40 *Stokes v. Christian Bros. High School Clonmel* (McCarthy J., unreported judgment, 3rd February 2012). This judgment is outside the formal reporting period but has been included in the analysis for the purposes of comprehensiveness and coherency.

41 *Ibid.*, para. 22.

whether or not an admissions policy was discriminatory was a “question of fact in each case.”<sup>42</sup> It concluded that the disadvantage suffered by Travellers in the context of the parental rule was “not peculiar or restricted to Travellers”, did not “distinguish them among others of the kind (i.e. applicants for admission)” and could not be said to be “more than ordinary”, “worth notice”, “marked”, and “special” because, of course, there are others in the same position as they are”:

... everyone who is not the son of a past pupil is at a disadvantage by virtue of this rule. There is no distinction between the extent of the disadvantage suffered by Travellers and others.<sup>43</sup>

Thus, because the Court found that there was no “particular disadvantage” and thus that no *prima facie* case of indirect discrimination had been established, it did not need to go on to consider the issue of objective justification and refused the appeal.

The High Court decision in *Stokes* is disappointing for a number of reasons. Although an appeal under section 28(3) is confined to points of law only, the judgment is unclear at times on the proper role of the High Court in such an appeal and the proper characterisation of the issues before it, including the central issue of discrimination.<sup>44</sup> However, what is of more concern is the Court’s analysis of the issue of indirect discrimination. The Court appeared to consider the concept of “particular disadvantage” in a manner which is divorced not only from the rest of section 3(1)(c) of the Acts but also from the significant body of case law and commentary which has developed in relation to the concept of indirect discrimination at both the national, European Union and international level. As Walsh has commented, the Court did not draw on “principles established in Irish, EU or ECHR case law in formulating this test” and the upshot of the decision is to generate “uncertainty about the indirect discrimination prohibition under the ESA.”<sup>45</sup> Because it was working from a dictionary definition of one part of that concept, the Court adopted an unduly narrow and literalist interpretation of indirect discrimination which undermines the purpose of the prohibition on indirect discrimination under the Acts. As a result of its approach, the Court did not even get to the question of objective justification which – as the Tribunal and Circuit Court decisions illustrate so well – is arguably the issue at the heart of the case. In conclusion, the High Court decision in *Stokes* is disappointing not simply in terms of its outcome but more fundamentally in terms of the mode of reasoning and analysis which it

42 *Ibid.*, para. 25.

43 *Ibid.*, para. 26.

44 See e.g. the comments at paras.2, 18 and 25.

45 Walsh, *Equal Status Acts 2000–2011* (ICCL/Blackhall Publishing, 2012), 175.

employs. While it is understood that a notice of appeal has been lodged against this decision, it is not clear how the Supreme Court could entertain such an appeal in view of the bar on any further appeals in section 28(3) of the Acts.<sup>46</sup>

Although the reasoning of the decisions in *Cahill* and *Stokes* invite criticism, other decisions have been even more stark in their reasoning. In *Pobal v. Hoey*, the Circuit Court allowed an appeal from the Equality Tribunal which had found that the Taxi Payments Hardship Scheme – an *ex gratia* scheme established on foot of a Government decision and administered by the appellant – had discriminated against Mr. Hoey on the grounds of age when it deemed him ineligible to receive a payment under the Scheme. Judge Reynolds considered that, in refusing the claim, the appellant had been doing no more than administering the scheme in accordance with the criteria established by the Executive; “to do otherwise would have been *ultra vires* its powers and unlawful.”<sup>47</sup> The Court also took the view that the Tribunal had no jurisdiction to entertain the complaint because to do so was “in effect, to purport to review a decision of the Government, which... falls outside the scope of the powers conferred on it by the 2000 Act.”<sup>48</sup> The Court did not further elaborate on the reasons for this decision and, in particular, made no reference to the detailed terms of the relevant provisions of the Equal Status Acts such as sections 5 or 14 even though this conclusion clearly has significant implications for challenges to other Government measures under the Equal Status Acts.

More recently, in *R.G. v. D.S.P.*, the Circuit Court (Judge Lindsay) heard an appeal from a decision of the Equality Tribunal rejecting a complaint that the failure to provide leave analogous to maternity and adoptive leave to the mother of a child born through an international surrogacy arrangement constituted discrimination on the gender, disability and/or family status grounds.<sup>49</sup> In this case, the complainant, who suffered from a disability preventing her from supporting pregnancy, was the genetic mother of a child carried by a surrogate mother in accordance with an agreement made under the law of Massachusetts and she and her husband were registered as the legal parents of their child under US law. Although it had recognised that the facts of the case presented a “compelling complaint”, the Equality Tribunal had rejected the complaint on the basis that the service sought by the complainant did not exist.<sup>50</sup> The Tribunal also appeared

46 See the comments of Hogan J. in *Fitzgerald v. Minister for Community, Equality and Gaeltacht Affairs* [2010] IEHC 180, para. 5, in relation to the analogous provision in section 22(4) of the Acts: “Section 22(4) plainly excepts the jurisdiction of the Supreme Court for the purposes of Article 34.4.3 of the Constitution, so that no appeal to that Court lies against my decision.”

47 *Pobal v. Hoey* (Circuit Court (Judge Reynolds), unreported judgment, 14th April 2011), Transcript (on file with the author), p. 5.

48 Transcript, p. 5.

49 *R.G. v. D.S.P.* (Circuit Court (Judge Lindsay), unreported judgment, 5th July 2012).

50 *A Complainant v. Department of Social Protection*, DEC-S2011-053A.

to rely on section 14(1) of the Acts, holding that, because the conditions for maternity and adoptive leave and benefit were prescribed by the Social Welfare Consolidation Act 2005 and the complainant did not satisfy those conditions, the Minister had had no option but to reject the complainant's application and the affording of special treatment to the complainant, which was not provided by the Act of 2005, would have been *ultra vires*. On appeal, Judge Lindsay, after considering the long title to the Acts, recognised that the Acts are there "to promote equality and prohibit discrimination."<sup>51</sup> The Court continued:

However, there is no legislative provision for surrogacy in Ireland. The Appellant's situation was not envisaged when the Equal Status Act became law. [The Acts] are quite specific: it covers situations where there is discrimination of those within the scope of [the Acts] and not outside it. Although there may be discrimination in the ordinary sense of the word and the Minister's decision may seem unfair and unjust, he is confined by the terms of the Act and any benefit given to the Appellant would be *ultra vires*. He does have a discretion to make a special provision and many interesting cases were opened to me but to exercise this discretion would be beyond the defined scope of the Act.

