

# **THE RACE AND FRAMEWORK DIRECTIVES: REMEDIES**

## **THE ACADEMY OF EUROPEAN LAW**

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In this paper I intend to examine the provisions pertaining to Redress and Remedies in the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>1</sup> and the Council Directive establishing a general framework for equal treatment in employment and occupation<sup>2</sup> (hereinafter referred to as the Race Directive and the Employment Directive respectively). I will look at the position in Ireland in terms of its corresponding provisions and how they are implemented in practice under existing legislation, namely, the Employment Equality Act 1998 and the Equal Status Act 2000. It is useful to look at the situation in Ireland, as it was somewhat ahead of itself in implementing these pieces of equality legislation. It has built up considerable case law in the area of equality since 1999, prohibiting discrimination across nine grounds – gender, age, disability, sexual orientation, race, family status, marital status, religion and membership of the Travelling Community – and not only in the area of employment equality but also in the provision of goods and services.

This should shed some light on how the Directives will take effect in terms of their provisions on remedies and indicate how the substantive provisions of the Directives will be made effective by the sanctions imposed. In particular I will examine, with reference to case law, whether the experience of remedies and sanctions awarded in

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<sup>1</sup> Directive 2000/43 EC (June 29<sup>th</sup> 2000)

<sup>2</sup> Directive 2000/78 EC (November 27<sup>th</sup> 2000)

Ireland could be deemed as ‘effective, proportionate and dissuasive’<sup>3</sup> as is required by both the Race and Employment Directives. Of interest too is that the Equality Bill 2004 was recently published in Ireland purporting to implement the changes necessitated by the two Directives. The Minister for Justice, Equality and Law Reform at the publication of the Bill adverted to the requirement that the necessary amendments be carried out as soon as possible and expressed hope that the Bill would pass through the legislative process in a timely and efficient manner.<sup>4</sup> I will examine the sections of the Bill relevant to this Paper on Remedies.

## **1. The Race and Employment Directives:**

### ***1.1 Defence of Rights***

Both the Directives set out that Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directives shall be available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended<sup>5</sup>.

Of note in relation to the above provision is that Member States may ensure compliance with the Directives by either judicial and/or administrative procedures. Consider the Equal Treatment Directive of 1976, in particular where it provides for those who consider themselves to have been discriminated against in contravention of the principle of equal treatment ‘to pursue their claims by judicial process after possible recourse to other competent authorities’<sup>6</sup> and the Equal Pay Directive of 1975<sup>7</sup> which provides for those employees who consider themselves wronged by failure to apply the principle of equal pay to have recourse in the same manner as that provided for in the Equal Treatment Directive of 1976. There is a subtle difference in

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<sup>3</sup> Article 15 Directive 2000/43/EC and Article 17 Directive 2000/78/EC

<sup>4</sup> “McDowell announces publication of the Equality Bill 2004”, Press Release 15 January 2004

<sup>5</sup> Articles 7 and 9 respectively

<sup>6</sup> Article 2 Council Directive 76/207/EEC

<sup>7</sup> Council Directive 75/117/EC

the wording of the Race and Employment Directives under consideration here in that they provide for judicial or administrative procedures or a combination or both.

## ***1.2 Bodies for the Promotion of Equal Treatment***

The Race Directive provides at Article 13 for bodies for the promotion of equal treatment: -

- 1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.*
- 2. Member States shall ensure that the competence of these bodies include:*
  - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,*
  - conducting independent surveys concerning discrimination,*
  - publishing independent surveys concerning discrimination,*
  - publishing independent reports and making recommendations on any issue relating to such discrimination.*

Article 13 of the Race Directive states that the body should provide the victims of discrimination with 'independent assistance' in pursuing their complaints. It does not specify whether this assistance should be financial, legal or otherwise. Another thing that is unclear about the Race Directive is that it fails to specify any grounds that should be taken into account in determining whether to provide assistance or not. It is obvious that there must be some limitations put on the provision of independent assistance as it would not be viable in terms of resources if it were otherwise.

It is interesting to note that the Employment Directive does not have a similar provision to Article 13 of the Race Directive. There is no obligation under the Employment Directive to provide a body for the promotion of equal treatment on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. Perhaps it was thought to be too onerous a burden to place on the Member State to provide assistance in the above-mentioned areas as well as the race and ethnic origin grounds.

