NEW GROUNDS OF NON DISCRIMINATION - THE IRISH EXPERIENCE

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As European equality lawyers consider the implications of extending the principles of equal treatment to the new grounds of racial and ethnic origin, religion, disability and age, they may very well look to recent Irish experience to see how such concepts operate in practice.

In this paper I will set out the background to the new Irish equality legislation, explain how discrimination in defined in Irish law and attempt to give a flavour of how some of the new principles of equal treatment have been applied in practice.

1. The Background to the Irish Legislation:

Prior to Ireland joining the European Communities there was no strong tradition of protection of equal treatment, either in relation to the workplace or the provision of goods and services. Insofar as the principle of equal treatment existed it was it the context of the right to equality before the law in the Irish Constitution[1]. This had been interpreted by the Courts in a limited manner and had seldom been used to develop the rights of Irish women or minorities in Irish society.

Upon joining the European Communities in 1973 the principle of equal pay was introduced in Ireland for the first time. The Anti Discrimination (Equal Pay) Act of 1974 was passed in order to implement the European Equal Pay Directive 1973. This was followed by the Employment Equality Act of 1977 to ensure the implementation of the Equal Treatment Directive 1976. These two pieces of legislation, along with the jurisprudence of the European Court of Justice, formed the body of Irish equality law

until the enactment of the Employment Equality Act of 1998. Like the European Directives they were intended to implement, the legislation limited its scope of protection to discrimination on grounds of sex and marital status in the workplace.

In 1996 radical new legislation was proposed by the Irish government which, for the first time ever, brought Irish equality law beyond the protections of European law. The 1996 Employment Equality Bill was a progressive piece of legislation which essentially took the existing principles of discrimination on grounds of sex and marital status and extended that protection to seven new grounds of family status, religion, disability, age, sexual orientation, race and membership of the Traveller community. The intention at the time was to extend that same protection beyond the workplace to the provision of goods and services by separate legislation. Ultimately the Employment Equality Bill of 1996 was struck down as unconstitutional by the Supreme Court[2] on three separate grounds, two of which were essentially technical in nature. The only significant aspect of the bill to be struck down by the Supreme Court as unconstitutional related to the expense to which an employer could reasonably be put in order to make reasonable accommodation for a disabled employee. The Supreme Court held that to require an employer to bear what could be significant costs in providing facilities for disabled persons was an unjust attack on the employer's constitutionally protected property rights.[3]

The legislative response to the Supreme Court's decision was to simply reintroduce the same legislation with the three impugned sections removed. Thus the Employment Equality Act of 1998 was passed and became operative in Irish Law on the 19th of October 1999.

The Employment Equality Act of 1998 was followed with the Equal Status Act 2000 which applied the same nine grounds of non-discrimination to the provision of goods and services.

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[1] Article 40.1 of Bunreacht na hEireann (the Irish Constitution) states: "All citizens shall, as human persons, be held as equal before the law."
[2] Pursuant to Article 26 of Bunreacht na hEireann (the Irish Constitution).
[3] In re: Article 26 and the Employment Equality Bill 1996 [1997] 2IR 321.

The impending date for implementation of Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[4] and Council Directive establishing a general framework for equal treatment in employment and education[5] will necessitate some changes and amendments to the existing Irish legislation. I understand it is proposed to implement these changes by way of amendments to the existing legislation. That method of implementation would suggest that the government does not envisage Ireland's obligations pursuant to the two new Equality Directives to be particularly onerous in the light of the Employment Equality Act 1998 and the Equal Status Act 2000.

Ireland has moved on significantly since the early 1970's when the prospect of equal pay for men and women was greeted with near horror!. We now find ourselves to the forefront of developments in equality law throughout the European Union. Our fellow Member States rightly look to the Irish experience for some indication as to how the new grounds of non-discrimination under the recent Equality Directives will affect both the workplace and, to a more limited extent, the provision of goods and services within their national jurisdictions.

2. Defining Discrimination:

2.1 The Discriminatory Grounds

The discriminatory grounds covered by the Irish Legislation are defined in virtually identical terms at section 6 of the Employment Equality Act of 1998 and Section 3 of the Equal Status Act 2000. They are as follows:-

a) That one is male and the other is female (the *"gender ground")*

b) That they are of different marital status (the *"marital status ground"*),

c) That one has family status and the other has not. (the *"family status ground"*),

[4] Directive 2000/43 EC (June 29th 2000).

d) That they are of different sexual orientation (the *"sexual orientation ground"),*

e) That one has a different religious belief from the other or that one has a religious belief and the other has not (the *"religion ground"*),

f) That they are of different ages (the *"age ground"*),

g) That one is a person with a disability and the other either is not or is a person with a different disability (the *"disability ground"*),

h) That they are of different race, colour, nationality or ethnic or national origins (the *"ground of race"*),

i) That one is a member of the Traveller community and the other is not (the *"Traveller community ground"*).