On this basis, Judge Lindsay concluded that the appellant had not been treated less favourably, that any special treatment would be *ultra vires* and therefore affirmed the decision of the Equality Tribunal to reject the complaint. There is no doubt that cases of this kind – where there is a legislative void with no clear guidance governing the legal position of persons involved in surrogacy arrangements<sup>52</sup> – are extremely challenging for judges and other decision-makers such as the Tribunal. Nevertheless, as in the *Cahill* and *Stokes* cases, the difficulty with the Circuit Court decision lies in the lack of clarity in its reasoning as much as in its conclusion. On the one hand, the judgment appears to suggest that, because the appellant's situation was not envisaged when the Acts came into force, this somehow affected the appellant's entitlement or ability to rely on the Equal Status Acts. On the other hand, the Court appears to consider the matter in terms of the scope of the Social Welfare Consolidation Act 2005 and perhaps, though it is nowhere expressed in the decision, seeks to base its decision on section 14.

51 R.G. v. D.S.P. (Circuit Court (Judge Lindsay), unreported judgment, 5th July 2012).

52 See, however, the limited guidance to be found in the recent guidelines published by the Department of Justice: Department of Justice, Equality and Defence, *Guidance Document on citizenship, parentage, guardianship and travel document issues in relation to children born as a result of surrogacy arrangements entered into outside the State*, available online at <http://www.justice.ie/en/JELR/Pages/PR12000035> (last accessed 15 November 2012).

### (iii) Analysis

The pool of decisions on appeal from the Equality Tribunal during the reporting period is very small. This limits the general conclusions which can be drawn on the approach of the Irish courts to complaints of discrimination under the Acts. The courts have delivered a number of judgments during the reporting period which clarify the law and provide guidance to the Equality Tribunal and the Labour Court in their work. However, the overall impression which emerges from a consideration of the case law of the Irish courts on appeals under the Acts, and particularly under the Equal Status Acts, is disappointing. While there will almost always be room for debate about the result or outcome of particular claims of discrimination, there can be little dispute about the importance of adopting a clear and coherent methodology in the analysis of such claims. Unfortunately, in some recent cases, the appellate process appears to have confused, rather than clarified, the essential issues. One possible explanation for this phenomenon is that, unlike the Equality Tribunal, the appellate courts under the Acts are not specialised in equality issues, which come before them very infrequently and with which they therefore lack familiarity. More generally, it may be said that, over a decade on from the enactment of the Employment Equality Acts and the Equal Status Acts, the process of familiarisation and acculturation of lawyers, judges and others in the Irish legal system with the Acts is still very much a work-in-progress.

## C. The Supervisory Jurisdiction of the High Court

Much of the remaining case law addressing equality legislation during the reporting period has come before the courts in the context of applications for judicial review. In these cases, parties have invoked the supervisory jurisdiction of the High Court in order to challenge decisions of the Equality Tribunal. Two main themes emerge from this case law. On the one hand, the High Court has consistently emphasised the importance of the Tribunal acting in accordance with fair procedures. On the other hand, the courts have shown considerable deference to the Tribunal in practice as the master of its own procedures and are very slow to permit collateral attacks on Tribunal decisions through judicial review proceedings.

In a number of cases, parties aggrieved at a decision of the Equality Tribunal have sought to challenge that decision by arguing that the Tribunal had failed to act in accordance with fair procedures. In *County Louth VEC v. Equality Tribunal*,<sup>53</sup> the High Court confirmed that, insofar as a complainant sought to expand the nature of his or her complaint during the investigation, “the respondent in the claim must be given a reasonable opportunity to deal with these complaints” and the procedures adopted by the Tribunal “must be fair and reasonable and in compliance with the principles of natural and

53 *County Louth VEC v. Equality Tribunal* [2009] IEHC 370.

constitutional justice.<sup>54</sup> To similar effect, in the *Eagle Star* case,<sup>55</sup> the High Court (Hedigan J.) stated that the Tribunal, like all administrative decision-makers, bears “an extremely important responsibility of adhering to the requirements of natural and constitutional justice”. In particular, the Tribunal must adhere to the primary maxim of *audi alteram partem* and hear both sides.

Nevertheless, in both cases, the High Court also underlined the limits to the Tribunal’s obligations to respect fair procedures. In the *County Louth VEC* case, McGovern J. stressed that the Equality Officer “was entitled to run the hearing of the complaint as she saw fit, so long as it complied with the principles of natural and constitutional justice.”<sup>56</sup> Moreover, it was, the Court said, “important to emphasise that the hearing before the Equality Tribunal is not a hearing in a court of law with all the attendant formality that would exist in such a forum.”<sup>57</sup> Applying this principle to the case before it, the Court rejected the applicant’s argument that the Tribunal had exceeded its jurisdiction by hearing evidence in relation to issues which stretched back over a decade but which were consistent with the general tenor of the complaint which had initially been made by the complainant. The Court also rejected the applicant’s argument that a decision of the Tribunal on a specific procedural matter – that, during the complainant’s evidence, certain of the applicant’s witnesses should wait outside the hearing room in circumstances where the applicant’s legal representatives were at all times present – constituted a breach of fair procedures. In *Eagle Star*, Hedigan J. declared that, if the doctrine of fair procedures were extended to the reaches which had been suggested by the applicant in that case, “it would be impossible for the public bodies to function effectively” and such bodies “would be stultified by boundless bureaucracy.”<sup>58</sup> The Court rejected the applicant’s argument that the Tribunal’s decision not to exercise its power under section 38 of the Equal Status Acts to dismiss the complaint was made in error of law or in breach of fair procedures.

These principles have been reaffirmed and refined in two further cases during the reporting period. In *Iarnród Éireann v. Mannion*, the High Court (Hedigan J.) stated that a “commonsense approach to the conduct of administrative proceedings which allows them to proceed in as informal a way as is possible” was generally the right approach.<sup>59</sup> In the case at hand, the applicant had agreed to provide certain information to the Tribunal but had ultimately had failed to do so. Hedigan J. rejected the applicant’s contention that the Tribunal was under an obligation to consult the applicant again before drawing inferences and coming

54 [2009] IEHC 370, para. 6.3.