### ***1.3 Sanctions***

The pertinent provisions in relation to sanctions in the Race and Employment Directives are contained in Articles 15 and 17 respectively. The relevant wording of both these Articles is as follows: -

*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.*

The sanctions are to be notified to the Commission and any subsequent amendments affecting them.

The provisions in the Directives in relation to sanctions clearly reflect Community case law on sanctions under previous Directives in relation to Equal Treatment<sup>8</sup>.

What the European Court of Justice has emphasised is that Member States should be free to choose between the different means for achieving the objectives of Directives. The Directives under consideration here allow for that.

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<sup>8</sup> Council Directives 75/117/EEC and 76/207/EEC

Articles 15 and 17 specifically state that the sanctions may comprise of the payment of compensation. The European Court has specifically stated that where a Member State chooses to penalize breaches of the prohibition of discrimination by an award of compensation:

*'...then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation...'*<sup>9</sup>

## **2. The Irish Experience:**

### ***2.1 Defence of Rights***

Considering the procedures in place under the Employment Equality Act 1998 in Ireland, claimants may apply to the Equality Tribunal in all cases with the exception of discriminatory dismissals of which complaints must originate in the Labour Court<sup>10</sup>. The Equality Tribunal is an independent statutory body set up under the 1998 Act. Appeals lie from both the Equality Tribunal and the Labour Court to the Irish court system. The principal function of the Equality Tribunal is the investigation and mediation of claims of discrimination arising under the Employment Equality Act 1998 and the Equal Status Act 2000. An investigation conducted by the Tribunal is a quasi-judicial process and is inquisitorial in nature. This is of note as it is a substantially different process from the adversarial process used by the Irish Courts. However where there is a complaint of discrimination on the gender ground there is provision in the Employment Equality Act that the complaint may originate at first instance in the Circuit Court<sup>11</sup>, in other words the Equality Tribunal and the Labour Court may effectively be bypassed. This provision appears to comply with decisions handed down by the European Court of Justice in relation to the provisions of awards of compensation where discrimination is established on the grounds of gender. In

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<sup>9</sup> Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen

<sup>10</sup> Section 77(2) EEA 1998

<sup>11</sup> Section 77(3) EEA 1998

particular, the requirement that these awards of compensation are such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and that compensation in any event be adequate in relation to the damage sustained<sup>12</sup>.

## ***2.2 Bodies for the Promotion of Equal Treatment***

Ireland has such a body for the promotion of equal treatment in the form of the Equality Authority and it satisfies all of the requirements for such a body in Article 13 of the Race Directive. The mission statement of the Equality Authority states that it is committed to ‘promoting and defending the rights established in the equality legislation’<sup>13</sup>. The functions of the Equality Authority are wide- ranging and include the working towards the elimination of discrimination in relation to employment; the promoting of equality of opportunity in relation to a number of grounds which include race and ethnic origin and the provision of information to the public.<sup>14</sup> The Equality Authority is empowered to conduct inquiries<sup>15</sup>; carry out equality reviews or action plans where it considers appropriate or invite a particular business or group of businesses to carry out an equality review in relation to their business<sup>16</sup>; carry out a review of legislation where it considers the elimination of discrimination is being impeded by such legislation containing recommendations for amendments it considers appropriate<sup>17</sup>. The Equality Authority may also provide assistance to a complainant of discrimination in making a reference or in the presentation of their case in legal proceedings.<sup>18</sup>

The approach of the Equality Authority in Ireland may be considered in respect of the provision to victims of discrimination with ‘independent assistance’ in pursuing their complaints and may be used as a guide model for those Member States that do not yet have a body for the promotion of equal treatment in place. If we are to consider the provision of independent assistance in terms of legal assistance, the Equality

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<sup>12</sup> Case 14/83 Von Colson v Land Nordrhein-Westfalen; Case C 271/91 Marshall v Southampton & SW Hants AHA; Case C 177/88 Dekker v VJV Centrum

<sup>13</sup> [www.equality.ie](http://www.equality.ie)

<sup>14</sup> Section 39 Employment Equality Act 1998

<sup>15</sup> Section 58 EEA 1998

<sup>16</sup> Section 69 EEA 1998

<sup>17</sup> Section 73 EEA 1998

Authority in Ireland exercises some discretion in determining whether it should provide free legal assistance to those making complaints under the Employment Equality Act 1998 or the Equal Status Act 2000. These Acts empower the Authority to give legal assistance in matters involving ‘an important matter of principle’ or where it would not be reasonable to expect a person to present their case adequately without assistance<sup>19</sup>. The Equality Authority clearly states on its web site that due to limitations on resources it is not in a position to provide legal assistance to all complainants of discrimination under the Acts. What the Equality Authority has done is draw up criteria that must be satisfied for the provision of legal assistance. These include, inter alia, the capacity of the applicant to represent himself/herself; the complexity of the issues; that the complainant has availed of other assistance; the extent to which a serious injustice has been perpetrated against the complainant; that the proceedings will have beneficial impact for others covered under the same or other grounds and for the development of equality policies and practices.