The legislation provides for a number of different types of unlawful discrimination,, essentially following traditional definitions of discrimination.

2.2 Direct Discrimination.

Neither the Employment Equality Act of 1998 nor the Equal Status Act 2000 expressly refers to direct discrimination. However, both Acts provide that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, on any of the discriminatory grounds.[6]

2.3 Indirect Discrimination.

[5] Directive 2000/78 EC (November 27th 2000)
[6] Section 6(1) of the Employment Equality Act of 1998 and Section 3(1)(a) of the Equal Status Act 2000.

Indirect discrimination is expressly referred to in a number of provisions in the Employment Equality Act of 1998. The multiplicity of definitions of indirect discrimination is confusing and unhelpful.[7] The definitions are all essentially similar and can be illustrated by reference to the first one that appears in the Act at Section 19(4) which provides for the principle of indirect discrimination on grounds of gender in relation to pay.

> *"Where a term of a contract or a criterion applied to employees (including A and B)-*
>
> *a) Applies to all the employees of a particular employer or to a particular class of such employees including A and B,*
> *b) Is such that the remuneration of those employees who fulfil the term or criterion is different from that of those who do not,*
> *c) Is such that the proportion of employees who are disadvantaged by the term or criterion is substantially higher in the case of those of the same sex as A than in the case of those of the same sex as B, and*
> *d) Cannot be justified by objective factors unrelated to A's sex.*
>
> *The, for the purpose of sub-section (1), A and B shall each by treated as fulfilling or, as the case may be, as not fulfilling the term or criterion, whichever results in the higher remuneration."*

The features of indirect discrimination as defined in the Irish legislation are that a practice requirement or criterion is applied which disadvantages one group of employees as versus another group by reference to one of the discriminatory grounds, that a substantial proportion of employees are disadvantaged by that criterion and that the criterion cannot be justified by objective factors unrelated to the discriminatory ground in question.

[7] Definitions of indirect discrimination appear at Sections 19(4), 22(1), 29(4) and 31 of the Employment Equality Act of 1998. Indirect discrimination is not specifically referred to in the Equal Status Act 2000 but the definition of discrimination at section 3(1)(c) is clearly one of indirect discrimination.

2.4 Harassment.

For the first time ever the Employment Equality Act of 1998 and the Equal Status Act 2000 make express provision outlawing harassment on each of the nine discriminatory grounds both in the workplace and in relation to the provision of goods and services. Unlike the definition of harassment in the new Directives which refers to an intimidating, hostile, humiliating or offensive environment, the definitions of harassment in the Irish legislation are more focused on the treatment to which the individual victim is subjected. Sexual harassment is defined separately from harassment on the other eight discriminatory grounds. The provisions on sexual harassment and non-sexual harassment are more extensive in the Employment Equality Act of 1998 but those from the Equal Status Act 2000 provide a reasonable summary of the Irish approach to defining harassment. Section 11(4) defines sexual harassment as taking place where a person:-

> *"a) Subjects another person (the victim) to an act of physical intimacy,*
>
> *b) Requests sexual favors from the victim, or*
>
> *c) Subjects the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material,*
>
> *Where-*
>
> *i) The act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to him or her or*
>
> *ii) The victim is treated differently by reason of his or her rejection of or submission to, as the case may be, the act, request or conduct or it could reasonably be anticipated that the victim would be so treated."*

Section 11(5) provides that harassment, being harassment on one of the other 8 non-discriminatory grounds, takes place where:

> *"A person subjects another person ("the victim") to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the victim is based on any discriminatory ground and which could reasonably be regarded as offensive, humiliating or intimidating to him or her".*

Whilst the new Directives provide that the concept of harassment may be defined in accordance with the national laws and practice of the Member States [8] it may very well be that the Irish definition could be considered overly objective to be consistent with the European definition. Whether or not permissible for a Member State to define harassment as something that can reasonably be regarded as offensive, humiliating or intimidating to the victim awaits further consideration.

2.5 Victimization.

As well as outlawing direct and indirect discrimination, both the Employment Equality Act of 1998 and the Equal Status Act 2000 make specific provision for a person who has been penalized or victimized for having lawfully opposed an unlawful act, for having taken proceedings or having given evidence in such Proceedings or having indicated an intention to take Proceedings.

3. The Scope of the Principle of Non Discrimination

The provisions of the Employment Equality Act of 1998 have a broad Application and cover conditions of employment, access to employment, training or experience in

[8] Article 2(3) of both Directives.

relation to employment, promotion or re-grading or classification of post.[9] The scope of the Employment Equality Act of 1998 is broadly similar to that of the Council Directive for Equal Treatment in Employment and Education.