55 *Eagle Star Assurance Co. of Ireland Ltd. v. Director of Equality Tribunal & Anor* [2009] IEHC 124.

56 [2009] IEHC 370, para. 6.6.

57 [2009] IEHC 370, para. 6.7.

58 [2009] IEHC 124, para. 32.

59 *Iarnród Éireann v. Mannion* [2010] IEHC 326.



to its decision on the complaint.<sup>60</sup> This approach finds an echo in the later case of *Clare County Council v. Director of Equality Investigations*, where the same judge observed that, in establishing the Tribunal, the Oireachtas “did not intend to create a complex system of adversarial decision-making.”<sup>61</sup> The Court continued:

The Equal Status Act is intended to provide accessible remedies for persons alleging discrimination. It is designed to proceed without lawyers present, but with lay representation. The legislation envisages that complainants before the Tribunal may have literacy problems and therefore a procedure strictly based on written submissions would be a considerable hurdle for many complainants. The legislation is structured so as to allow complainants to elaborate on their complaints by way of oral submissions...<sup>62</sup>

The Court rejected the applicant’s contention that the procedures adopted by the Tribunal in dealing with a large number of related cases were unfair, noting the challenge faced by the Tribunal in trying to be fair to both sides in difficult circumstances marked by animosity between the parties.

Finally, in the case of *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal*, the High Court granted the applicants an order prohibiting the Tribunal from investigating a complaint of discrimination on the ground of age on the basis that the Tribunal, as a statutory creature of limited jurisdiction, could not embark upon a hearing which assumed a legal entitlement to overrule a statutory instrument.<sup>63</sup> As discussed in Chapter 2, this decision, which is under appeal, presents a fundamental challenge to the jurisdiction of the Tribunal to interpret and apply European Union law. For present purposes, it suffices to observe that the decision also represents a rare instance of the High Court, in the context of judicial review proceedings, intervening to restrict the Tribunal’s exercise of its functions under the Acts.<sup>64</sup>

In conclusion, while the High Court has, in the exercise of its supervisory jurisdiction over the Equality Tribunal, repeatedly and rightly emphasised the duty of the Equality Tribunal to act in accordance with fair procedures, it has

60 [2010] IEHC 326, 8.

61 *Clare County Council v. Director of Equality Investigations* [2011] IEHC 303.

62 [2011] IEHC 303, para. 6.2.

63 See *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* [2010] 2 IR 455, discussed further in Chapter 3.

64 See also *Clare County Council v. Kenny* [2009] 1 IR 22 (where the High Court quashed an order of the Circuit Court asserting jurisdiction over an appeal from the Equality Tribunal on the basis that the judge had addressed himself to the wrong question, taken irrelevant considerations into account and made an order without deciding the necessary issues before him).

generally shown a marked reluctance to interfere with the Tribunal's conduct of the proceedings before it and to allow judicial review proceedings to be used as a means for parties to challenging decisions which do not go their way.

## D. The Portmarnock Golf Club and Donnellan Cases

In addition to appeals and applications for judicial review on foot of decisions of the Equality Tribunal, issues under Irish equality legislation have also come before the courts through a number of other avenues.<sup>65</sup> For example, in the *Portmarnock Golf Club* case, two sets of proceedings – a case stated from the District Court to the High Court and a plenary action involving a constitutional challenge to the relevant provisions of the Equal Status Acts – were joined in the High Court and, on appeal, in the Supreme Court.<sup>66</sup> The case of *Donnellan* took the form of plenary proceedings in which the equality issues were raised by way of a direct challenge to the compatibility of the relevant regulations with EU law.<sup>67</sup>

### (i) Equality Authority v. Portmarnock Golf Club

The *Portmarnock Golf Club* case started life as an application by the Equality Authority to the District Court for a determination that Portmarnock Golf Club ('the club'), which did not admit women to membership, was a discriminating club within the meaning of section 8 of the Equal Status Acts. Section 8 (2) of the Acts provides *inter alia* that a club "shall be considered a discriminating club if... it has any rule, policy or practice which discriminates against a member or an applicant for membership" and that refusal to admit a person to membership is evidence that the club is a discriminating club. The effect of a determination by the District Court under section 8 was that a registered club would lose its drinks licence. Section 9(1) of the Acts provides that, for the purposes of section 8, a club shall not be considered to be a discriminating club "by reason only" that, "if its principal purpose is to cater only for the needs of" persons of a particular gender or of another protected group under the Acts, it refuses membership to other persons.

The District Court acceded to the Equality Authority's application, finding that the club was a discriminating club within the meaning of the Acts, but it then stated a case to the High Court on the issue. At the same time, the club issued plenary proceedings seeking a declaration that it was not a discriminating club or, if the Court found to the contrary on that point, a declaration that the legislation was unconstitutional. The High Court (O'Higgins J.) heard both

65 See also *Lawrence v. Ballina Town Council* (High Court (Murphy J.), unreported judgment, 31st July 2008), a case which was brought on the Housing Acts and in which constitutional and equality issues had been raised were settled prior to the hearing of the action although they were the subject of some *obiter* comments in the Court's reserved judgment.

66 *Equality Authority v. Portmarnock Golf Club* [2010] 1 IR 671.

67 *Donnellan v. Minister for Justice, Equality and Law Reform* [2008] IEHC 467.

actions together, concluding that the club was not a discriminating club within the meaning of the Acts and, in the alternative, that the legislation was not unconstitutional. The parties appealed the decision to the Supreme Court.

The crux of the issue before the Supreme Court was whether the club fell within the scope of section 8 of the Acts or was taken outside its scope by application of section 9. In a majority decision, by 3 votes to 2, the Supreme Court concluded that, in accordance with section 9 of the Acts, the principal purpose of the club was to cater only for the needs of persons of a particular gender, in this case men, and that the club was therefore not a discriminating club within the meaning of section 8.