The suggestion at section 1.2 of this Paper for the Employment Directive not containing a similar provision for a body promoting equal treatment due to it being too onerous a burden to place on the Member State does not hold much sway when one considers the work of the Equality Authority in Ireland and its provision of assistance under the relevant Equality legislation. It is currently providing assistance across nine grounds of discrimination, these being age, disability, sexual orientation, religion, race (including ethnic origin and nationality), membership of the Travelling Community, gender, marital status and family status. The nine grounds of discrimination covered relate to employment activities such as vocational training, access to employment, pay and conditions of employment<sup>20</sup> and the provision of goods and services<sup>21</sup>. The issue naturally of the availability of resources will always arise. However I do not consider it to be a particularly strong reason for the exclusion of a body for promotion from the Employment Directive when one considers the range and ambit in which the Equality Authority is operating under in Ireland.

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<sup>18</sup> Section 67 EEA

<sup>19</sup> Section 67(2) EEA

<sup>20</sup> Employment Equality Act 1998

## 2.3 Sanctions

The relevant sections pertaining to redress in relation to Employment Equality are:

(i) Section 82(1)(c)<sup>22</sup>:

*An order for compensation for the effects of acts of discrimination or victimisation which occurred not earlier than 6 years before the date of the referral of the case...*

(ii) Section 82(d)<sup>23</sup>:

*An order for equal treatment in whatever respect is relevant to the case;*

(iii) Section 82(e)<sup>24</sup>:

*An order that a person or persons specified in the order take a course of action which is so specified.*

(iv) Section 82(4)<sup>25</sup>:

*The maximum amount which may be awarded by the Director or the Labour Court..., in any case where the complainant was in receipt of remuneration at the date of the reference of the case, or if it was earlier, the date of dismissal, shall be an amount equal to 104 times either-*

*(a) the amount of that remuneration, determined on a weekly basis, or*

*(b) where it is greater, the amount, determined on a weekly basis, which the complainant would have received at that date but for the act of discrimination or victimisation in question,*

*and in any other case, shall be £10,000<sup>26</sup>.*

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<sup>21</sup> Equal Status Act 2000

<sup>22</sup> Employment Equality Act 1998

<sup>23</sup> EEA 1998

<sup>24</sup> EEA 1998

<sup>25</sup> EEA 1998

The relevant provision on Redress in Equality in the provision of goods and services is set out in Section 27 of the Equal Status Act which provides as follows:

*Subject to this section, the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:*

- (a) an order for compensation for the effects of discrimination; or*
- (b) an order that a person or persons specified in the order take a course of action which is so specified.*

*(2) The maximum amount which may be ordered by the Director by way of compensation under subsection (1)(a) shall be the maximum amount that could be awarded by the District Court in civil cases in contract.<sup>27</sup>*

## **IRISH CASE LAW**

I propose in this section to give an overview of cases taken under Irish legislation to illustrate the types of remedies and sanctions imposed in practice. What should be born in mind when considering the remedies and sanctions is the requirement that these should be effective, proportionate and dissuasive. As already stated in this Paper, the grounds on which discrimination are prohibited by the Race and Employment Directives are already broadly covered by Irish law and I will examine the remedies handed down on the relevant grounds.