The Equal Status Act 2000 has an even broader scope. Section 5(1) of the Act 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 provided can be availed of only by a section of the public".*

That application of those principles of non-discrimination are at least as wide at that provided for in Article 3 of the Council Directive implementing the principle of equal treatment and the provisions relating to employment as covered by the Council Directive for Equal Treatment in Employment and Education. It may even be that the Irish provisions go further than these European provisions in relation to racial or ethnic origin in that Section 5(1) of the Equal Status Act 2000 expressly states that the goods or services in question do not have to be for consideration.

The extent to which the goods and services are covered by the principle of non-discrimination as defined in the Equal Status Act 2000 is limited somewhat by the various exemptions provided for in Act. For example, as a result of lobbying from the insurance industry Section 5(2)(d) provides that differences in the treatment of persons in relation annuities, insurance policies or any other matters related to the assessment of risk where the treatment is affected by reference to:-

> *"i) Actuarial or statistical data obtained from a source from which it is reasonable to rely, or*
>
> *ii) Other relevant underwriting or commercial factors, and*

[9] Section 8(1) of the Employment Equality Act of 1998.

iii) is reasonable have regard to the data or other relevant factors."

A number of other specific exemptions are also provided in relation to such issues as privacy, services provided for a religious purpose, sporting services, reasons of authenticity, aesthetics, tradition or custom or a disposal of goods by will or gift.[10]

Clearly, the scope of the Equal Status Act 2000 goes considerably beyond that of the new European Equality Directives in that the principle of non-discrimination in relation to the provision of goods and services is not limited to discrimination on grounds of racial or ethnic origin but applies across the board to all of the nine grounds of non-discrimination.

4. The Non Discriminatory Grounds in Practice

4.1 Discrimination on Grounds of Disability

4.1(i) Defining Disability

Disability is given an identical definition in both the Employment Equality Act 1998 and the Equal Status Act 2000 as follows:-

"a) The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

b) The presence in the body of organisms causing or likely to cause, chronic disease or illness,

c) The malfunction, malformation or disfigurement of a person's body,

[10] Section 5(2) Equal Status Act 2000.

d) A condition or malfunction which was also in a person learning differently from a person without the difficulty or malfunction, or

e) A condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behavior,

And shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person".

To date most of the disability cases that have come before the Equality Tribunal and Labour Court in Ireland have not had to consider whether or not a particular complaint comes within the definition of disability as provided for in the Act as it has usually been accepted by both parties that it does. Interestingly, in the very first case in which discrimination on grounds of disability was alleged, a complaint of back pain was held to come within the definition.[11]

It is very clear from the broad definition of disability provided for in the Irish legislation that it is a medical definition rather than a functional definition, i.e. that it focuses on the complaints suffered by the person alleging discrimination rather than on how those complaints present an obstacle to that individual's full participation in the workplace or in availing of goods or services. This is in stark contrast to the definitions of disability in other jurisdictions. For example the UK Disability Discrimination Act 1995 defines a disability as either a physical or mental impairment which has a substantial and adverse and long term effect on a person's ability to carry out normal day to day activities.[12] A wide range of medical complaints have been found to come within that definition of disability in the UK including conditions such as clinical depression, chronic fatigue syndrome, gender identify dysphoria resulting from a gender reassignment, epilepsy, mental illness, diabetes and dyslexia.

[11] Anna Martinez -v- Network Catering [2001] ELR.

4.1(ii) Reasonable Accommodation

A near universal concept in disability discrimination law worldwide is that of *"Reasonable Accommodation"*. This principle is set down in Article 5 of the Council Directive for Equal Treatment in employment and education which provides as follows:-

> *"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the member state concerned".*

The concept of reasonable accommodation is included in the Irish legislation along with the principle that an employer shall not be obliged to recruit or promote a person to a position if they are not fully competent of undertaking the duties attached to that position. The relevant principles in relation to employment are set out at Section 16 of the Employment Equality Act 1998 which provides as follows:-

> *"(1) Nothing in this Act shall be construed as requiring any person to recruit or promote and individual's true position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual-*
>
> *a) Will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept*

[12] Section 1(1) of the Disability Discrimination Act 1995.

(or as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or

b) Is not (or as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

(2) In relation to-

a) The provision by an employment agency of services or guidance to an individual in relation to employment in a position,

b) The offer to an individual of a course of vocational training or any related facility directed towards employment in a position, and

c) The admission of an individual to membership of a regulatory body or into a profession, vocation or occupation controlled by a regulatory body,

Subsection (1) shall apply, with any necessary modification, as it applies to the recruitment of an individual to a position.

(3) a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and by fully capable of undertaking, those duties.

b) *An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to them.*

c) *A refusal to provide special treatment or facilities to which (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.*

The concept of reasonable accommodation is applied to the provision of goods and services by section 4 of the Equal Status Act 2000 which provides as follows:-

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

(2) A refusal or failure to provide the special treatment or facilities to which sub-section (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.