In the leading judgment, Hardiman J. emphasised that the case, which essentially raised a point of statutory construction, had a very narrow focus.<sup>68</sup> He set out a number of areas of agreement between the parties, including that section 9 permitted clubs for specific groups of the community to exist, to exclude others and yet to be registered as clubs provided that their principal purpose was to cater only for the needs of the specific group.<sup>69</sup> Expressing concern that the effect of section 8 in this case would be to penalise something – here, a gentleman's golf club – which was otherwise perfectly legal, Hardiman J. placed his decision in the context of the constitutional right to freedom of association and the canon of construction against doubtful penalisation. In a lengthy and at times quite forceful judgment, Hardiman J. concluded that the principal purpose of the club was to provide facilities for the playing of golf by gentlemen. Adopting a concept of the “needs” of members which was not restricted to absolute necessities and which included the playing of golf,<sup>70</sup> Hardiman J. was satisfied that the club catered only for the needs of male golfers and was accordingly entitled to benefit from the exemption contained in section 9. This conclusion was not undermined, the judge said, by the fact that the club complied with the law of the land by also catering for women golfers who could play the course seven days a week at permitted times on the payment of green fees on the same basis as all non-members.

For his part, Geoghegan J. also considered that the provisions at issue fell to be interpreted in light of the constitutional right of freedom of association. Describing the regime established under sections 8 to 10 of the Acts as very unusual, Geoghegan J. took the view that section 9 was not concerned with purely theoretical and potentially non-existent clubs.<sup>71</sup> Interpreting the key phrase in that provision as a whole, he concluded that the principal purpose test related to the needs of the persons catered for rather than to the activities of the club

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68 [2010] 1 IR 671, 698.

69 [2010] 1 IR 671.

70 [2010] 1 IR 671, 742.

71 [2010] 1 IR 671, 748.

itself.<sup>72</sup> For this reason, Geoghegan J. agreed that the principal purpose of the club was the playing of golf by men. Macken J., who did not deliver a separate judgment, agreed with the judgments of Hardiman and Geoghegan JJ.<sup>73</sup>

In their dissenting judgments, Denham J. (as she then was) and Fennelly J. took a more straightforward approach to the interpretation of section 9 and its application to the case at hand. They both concluded that the principal purpose of the club in this case was the playing of golf and that the club did not cater only for the needs of men.<sup>74</sup> Describing this as the case in a nutshell, Fennelly J. said that it was “unreal and implausible” to suggest otherwise.<sup>75</sup> While acknowledging that the concept of needs in section 9 could include subjective requirements such as social and cultural needs, Fennelly J. rejected the argument that the club catered only for male golfers, on the basis that female golfers were also catered for by being permitted to golf on the club’s grounds. For her part, Denham J. stressed that the words of section 9 were precise and clear and that it was therefore necessary only to interpret the words in their natural and ordinary meaning, under which they did not include Portmarnock Golf Club which catered for both men and women albeit in different ways.<sup>76</sup> However, even if there were any ambiguity in the words of section 9, Denham J. expressed the view that the Act, which was a “remedial social statute”, should be interpreted purposively and, as an exception, section 9 should be construed narrowly.<sup>77</sup>

While the core issue before the Supreme Court may have been an apparently discrete question of statutory interpretation, the lengthy judgments of the Supreme Court, and the High Court before it, illustrate the potential complexity of the underlying provisions of the Equal Status Acts as well as the interpretative choices which they entail. As early as 2000, Bolger and Kimber had described as “rather puzzling” the fact that the Equal Status Acts contained a number of exceptions to the principle of non-discrimination in the membership of clubs, such as section 9(1)(a), “which would seem to allow the very kinds of discrimination which it prohibits.”<sup>78</sup> Exceptions of this kind, they suggested, “threaten to engulf the non-discrimination principle and remove much of its usefulness.”<sup>79</sup> This assessment has arguably been borne out by the decision of the Supreme Court in the *Portmarnock* case. The majority judgments, while very sophisticated in many respects, ultimately adopt a strained reading of section 9 which appears to undermine the fundamental purpose of the Acts and the rule in section 8 specifically.

72 [2010] 1 IR 671, 749.

73 [2010] 1 IR 671, 766.

74 [2010] 1 IR 671, 696-697 (*per* Denham J.) and 756 (*per* Fennelly J.).

75 [2010] 1 IR 671, 761.

76 [2010] 1 IR 671, 694.

77 [2010] 1 IR 671, 695.

78 Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000), 452.

79 Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000), 461.

While the Equality Authority welcomed at the time as a clarification of the law,<sup>80</sup> most commentators have been critical of the reasoning of the majority and of the end result. Bacik has expressed the view that “[t]he majority judgments, sadly, can be interpreted as showing how the clear purpose of equality legislation may be thwarted by those who are opposed to any broad conception of ‘equality’”.<sup>81</sup> O’Connell has described it as “disappointing that the Supreme Court failed, by an unconvincing majority, to give effect to the wishes of the Oireachtas to open the membership of men-only golf clubs to the other half of the population”.<sup>82</sup> Fenelon has described the implications of the rulings for registered clubs as “profound” and has suggested that, unless the exemptions in section 9 are removed or amended, it would be permissible for such clubs to discriminate on the prohibited grounds without fear of being penalised through the loss of its liquor licence.<sup>83</sup> Coulter has drawn attention to the wider implications of the judgment, writing shortly after the judgment was delivered that the “unmentioned elephant in the court-room” was “the undefined, but undoubted, social and business advantages conferred by membership of a historically exclusive club, whose exclusivity was maintained by yesterday’s judgment”.<sup>84</sup> However, the irony of these very costly and complex proceedings is perhaps that, while the Supreme Court decision ultimately found for Portmarnock Golf Club, the effect of the initial proceedings before the District Court was, as Coulter has pointed out, that “400-odd golf clubs changed their rules to permit women members”.<sup>85</sup>

### **(ii) *Donnellan v. Minister for Justice, Equality and Law Reform***

In the *Donnellan* case, the plaintiff was an Assistant Commissioner of An Garda Síochána who was required to retire at the age of 60 under the Garda Síochána (Retirement) Regulations 1996 (as amended) (‘the Regulations’).<sup>86</sup> Following the refusal of the Garda Commissioner to extend his tenure, Mr.

80 “Equality Authority welcomes ‘clarification’”, *Irish Times*, 4th November 2009.