(3) A refusal or failure to provide the special treatment or facilities to which sub-section (1) refers does not constitute discrimination if, by virtue of another provision of this Act, a refusal or failure to provide the service in question to that person would not constitute discrimination.

(4) Where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination."

The concept of *"nominal cost"* was inserted in the legislation as a result of the decision of the Supreme Court to strike down the Employment Equality Act of 1996 as unconstitutional. The Supreme Court had found that an unrestricted duty to accommodate amounted to an unconstitutional interference with the property right of the employers. They held that the provisions of the Bill attempted to:-

> *"transfer the cost of solving one of society's problems onto a particular group. The difficulty the Court finds with this section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work".*[13]

At the time the concept of a *"nominal cost"* was criticized by academic commentators as depriving the legislation of any real effectiveness. However, it is interesting to note in the American context the results of a 1982 study which concluded that 51% of reasonable accommodations in the workplace cost nothing and that a further 30% cost between $100 and $380 per employee.[14]

The case of An Employee v A Local Authority[15] provides a useful indication of what might be considered to be, or not to be, a "nominal cost" in making reasonable accommodation for a disabled employee. The claimant in that case commenced work with the respondent on the 2nd of May 2000 following his placement on a panel for clerical officer registered or entitled to be registered with the Irish National Rehabilitation Board. Less than six months into his employment he was informed that his contract was terminated due to continued unsatisfactory performance. He was offered alternative employment in a non-administrative area of the local authority. He subsequently resigned from that post in March of 2001 to take up a clerical position in the Civil Service. He claimed that the respondent employer did not explore or offer to

[13] Hamillton C.J. at 367.
[14] Quinn McDonagh and Kimber Discrimination Law in the US, Australia and Canada (1992) at page 63. The exact scope of "nominal cost" has been considered by an equality officer in the case of An Employee -v- A Local Authority [2002] ELR 159.
[15] [2002] ELR 159.

him any special treatment or facilities as permitted by the Employment Equality Act and as required by Section 16(3) of the Act (outlined above). The employer argued that the claimant was provided with constant on the job training and coaching and argued that his concentration and performance levels were inadequate to such an extent that he was considered unsuitable for a clerical position.

The Equality Officer analysed the relevant provisions at Section 16 of the Employment Equality Act of 1998 as follows:-

> *"The Act therefore does not require an employer to recruit, train or retrain in employment a person who is not fully competent or capable to undertake the duties attached to a post. However, it also provides that a person with a disability must not be regarded as other than fully competent and capable of performing the duties attached to a post if the provision of special treatment or facilities would assist this objective. An employer is obliged to do all that is reasonable to provide such treatment or facilities unless its provision would give rise to a cost to the employer which exceeds the nominal cost".*

The Equality Officer considered a proposal that had been made by the employer's external advisors that the claimant be provided with a personal job coach. The Equality Officer concluded that had a professional job coach been engaged by the respondent to assist the claimant, he would have been able to carry out the functions attached to his post in a capable and competent manner. Therefore he found that the respondent employer did not reasonable assess this option.

It is interesting to examine the Equality Officer's views in relation to the cost of retaining a professional job coach. The Equality Office decided that the services of a professional job coach would have been required at the most for a period of two to three months. He then went on to look at what was meant by the term *"nominal cost"* which is not actually defined in the Act. For assistance he looked to the parliamentary debates on the legislation and found that the Minister of State has stated at one stage that:-

> *"Nominal may not be the same for every employer or enterprise and the term may be interpreted in a relative sense. What is nominal for a large enterprise*

employing hundreds of people will not be the same as that for a small business with two or three employees".

The Equality Officer also had regard to the judgement of the Supreme Court in its consideration of the constitutionality of the Employment Equality Bill 1996. In that part of its judgement dealing with reasonable accommodation the Court has stated:-

> *"That the Bill has the totally laudable claim of making provisions for such of our fellow citizens as are disabled … It requires [an employer] to bear the cost of all special treatment and facilities… unless the cost of the provision of such treatment would give rise to undue hardship to the employer. There is no provision [in the Bill] to exempt small firms, or firms with a limited number of employees".*

The Equality Officer concluded that the apparent distinction drawn by the Supreme Court between employers of different size and level of resource refers equally to employers in both the public and private sections and is still valid. He also found that it is clear from the Minister For State's comments that the legislature is understanding on the issue *"nominal cost"* was that all employers would not be treated in an identical fashion and that the particular circumstances would have to be evaluated in each case. He concluded that the costs associated with the provision of a professional job for a period of two to three months could not be considered as anything other than nominal to a large public sector organization.