81 Bacik, “Is Ireland Really a Republic?” (2009) 1(1) *Irish Journal of Public Policy* 9/11

82 O’Connell, “No Ladies Need Apply – Equality Authority v. Portmarnock Golf Club”, *Village Magazine*, December 2009.

83 Fenelon, “Discriminating Tastes”, *Gazette of the Law Society of Ireland*, December 2009, 16-19. See also Marry, “Portmarnock Golf Club Decision: A Step Backwards For Equality Law?” (2010) 15(2) *Bar Review* 39 and Lenkiewicz, “Green jackets in men’s sizes only: gender discrimination at private country clubs” (2011) 44 *Vanderbilt Journal of Transnational Law* 777.

84 Coulter, “Being female still handicap as judgment puts men first”, *Irish Times*, 4th November 2009.

85 Coulter, “Being female still handicap as judgment puts men first”, *Irish Times*, 4th November 2009 (referring to the fact that, following the taking of the District Court proceedings, “400-odd golf clubs changed their rules to permit women members, with two exceptions - Portmarnock and the Royal Dublin”).

86 *Donnellan v. Minister for Justice, Equality and Law Reform* [2008] IEHC 467.

Donnellan issued plenary proceedings challenging the Regulations on the basis that they were *ultra vires* the Police Forces Amalgamation Act 1925 and that their provisions were incompatible with Council Directive 2000/78/EC which had been transposed in Irish law through the Equality Act 2004. The High Court (McKechnie J.) first rejected the *ultra vires* argument before considering the argument that the Regulations were in breach of EU law. After undertaking a detailed analysis of Directive 2000/78/EC, the Framework Directive, and the decision of the Court of Justice in *Palacios de la Villa*,<sup>87</sup> the Court concluded that the Directive did indeed apply to the plaintiff and that the Regulations, which terminated his employment at the age of 60, constituted direct discrimination within the meaning of article 2 of the Directive.<sup>88</sup> The Court then proceeded to consider whether this discrimination could be justified by reference to other provisions of the Directive. Having rejected the first two justifications – that the measure was a genuine and determining occupational requirement and that it was aimed at preserving the operational capacity of An Garda Síochána – the Court then proceeded to consider whether the measure was objectively justified by a legitimate aim and whether the means of achieving that aim were appropriate and necessary. Ultimately, McKechnie J. accepted that the effective and efficient running of An Garda Síochána through its employment policy could constitute a legitimate aim and considered that the measure in question was an appropriate and necessary means of achieving that aim insofar as it was of a specific and defined character, concerned a small pool of senior officers, and provided for a possible extension of tenure which was individually assessed.<sup>89</sup>

What is unclear about the decision is the basis on which the Court considered the matter directly by reference to the Directive 2000/78/EC rather than by reference to the implementing domestic measures, such as the Employment Equality Acts, as amended by the Equality Act 2004. In his introductory remarks, McKechnie J. simply notes that, while the plaintiff had lodged a claim with the Equality Tribunal, that in itself had “no direct bearing on this case”.<sup>90</sup> Later, the Court stated that, although much reference had been made to the position under the Equality Act 2004 and it was suggested “albeit somewhat indirectly or even opaquely” that the Act in itself should be a yardstick against which the Regulations should be measured, “this point was never fully explored and its correct place in contextual terms was never finalised”. Therefore, the Court did not propose to deal with that matter individually, merely noting that any conclusions in relation to the Directive apply *mutatis mutandis* to the question

87 Case C-411/05 *Palacios de la Villa* [2007] ECR I-08531.

88 [2008] IEHC 467, paras. 69-70.

89 [2008] IEHC 467, paras. 103-104.

90 [2008] IEHC 467, para. 4. See the contrasting approach adopted by the High Court (Charleton J.) in *Doherty v. South Dublin County Council* [2007] 2 IR 696, 704-706 (where the Court took the view that the Equal Status Acts did not create new legal norms which were “justiciable outside the framework of compliance established by those Acts”: “In such an instance, administrative norms, and not judicial ones are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme”).



of whether the Regulations were also compatible with the Equality Act 2004.<sup>91</sup> In other words, in *Donnellan*, the Court bypassed the usual avenue for pursuing an equality complaint by asserting its jurisdiction to consider the validity of the Regulations directly by reference to the Directive without first considering the position vis-à-vis the Irish implementing measures in the Employment Equality Acts or the compatibility of those measures with the Directive. While the wide jurisdiction of the High Court under the Irish Constitution, combined with the very broad jurisdiction granted to domestic courts in order to give effect to European Union law, might justify such an approach in circumstances such as those in *Donnellan*, the case raises broader issues about the proper manner in which the relationship between EU equality law and its Irish implementing measures should be articulated. However, at a time when there was a clear risk that the decision in *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* could have had something of a chilling effect on the Tribunal's consideration of matters of EU law,<sup>92</sup> *Donnellan* has arguably had the opposite effect and has been frequently invoked by the Tribunal to support an assertive approach to the interpretation of the Employment Equality Acts in a manner which is consistent with EU law.<sup>93</sup>

Finally, on the subject of EU equality law in the Irish courts, it is appropriate to refer to the recent reference for preliminary ruling under Article 267 TFEU in the *Kenny* case, which is concerned primarily with the test of objective justification in a case where there is *prima facie* indirect gender discrimination in pay.<sup>94</sup> While references to the Court of Justice on matters of equality issues have a long history in Irish law,<sup>95</sup> this reference underlines the intertwined relationship between Irish and EU equality law.

91 [2008] IEHC 467, para.125.

92 See e.g. *Nowak v. The Law Society Of Ireland*, DEC-E2010-051; *Saunders v. CHC Ireland*, DEC-E2011-142; *Murphy v. An Garda Síochána*, DEC-E2011-170; *Eircom Ltd v. McGovern*, Labour Court, Case EDA1114.

93 See especially *Five Named Complainants v. Hospira Ltd.*, DEC-E2011-083, discussed at Chapter 4.B.(vi) of the report.

94 Case C-427/11, *Kenny & Ors v. Minister for Justice, Equality and Law Reform & Ors* (reference of 16th August 2011), application available online at [curia.europa.eu](http://curia.europa.eu) (last accessed 12 November 2012).

95 See e.g. Case 157/86, *Murphy v. An Bord Telecom* [1988] ECR 00673; Case C-208/90, *Cotter and McDermott* [1991] ECR I-04269.



## E. Conclusion

The case law of the Irish courts in relation to the Acts between 2008 and 2011 paints a mixed picture. Some of the courts' decisions have provided valuable guidance on the interpretation and application of the Acts, even if, as in the case of *Portmarnock Golf Club*, such guidance might also be considered as a setback for the promotion of equality under the Acts. Furthermore, in the exercise of its supervisory jurisdiction, the High Court has generally shown a healthy degree of deference to the Equality Tribunal in the conduct of the proceedings coming before it. However, many of the substantive decisions on equality matters during the reporting period have been disappointing and highlight the challenges that the Acts continue to represent for the Irish courts over a decade after their enactment. This may be explained, at least in part, by the relative novelty of the Acts themselves and the limited extent to which they have penetrated the Irish courts system. Yet it also draws attention to the considerable complexity of the Acts, a characteristic of the legislation which stands in tension with its avowed goal of accessibility. It is hoped that, over time, the Irish courts – at all levels – will gain more familiarity with the provisions and purposes of the Acts, pay closer attention to the methodology which is required by the Acts, and thereby contribute to their more consistent and effective application.



## Chapter 6

# Conclusion

### A. Introduction

This report has analysed a number of selected issues in Irish equality case law during the period 2008–2011. Irish equality case law was understood, for this purpose, as referring to the decisions of the courts and tribunals under or in relation to the Employment Equality Acts 1998–2011 and the Equal Status Acts 2000–2011, the two key pillars of Ireland’s equality legislation. Because the vast majority of decisions under the Acts are made at first instance by the Equality Tribunal and only a very limited number of cases reach the Irish courts in any given year, it was necessary to adopt a broad understanding of the concept of case law in this report, which encompasses the decisions of the Tribunal and of the Labour Court, as well as those of the courts. Naturally, it is the decisions of the Irish courts, and the Court of Justice of the European Union on matters coming within the scope of EU law, which constitute the most important and authoritative case law on equality matters. However, in relation to many of the substantive and procedural issues which have arisen under the Acts during the reporting period, the only guidance which exists is that to be found in the Tribunal’s own jurisprudence, its database of decisions. This report does not purport to be a comprehensive, let alone exhaustive, examination of Irish equality case law during the reporting period. Its scope and scale are more modest. It has looked first at two specific themes in the case law – the jurisdiction of the Tribunal and the assessment of the burden of proof under the Acts – and it has then provided a survey of other important developments in the case law of the Equality Tribunal, on the one hand, and the Irish courts, on the other. After setting out briefly the conclusions of each of the four substantive chapters, this Chapter will offer some general conclusions on Irish equality case law between 2008 and 2011 and the broader issues to which it gives rise.

### B. The Jurisdiction of the Tribunal

As explored in Chapter 2, challenges to the jurisdiction of the Equality Tribunal, the first instance decision-maker on complaints of discrimination under the Acts, have become increasingly common during the reporting period. Such challenges have touched upon many aspects of the Tribunal’s jurisdiction, from the subject matter of the complaints and the persons whom it is entitled to investigate to the time frame within which complaints must be made and the territorial scope of the legislation. However, it is the High Court’s decision in the case of *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of the Equality Tribunal* which arguably represents the most serious challenge to the Tribunal’s jurisdiction since its establishment. By prohibiting the Tribunal from investigating a complaint which, if upheld, could have required the Tribunal to disapply an Irish statutory instrument alleged to be in conflict with EU law, the High Court has called into question

the Tribunal's jurisdiction to interpret and apply the European Union law to which the Acts, in large measure, give effect. Because the Tribunal is one of the decision-making bodies in the State which is required to deal with issues of EU law on an almost daily basis, this decision, if upheld by the Supreme Court, could significantly impede its work, or that of its successor, and could undermine respect for the principle of supremacy of EU law in this jurisdiction.

### C. Assessment of the Burden of Proof

Chapter 3 considered in some detail the assessment of the burden of proof in discrimination cases under the Acts during the reporting period. After setting out the general principles laid down by the Tribunal and the Labour Court in their decisions, the report looked at two particular contexts in which the test has been applied in practice: first, complaints of discrimination relating to pregnancy; secondly, complaints of discrimination on the ground of race, the most common ground of discrimination invoked during the reporting period. While the complaints in the pregnancy context demonstrate the potential value and utility of the partial shifting of the burden of proof provided for under the Acts, the complaints on the race ground illustrate some of the difficulties which remain notwithstanding this modification of the ordinary rules of proof. Because each case ultimately turns on its own facts, it is difficult to reach any firm general conclusions on how the test for the assessment of the burden of proof has been applied in practice. Even if the different elements of the burden of proof are, like all formulae which are repeated as a matter of course, are sometimes applied without distinction, the case law during the reporting period confirms that the test is very well embedded in the practice of the Tribunal and the Labour Court. As suggested in the conclusion to Chapter 3, the test for the assessment of burden of proof under the Acts reduces but does not remove the difficulties for complainants in proving their cases. For complainants and their representatives, more effective use of the mechanisms for the access to information under the Acts is one important, practical way in which they might further reduce the difficulty of satisfying the requirement to establish a *prima facie* case of discrimination under the Acts and might thereby shift the burden of proof to the respondent. For respondents, it remains essential to adduce cogent evidence in order to rebut the inference of discrimination that arises where the complainant has established a *prima facie* case.

### D. The Evolving Equality Tribunal Case Law

Having considered the issues of the Tribunal's jurisdiction and the assessment of the burden of proof in some detail in Chapters 2 and 3, Chapter 4 surveyed other important developments in the case law of the Equality Tribunal between 2008 and 2011. This survey highlighted the very broad range of issues – whether in respect of the different grounds of discrimination invoked by complainants, or the exceptions relied upon by respondents, or the procedural issues facing both parties – which arise in the course of the Tribunal's investigation of complaints under the Acts. While there was a wide variation in the numbers of complaints under the different grounds of discrimination, the Tribunal has ruled on, and shed

light on, all of the protected grounds during the reporting period, often in cases raising issues of broader social significance which, as in the recent surrogacy cases, often reach the Tribunal before they reach the Irish courts. However, the case law has also demonstrated the continued significance of the wide array of exemptions contained in the Acts, including the very far-reaching exemption in section 14 of the Equal Status Acts for conduct required by law, which removes significant fields of activity from the scope of Irish anti-discrimination law. Finally, just as the jurisdictional issues examined in Chapter 2 have started to feature more frequently, so too the Tribunal has increasingly been called upon to consider the procedural framework under the Acts. Against the backdrop of a very heavy case load relative to its resources and the lengthy delays which have inevitably resulted therefrom, the case law draws attention to both the potential and problems of the procedural tools available to the Tribunal under the Acts for dismissing complaints and for penalising those who impede or obstruct its work. Bringing these issues together, what is clear is that the Tribunal has, during the reporting period, continued to define and develop its case law. As well as following and distinguishing its own previous decisions in appropriate cases, the Tribunal consistently and proactively follows the judgments of the Irish courts and the Court of Justice of the European Union on equality matters. In this respect, the Tribunal arguably demonstrates many of the hallmarks of specialist decision-making. The only risk for the Tribunal is that, as this case law becomes increasingly sophisticated, it becomes less accessible for those who appear before it.