In another case in which discrimination on grounds of disability was alleged against a relatively small but well resourced private employer, the Labour Court found that provision of specialized headset for an employee with hearing difficulties which cost approximately €450 could not be considered as anything other than *"nominal"*.[16]

Thus it would appear that in considering what constitutes a nominal cost, regard will be had to the size of the organization and the resources available to it.

One of the difficulties with the provisions of the Employment Equality Act of 1998 is that the concept of reasonable accommodation is not given any particular meaning and it is largely left up to the courts to decide what level of obligation this imposes on an individual employer. This is in contrast to the provisions of the comparable UK and US legislation where the concept of reasonable accommodation is given some meat. For example, the 1995 UK Disability Discrimination Act includes a list of steps that it may be reasonable for an employer to take including:-

?? Making adjustments to a premises.

?? Allocating some of the employee's duties to another person.

?? Transferring him or her to an existing vacancy.

?? Altering his or her working hours.

?? Assigning him or her to a different place of work.

?? Allowing time off for rehabilitation, assessment or treatment.

?? Acquiring or modifying any equipment.

?? Modifying instructions or reference manuals.

?? Modifying procedures for testing or assessment.

?? Providing a reader or interpreter.

?? Providing supervision.

Having regard to the manner in which the concept of *"nominal cost"* has been applied in Ireland, it is entirely possible that steps such as those set out in the UK Act could be deemed to be included in the employer's obligations to make reasonable accommodation in a manner that would not involve anything more than a nominal cost to the employer. Obviously the size and resources available to the individual employer will also be taken into account.

4.1(iii) The Employee's Ability to carry out their duties

A considerable amount of judicial consideration has been given to the attempts made by an employer accused of discrimination on grounds of disability to establish the exact

[16] A motor company -v- A Worker ED 01/40 determination no. 026.

nature of the disability and precisely whether or not the employee is competent to carry out the duties attached to the position. An example of this arose in the case of A Garden Centre -v- A Worker[17] where the claimant was employed by the respondent as a trainee horticulturist mechanic from the 12th of March 2001 until the 4th of September 2001 when he was dismissed. During that time he suffered from an illness which could be controlled by medication. His employers were not aware of this until some six months into his employment he went out for a social evening with his work colleagues and as a result of consuming alcohol he behaved in an inappropriate manner. Once his illness came to the attention of his employers he was immediately dismissed. What is particularly surprising is that the employer actually admitted in the course of the hearing that had he known that the claimant has a disability he would never have hired him and as soon as he found out his medical history he dismissed him!

In its determination the Labour Court pointed out that no evidence had been advanced to indicate that the claimant was not capable of fulfilling the duties of the post for which he was employed. The Court criticized the employer for having made no attempt to ascertain the exact nature of the claimant's disability and for having dismissed the claimant on the phone without having any direct discussions or giving the claimant an opportunity to present his case. In those circumstances the Court had little difficulty in finding that the employer did discriminate against the claimant on grounds of his disability. Compensation of €7,500 was awarded.

Another example of an employer acting precipitously in dismissing a claimant before receiving any medical evidence and without undertaking any form of safety assessment was the case of A Computer Component Company -v- A Worker[18] The claimant had been working in a temporary capacity and after some six weeks work was informed that her performance was satisfactory and was offered a permanent contract. She was required to go under a medical and it was only at that stage that it came to her employer's attention that she suffered from epilepsy. However, the medical examination found that her condition was well under control and presented no difficulties for the type of work in which she was engaged. Nevertheless she was dismissed on medical grounds. The Labour Court had no difficulty in finding that she was dismissed by reason

[17] ED/02/17 determination no. 0211.

of her disability which constituted discrimination within the meaning of the Employment Equality Act of 1998. The Labour Court stated that:-

> *"It is abundantly clear that [the employer] did not give the slightest consideration to providing the claimant with reasonable special facilities which would accommodate her needs an so overcome any difficulty which she or the respondent might otherwise experience".*

Compensation of €19,000 was awarded.

A more complicated situation arose in the case of A Health & Fitness Club -v- A Worker[19] where the claimant was a childcare worker who suffered from anorexia and bulimia which necessitated her being hospitalized on a number of occasions throughout her employment. She also had a number of periods of sick leave. She was not paid during her sick leave and kept her employers informed of her situation. Some eighteen months into her employment she became depressed and requested more time off from her employers as she wished to be readmitted to hospital. At that point in time the employer had formed the view that she was a danger to herself and the young children in her care. She was summons to a meeting at which she was informed that she was being dismissed. The employer did not obtain any medical or psychiatric advice in relation to her disorder and they did not undertake any form of risk assessment in relation to her condition.

The Labour Court concluded that the claimant's dismissal arose wholly or mainly from the employer's belief that the disorder from which the claimant suffered impaired her ability to carry out the duties for which she was employed. However, for the employer to form a bona fide belief that the claimant is not fully capable within the meaning of Section 16(1) of performing the duties for which they are employed, the employer would normally be required to make adequate to establish fully the factual position in relation to the employee's capacity. The Court suggested that an employer must ensure that they are in full possession of all of the material facts concerning the employee's condition and that the employee is given fair notice that the question of their dismissal for incapacity is

[18] [2002] ELR 124.

being considered and must be allowed an opportunity to influence that decision. The Court specifically suggested that this would involve looking at the medical evidence available to the employer either from the employee's own doctors or obtained independently. Having done this the employer must go on to consider what, if any, special treatment or facilities may be available by which the employee can become fully capable as required by Section 16(3). Whilst the Court accepted, on the facts of this case, that an employer is entitled to take account of possible dangers occasioned by disabilities from which an employee suffered, they criticized the employer for having made no effort to obtain a prognosis of the claimant's condition or having discussed the situation with her before taking a decision. Whilst the Court set out a number of courses of action that could have been open to the employer, essentially the Court found that they had discriminated against the claimant for having failed to even consider her medical condition in a properly informed manner or to have considered any treatment or facilities that could have been provided to her in the wake of a reasonable accommodation. In those circumstances the Court found that the claimant had been dismissed wholly or mainly because of her disability and that they were not satisfied that she was not fully capable of continuing to perform the duties for which she was employed within the meaning of Section 16(3) of the Act. Compensation of €13,000 was awarded.

Clearly there are significant implications for an employer who fails to consider what options are open to them to provide reasonable accommodation for a disabled employee. It may very well have been that, upon making the relevant inquiries, the employer may find it impossible to provide reasonable accommodation to the employee. However, a failure to make the inquiries or to try and avail of whatever opportunities may be there to seek special treatment facilities for their employees will almost definitely expose them to liability.

4.1(iv) Other examples of unlawful Disability Discrimination

[19] CD/02/59 termination no. 037.

Disability discrimination has also been successfully argued in relation to access to employment. In the case of Harrington -v- East Coast Area Health Board[20] the claimant attended for interview for the position for senior pharmaceutical technician. Prior to the interview she informed her prospective employers that she was a wheelchair user. She was informed that the building was wheelchair accessible. When she arrived the wheelchair access was blocked by cars and she had to get access to the building through an unsuitable entrance. The interview had to take place in a corridor as the designated interview room was inaccessible due to the lift being out of order. Whilst the Equality Officer had no difficulty in finding that the claimant had not been provided with proper interview facilities and had therefore been discriminated against on grounds of her disability, she was awarded relatively small compensation of £1,000 (€1,270). It would appear that the reason for the low level of compensation was due to the opinion of the Equality Officer that the discrimination which she had suffered was not the reason why she did not get the job.

In one of the few disability discrimination cases in relation to the provision of goods and services, the Equality Officer found that a public house discriminated against a customer on the grounds of his disability in refusing to allow him access to the premises accompanied by his guide dog.[21] The claimant had intended to gain access to a public house at 9.00pm one evening and was told that his guide dog could not accompany him as food was served in the premises at lunch time and dogs were not allowed on the premises pursuant to the Food Hygiene Regulations of 1950. The Equality Officer found that the respondent failed to do all that was reasonable to provide the claimant with special treatment or facilitate the needs of a person with a disability contrary to Section 4 of the Equal Status Act. Their offer to have the dog minded at the door of the premises was considered to be insufficient. The company's attempt to rely on the Food Hygiene Regulations was unsuccessful as the Equality Officer found that the regulations were not sufficiently clear to constitute a requirement for the dog's exclusion, that the regulations did not specifically apply to the claimant's guide dog as she was on a leash and in any event that the Department of Health circulars provide that guide dogs can be exempted from the regulations. Not only was the respondent directed to pay compensation of €3,000, they were also required to place a notice at the entrance to the

[20] TEC E2002 - 001

premises stating that people with disabilities including people with guide dogs are welcome to the premises and to train their staff in relation to the provisions of the Equal Status Act 2000 and the relevant regulations and circulars in relation to food hygiene and guide dogs.

5. Discrimination on the Ground of Race

The definition of discrimination on grounds of race in Irish legislation is considerably wider than that set down in the Council Directive implementing the principle of equal treatment which expressly excludes difference of treatment based on nationality. In contrast the Irish definition applies where a person is treated differently on grounds of race, colour, national or ethnic or national origin.

Interestingly it was decided to make specific provision for discrimination on grounds of membership of the Traveller Community even though it could be argued that this group is a distinctively ethnic group which comes within the definition of the ground of race. It may very well be that the European Court of Justice will, itself, develop the concept of discrimination on grounds of racial or ethnic origin to extend to membership of the Traveller Communities. Such an approach has already been taken in the UK in the case of CRE -v- Dutton[22] where the Court of Appeal concluded that Gypsies were an ethnic group on the basis that they were a wandering race of Hindu origin, that they had a long shared history, common geographical origin, their own customs, language, folk tale and music. The Court compared this to Travellers such as New Age Travellers which they found were not an ethnic group. This is a point that could become relevant in the Irish context if members of the Traveller Community are deemed to enjoy protection not only pursuant to the Irish legislation but also pursuant to the Council Directive implementing the principle of equal treatment.