## E. Equality Legislation before the Irish Courts

As explored in Chapter 5, the record of the Irish courts between 2008 and 2011 in cases relating to Ireland's equality legislation has been chequered. On the one hand, the High Court, in the exercise of its supervisory jurisdiction, has generally shown considerable deference to the Equality Tribunal in respect of how it conducts the proceedings which come before it. Furthermore, in some of their substantive decisions under the Acts, the Irish courts have provided valuable guidance on the interpretation and application of Irish and indeed EU equality legislation, which has then been integrated into the Tribunal's day-to-day decision-making. On the other hand, however, many of the decisions on substantive equality issues during the reporting period have been disappointing, particularly on account of the methodology used, or indeed the lack of any discernible methodology. While there will inevitably be scope for reasonable disagreement about the outcomes of particular discrimination complaints, there can be little disagreement about the need for clarity and consistency of reasoning in reaching those outcomes, particularly where a court is exercising an appellate function and its decisions serve to guide, and indeed bind, a lower court or tribunal which acts as the primary decision-maker in cases under the Acts. This is not to underestimate either the difficulty that equality decision-making generally entails or, for that matter, the additional difficulties facing decision-makers in the context of relatively novel and complex equality legislation such as that embodied in the Acts. Yet it must be hoped that the courts will, over time, become more familiar and thus more comfortable with the Acts and related EU legislation.

## F. General Conclusions

Looking at the case law between 2008 and 2011 as a whole, one of its most striking features is the contrast between the very large number of decisions at first instance and the very low number of decisions on appeal. The explanation for this phenomenon is not to be found in unusually high rates of success for complaints of discrimination under the Acts. Instead, it is, arguably and at the very least in part, to be found in the very serious costs implications of appealing such decisions, which represent a major deterrent for unsuccessful parties before the Tribunal who might otherwise wish to appeal. This is particularly the case under the Equal Status Acts where— in contrast to the Labour Court in employment equality appeals — the first layer of appeal, the Circuit Court, has the power to make orders for costs against unsuccessful parties. For parties who might wish to make a further appeal on a point of law to the High Court, the costs implications are even more daunting. A further disincentive in Equal Status Act complaints is the strict cap which the legislation places on awards of compensation. More generally, in light of the high failure rate of recent appeals, it is open to question whether complainants are likely to fare any better on appeal to the courts than they might have fared at first instance before the Tribunal. Bearing these factors in mind, it is perhaps unsurprising that, during the reporting period, in the vast majority of appeals by complainants under the Acts, and especially under the Equal Status Acts, the parties have received some form of external support, most frequently in the form of legal representation by the Equality Authority. Without such support, the number of appeals — and thus the number of substantive equality issues — coming before the courts would be even more limited than is already the case.

The costs implications of pursuing complaints under the Acts are also evident in another important context, the jurisdiction of the District Court in respect of complaints of discrimination “on, or at the point of entry to, licensed premises”. While there is little available case law on its application, the implications of the transfer of jurisdiction from the Tribunal to the District Court effected by section 19 of the Intoxicating Liquor Act 2003 (‘the Act of 2003’) have become clearer over time. In contrast to the position prior to the transfer of jurisdiction — when complaints involving licensed premises, particularly on behalf of members of the Traveller community, featured prominently in the Tribunal’s case law — the research undertaken for this report points to a dearth of information on the practice of the District Court, and in all likelihood a dearth of activity in that court, under section 19 of the Act of 2003. The limited information which is available in relation to the practice of the District Court points to the potential difficulties facing complainants not just in terms of adverse costs orders but also in terms of establishing proof of discrimination in an adversarial context. This information reinforces rather than reduces concerns about the effect of this transfer of jurisdiction on the pursuit of complaints of discrimination against licensed premises. Costs, as well as the formality of court proceedings, combine to make the District Court a far less attractive forum for first instance complaints of discrimination than the Equality Tribunal.



At a time when major change in Ireland's equality architecture is underway, these general considerations arising from an analysis of the case law for 2008 to 2011, and its silences, emphasise the importance of an accessible process for the resolution of complaints of discrimination under the Acts at both first instance and appeal. While complaints under the Equal Status Acts would not fit neatly into the proposed Workplace Relations Commission which is to replace the Equality Tribunal, the experience of the existing appellate process and of the transfer of first instance jurisdiction to the District Court under the Intoxicating Liquor Act 2003 militates strongly against any suggestion that jurisdiction over equal status complaints could or should be transferred to the District Court.

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The case law of the Equality Tribunal during the reporting period confirms the long reach and radical nature of the Employment Equality Acts and Equal Status Acts. As Chapter 2 considered in some detail, the Tribunal has adopted a very broad conception of its own jurisdiction, as perhaps best illustrated by its interpretation of the notion of service under the Equal Status Acts: from accessing a website to the allocation of shares to the non-adjudicative functions of bodies such as the Employment Appeals Tribunal, to take but a few examples. If the Tribunal has shed light on each of the nine principal grounds of discrimination listed under the Acts, some grounds have featured more than others between 2008 and 2011. Complaints on the grounds of religion and sexual orientation, for example, are much more rare than complaints on the age and disability grounds. Undoubtedly reflecting more deep-rooted social challenges, complaints on the ground of membership of the Traveller community barely feature under the Employment Equality Acts while they remain, section 19 of the Act of 2003 notwithstanding, reasonably common under the Equal Status Acts. If complaints on the gender ground are frequently made to the Tribunal, such complaints are characterised by considerable internal diversity as a sample of cases during the reporting period – dealing with issues as diverse as surrogacy, school dress codes and transsexualism – so clearly shows. Perhaps the outstanding feature of the Tribunal case law during the reporting period has been the very sharp rise in complaints of discrimination on the race ground, especially but not exclusively under the Employment Equality Acts. While the Tribunal has dismissed many complaints on this ground in recent years, the complaints which the Tribunal has upheld – undoubtedly a symptom of deeper problems – are enough to displace any sense of complacency that might exist about the presence and prevalence of racism in certain parts of Irish society. Of course, the Tribunal's jurisdiction is not without significant limits, particularly those limits resulting from far-reaching exemptions such as that laid down in section 14 of the Equal Status Acts.