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[21] John Roche -v- Alabster Associates Ltd, t/a Madigans [2002] ELR 343

The only Irish case to date in which a claim of discrimination on grounds of race has been successfully brought was that of St James Hospital -v- Dr Bennett Kim Heng Eng.[23] This was an equal pay case involved a Malaysian doctor who was awarded his degree in medicine from Trinity College in Dublin in June 2000. Before qualifying as a medical practitioner he was required to obtain a certificate of experience in the practice of medicine from a teaching hospital which necessitated a period of internship in an approved hospital. The number of paid intern posts available to the graduates of Trinity College in June 2000 was limited and was less than the total number of graduates. The posts were allocated to graduates on the basis of examination results. The claimant, having finished 81st out of 85 graduates was not assigned to any of the funded posts. However, as well as exam results, the nationality of the graduate was relevant in the Irish citizens and citizens of other EEA countries were given priority over citizens of non EEA countries. This was because a work permit could not be obtained for the graduate who was a citizen of a non EEA country in respect of a paid position where a suitable candidate of EEA nationality was available.

In order to provide for the excess of graduates above the number of paid internships available, a number of supernumerary posts were created. These were effectively unpaid intern posts. The claimant was employed in one of these supernumerary posts rather than a funded post, having come 82nd in the examinations out of a total of 85 graduates and being a citizen of a non EEA country. The employer sought to justify the discrimination in relation to his pay by relying on the fact that the difference in treatment was on grounds other than race, as is permitted by the Act.

The reason for which the claimant was not receiving equal pay was because he was working in a supernumerary intern post as versus a paid intern post. In those circumstances the Court concluded that the difference in treatment arose from a criterion which was race neutral on its face and is a ground other than a discriminatory ground within the meaning of the Act. Therefore it rejected the argument that the claimant had suffered direct discrimination in terms of the Act.

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[22] [1989] QB 783

The Court went on to consider the issue of indirect discrimination. The Court was satisfied that the definition of race including race, colour, nationality or ethnic or national origins or any combination of those factors was sufficiently broad to bring citizenship of an EEA country or non citizenship of such countries within the scope of the race grounds. Having examined the statistics the Court was satisfied that all graduates of EEA nationality were appointed to funded posts and that only non EEA nationals were appointed to supernumerary posts. In those circumstances it was quite clear that the proportion of intern doctors who can fulfill the criterion for being paid full remuneration, being occupancy of a funded post, was substantially smaller in the case of non EEA nationals such as the claimant than in the case of citizens of EEA countries. Therefore this criterion would be discriminatory if it could not be justified as being reasonable in all of the circumstances. The Court considered the justification put forward by the employer, specifically the fact that a work permit could not be obtained for the claimant in respect of a funded post where a suitable candidate of EEA nationality was available. The employer sought to rely on a UK decision relating to a claimant's right to enter employment. The Court refused to accept that the UK case provided any authority for the proposition that a person in respect of whom a work permit has issued can be expected to work for lower pay than a person for whom a work permit is not required. The Court concluded that the work permit scheme could not be intended to offset or supplant the clear obligations of an employer under the Employment Equality Act of 1998. Therefore the Court rejected the grounds on the work permit scheme as reasonable justification for paying the claimant less remuneration than his chosen comparators.

The employer also sought to make an essentially economic argument based on budgetary constraints. Not surprisingly this was rejected by the Court as virtually every claim for equal pay could be met with the defence that the employer had not made sufficient financial provision to cover their obligation. If this were to be accepted as sufficient to relieve the employer of the obligations imposed by the Act, the act would be rendered ineffective or nugatory.

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[23] ADE/02/4 Determination No. 023.

The Court concluded that the claimant had been discriminated against in relation to his pay on grounds of his race and awarded back pay for a period of three years.

6. Discrimination Against Members of the Traveller Community in Relation to Access to Goods and Services.

By far and away the majority of claims presently being brought before the Equality Tribunal in Ireland are being taken by members of the Traveller Community alleging discrimination in relation to access to goods and services specifically in relation to access to licenced premised. In the first six months of 2002 almost 80% of the claims under the Equal Status Act were in relation to discrimination on grounds of membership of the Traveller Communities. During that period of time out of a total of 520 claims brought before the Equality Tribunal both under the Employment Equality Act 1998 and the Equal Status Act 2000 complaints against pubs, hotels and night clubs amounted to 459 claims. Whilst some of these claims have been successfully defeated by the respondent pub, a great many of them have been successful for the claimants.