The cases which have come before the Tribunal and the courts between 2008 and 2011 inevitably reflect wider developments in Irish society. The sharp rise in complaints of race discrimination is just one example of this. Many other decisions illustrate the radically changed economic climate in which Ireland now finds itself. For example, the economic downturn has resulted in a rise in employment equality cases, in particular arising from dismissals and redundancies which are alleged to be discriminatory. Further evidence of the

crisis is to be found in the large number of respondent companies which have gone into liquidation, receivership or, worse still, which have been dissolved, with the grave implications this entails for complainants seeking redress.

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Ireland's equality legislation can arguably be understood in three broad phases: first, an early period which was defined by a focus on gender equality in pay, social security and related matters and which was driven by Irish accession to the European Communities and developments in European law; second, a middle period involving the build-up to, and enactment of, the Acts themselves, which reflected European law obligations to some extent but which, particularly in the Equal Status Acts, went far beyond the obligations under European law and other international agreements; and third, the current phase which is once again largely driven by EU law, which has been revitalised by the coming into force of the Lisbon Treaty and with the emergence of the Charter as a legally binding instrument. While Ireland can be justifiably proud of its achievements during the second phase – the fruits of which are much in evidence in the case law during the reporting period – the case law also pinpoints certain areas where Irish law now lags behind current and proposed EU equality norms. If the scope of the Equal Status Acts remains broader than the scope of EU equality legislation in a number of respects, it arguably falls short of that legislation in other areas, particularly because of the far-reaching exceptions, such as section 14, which, as well as being problematic on their own terms, are also difficult to reconcile with, for example, provisions of Directive 2000/43/EC, the Race Directive, and Directive 2004/113/EC, the Gender Goods and Services Directive. Notwithstanding the amendments made by the Equality Act 2004, there are also a number of other areas in which questions about the compatibility of the Acts with EU law have already been raised and will continue to be raised in the years ahead.

More generally, the differences between the Employment Equality Acts and the Equal Status Acts – which feature time and again in the case law – point to the need for greater convergence of, and increased coherence in, the twin pillars of Irish equality legislation. With little sign of a fourth phase for Irish equality law in which home-grown developments once again move ahead of international developments, any move towards greater convergence and coherence now appears far more likely to emerge at the EU level rather than in Ireland itself.

The case law between 2008 and 2011 confirms in a dramatic way the ever-increasing role of the European Union in Irish equality law. While the High Court decision in *Minister for Justice, Equality and Law Reform v. Director of the Equality Tribunal* appears to limit the power of the Tribunal to give effect to EU law, other High Court decisions such as *Donnellan* as well as the practice of the Tribunal itself, including its first-ever reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, emphasise the real importance of EU law in the interpretation and application of the Acts. This is likely only to increase over time.

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While the Employment Equality Acts and the Equal Status Acts have now been in force for well over a decade, as stated in Chapter 5, the process of familiarisation and acculturation of lawyers, judges and others in the Irish legal system with the Acts remains very much a work-in-progress. This is evident in the case law of the Irish courts on the Acts during the reporting period. Although many of the decisions on substantive equality issues have been disappointing, as already discussed in Chapter 5 and alluded to earlier in this chapter, this has as much to do with the methodology of the decisions as it has to do with their specific outcomes and results. As the Acts enter their 'adolescence', and as the Acts and the decisions thereunder benefit from further critical study and analysis, it may be hoped that Ireland's equality case law will witness a period of maturation.

The Employment Equality Acts and the Equal Status Acts are novel, in many respects radical, and complex legislative regimes. The Supreme Court decision in the *Portmarnock Golf Club* case underscores some of these features in respect of the Equal Status Acts. Underlying the divergent views in the Supreme Court are not just different approaches to a specific problem of statutory interpretation but also, at a deeper level, different visions of the purpose and proper scope of the Acts. Similar issues are also evident in other judgments of the Irish courts under the Acts. Moreover, the complexity of the legislative regimes is increased in many areas by the significant but incomplete web of overarching obligations under European Union law. These factors combine to make interpretation and application of the Acts a challenging task.

The challenging nature of the task can be seen in the evolving case law of the Equality Tribunal as much as in the jurisprudence of the Irish courts. The Tribunal's case law has become increasingly detailed and sophisticated over the past ten years: from the wide range of jurisdictional issues which arise through the assessment of the burden of proof to the applicability of different grounds of discrimination, exemptions or defences, and the availability of redress, there are few elements of such a case which are entirely straightforward. While this evolving case law is a welcome development in many respects, the potential difficulty and danger it presents is that, as the case law becomes more and more detailed and sophisticated, it becomes less and less accessible to complainants and respondents alike who appear before the Tribunal with or without representation. Of course, the danger is particularly acute for those who appear before the Tribunal without representation of any kind. The investigative nature of the Tribunal's function can only go so far in order to counteract difficulties of this kind, which may be an inevitable consequence of specialised decision-making in a complex field. The reality is that, while it may have been intended that the Acts would make equality law and its institutional framework as accessible as possible to those directly affected by discrimination, the objective of accessibility for legislation such as the Employment Equality Acts and the Equal Status Acts is quite difficult to attain in practice.

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At the time of writing, the most significant reform of the institutional framework of Irish equality law since the introduction of the Acts is underway, with the merging of the Equality Authority and the Irish Human Rights Commission into the Irish Human Rights and Equality Commission and the replacement of the Equality Tribunal by the Workplace Relations Commission. Although these reforms may bring about significant changes in the way in which equality complaints are processed, the case law which has developed over the last decade or so – including during the period under review in this report, 2008 to 2011 – will lay the foundations for the future development of Irish equality law. This case law will continue to serve as a valuable resource and reference point for so long as the Employment Equality Acts and the Equal Status Acts remain on the Irish statute book.



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