One example of such a case is that of Michael McDonagh -v the Castle Inn, Birr[24] The claimant claimed to have been discriminated against on grounds of his membership of the Traveller Community having been denied service by the proprietors of the Castle Inn, Birr. The claimant gave evidence to the effect that he had visited these premises on a number of occasions over the years but, on each occasion had been refused service. The evidence that was common between the parties was that when the claimant approached the bar and asked for a drink he was informed by the manager of the premises that he was not serving him. The manager alleged that, in his view, the claimant had drink taken and that he had refused to serve him because it was his policy not to serve people who appeared to be under the influence of alcohol. On the following day the claimant entered the premises at lunchtime and again sought to be served. He was refused on that occasion by the manager's wife who alleged that she had refused them because they had drink taken. The manager also sought to justify his conduct by

[24] [2002] ELR 355.

reference to his policy of restricting the number of Travellers permitted entry to the pub to a limited small number because of an incident that had occurred some years previously when a group of Travellers had caused damage to the pub.

The Equality Officer, in seeking to establish whether the claimant had established a prima facie case, stated that there were three key elements which needed to be established to show that a prima facie case existed which were as follows:-

> *"a) Membership of a discriminatory ground (eg. the Traveller Community ground);*
>
> *b) Evidence of specific treatment by the respondent;*
>
> *c) Evidence that the treatment received by claimant was less favourable than the treatment that someone not covered by that ground, would have received in similar circumstances.*

He went on to say:-

> *"If and when those elements are established, the burden of proof shifts, meaning that the difference in treatment is assumed to be discriminatory on the relevant grounds. In such cases the claimant does not need to prove that there is a link between the difference and the membership of the ground. In such cases the claimant does not need to prove that the there is a link between the difference and the membership of the grounds, rather the respondent has to prove that there is not".*

Having regard to the manager's admission that he operated a quota system in relation to members of the Traveller Community which he did not operate for settled people, the Equality Officer stated that he was satisfied that Travellers are treated less favourably than non Travellers in this pub and that a prima facie case of discrimination has been demonstrated, resulting in the burden of proof shifting to the respondent. The Equality Officer considered the provisions of Section 15(1) of the Equal Status Act 2000 which provides that nothing in the Act prohibiting discrimination shall be construed as

requiring a person who provides services to another person in circumstances which would lead a reasonable individual, having responsibility, knowledge and experience of the person, to the belief, on grounds other than discriminatory grounds, that the provisions of services to the customer would produce a substantial risk of criminal or disorderly conduct or behavior or damage to property at, or in the vicinity of the place in which the services are sought. The Equality Officer concluded that the respondents had failed to produce any evidence to convince him that the claimant himself had previously been involved in disorderly conduct and thus could be considered a risk on the occasions in which he sought service. Therefore he refused to accept that the respondents were entitled to refuse admission to the claimant under Section 15(1) of the Act. In relation to the allegation that the claimant had drink taken on the occasion on which he was refused, while he admits to having drink taken at 10.30pm on the evening in question, the Equality Officer refused to accept that he had sufficient drink taken to make the manager believe that he might be a threat to himself personally or to other customers. The Equality Officer concluded that the manager could not have had any other reason for refusing the claimant service other than he recognized him as a Traveller. He therefore had no hesitation in finding that the respondents were guilty of discrimination on grounds of membership of the Traveller Community and directed that they pay the claimant compensation of €1,270 for the embarrassment and humiliation suffered by him. He also directed that the respondent immediately review his practices to ensure compliance with the Equal Status Act 2000 in respect of persons seeking service in his pub. Finally, he recommended that the manager and publicans in general expedite the drawing up of a universal code of practice emphasizing their commitment to non-discriminatory practices and setting out clearly the rules which they apply to all customers with regard to admission and to the behavior expected from customers when on the premises.

7. Conclusions

These are interesting times for European equality lawyers. The Irish experience suggests that a vast amount of litigation is going to brought upon the implementation of the new Equality Directives. It is clear that a considerable onus now rests on employers to make reasonable accommodation for disabled employees, which may not involve much financial outlay but may involve being able to demonstrate having made an effort to investigate what options and services are available to both employer and employee in order to enable the employee to do their job.

Other issues are less clear and await further judicial consideration. For example what precisely is the status of pre-employment medicals? In what circumstances can an employer seek information about an employee's medical history? How will the rules on work permits for non-nationals operate alongside European principles of non-discrimination on grounds of racial and ethnic origin? Will members of minority groups such as Irish travelers, new age travellers and gypsies come within the principle of non-discrimination on grounds of racial or ethnic origin?

Equal treatment in the workplace between men and women is now a well established principle. Soon we will become just as accustomed to new principles of equal treatment between different minority groups, but for the moment there is a learning curve waiting for all of us!