The Equality Tribunal in Ireland received a record number of claims in 2002, there were 1,298 claims referred and this was an increase of 184 on 2001. There were 69 claims made on the race ground. The race ground in Irish law is broadly defined to include discrimination on grounds of different race, colour, nationality, ethnic or national origins or any combination of those factors<sup>28</sup>. Furthermore Irish law

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<sup>26</sup> Note this amount is €12,700 in value today

<sup>27</sup> The maximum amount of compensation that can be awarded in any individual case is €6,349

<sup>28</sup> Section 6 Employment Equality Act 1998; Section 3 Equal Status Act 2000

expressly protects a particular group – membership of the Traveller Community<sup>29</sup> that also warrants protection on the race and ethnic origin grounds - against discrimination. Some 745 claims were made to the Equality Tribunal on the basis of discrimination as a result of membership of the Travelling Community. This number counts for over half the claims coming before the Equality Tribunal and is obviously of some significance. Of note too is that 741 of these claims were made under the Equal Status Act with only 4 being made under the Employment Equality Act. There were in total the rather less sizeable figure of 56 decisions handed down by the Equality Tribunal. The breakdown of claims in relation to age; disability; sexual orientation and religion were 68; 94; 11 and 5 respectively<sup>30</sup>.

### **3. Case Law under the Employment Equality Act 1998**

#### ***3.1. Discrimination on the Grounds of Age***

In the case of Gillen v Department of Health<sup>31</sup> the Equality Tribunal was dealing with allegations of discrimination relating to the lack of success of the complainant in two competitions for promotion. The candidates successful in the two competitions were all aged less than 50 years old. The complainant had more service; had never been told that his work was unsatisfactory and he had been found suitable for promotion on a number of previous occasions. The Equality Officer found that a prima facie case of discrimination had been established on the age ground and thought that in the circumstances the most appropriate award would be one of compensation. In his decision the Equality Officer noted that the maximum permitted by section 82(4) is 104 times the weekly salary being received by the complainant at the date of referral of a complaint and was satisfied that the appropriate amount to be awarded in the present case was half of the permitted maximum.

Accordingly he ordered that the respondent pay the complainant the sum of €40,000 in compensation for the consequences of discrimination. He also ordered that the

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<sup>29</sup> Section 6 Employment Equality Act 1998; Section 3 Equal Status Act 2000

<sup>30</sup> Annual Report 2002 of the Office of Director of Equality Investigations

internal interview boards have formal interview training, apply strict promotion criteria with adequate marking schemes and keep comprehensive interview notes. This order that the respondent take a specific course of action is made pursuant to section 82(1)(e).

These orders illustrate the positive steps the Equality Tribunal can take towards preventing future acts of discrimination from occurring and making adequate and compliant the procedures in place of respondents.

### ***3.2. Discrimination on the ground of Membership of the Travelling Community***

The case of Sweeney v John McHale Co Ltd<sup>32</sup> came before the Equality Tribunal by way of an allegation of discrimination on the ground of membership of the Travelling Community. The background of this case is that the Equality Authority referred the case on behalf of the claimant on the ground that he had been discriminated against in relation to access to employment by the respondents. The claimant had sent his curriculum vitae to an employment agency in response to an advertisement they had placed to fill vacancies for saw mill workers. He was later informed that the respondents thought him unsuitable for sawmill work. The respondents confirmed this by saying they only wished to recruit foreign workers for sawmill work. The Equality Tribunal was satisfied that the reason the claimant was turned down for a position was because of his membership of the Travelling Community. The Equality Officer also noted that the respondents could not rely on the race ground (another discriminatory ground under the Act) to justify the discrimination in the present case. The Equality Officer ordered that the respondent pay to the complainant compensation of €3,000 for the distress suffered as a result of the discrimination.

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<sup>31</sup> DEC-E2003-035

<sup>32</sup> DEC-E-2003-050

### ***3.3. Discrimination on the Disability Ground***

The Equality Tribunal in A Computer Component Company v A Worker<sup>33</sup> found that the respondent was dismissed because of her disability and that this constituted discrimination under the Employment Equality Act. The facts here were that the respondent suffered from epilepsy that was well controlled by medication. The Company initially employed her on a temporary contract and it was when they offered her a permanent position that she was called for a medical examination. When the doctor informed the personnel officer in the Company that the respondent suffered from epilepsy the Company decided to withdraw the offer of the permanent position and terminated her contract. The Court was told that the respondent was not seeking reinstatement and in these circumstances it determined that compensation was the appropriate form of redress under section 82(1)(c) of the 1998 Act. The Court took into account the respondent's loss of earnings and the distress suffered as a result of the dismissal and from having to bring this case and awarded compensation of €19,046.07.

### ***3.4. Victimisation***

Victimisation is covered in Ireland in the Employment Equality Act 1998 in section 74(2). A case that came before the Equality Tribunal on this point is that of Dunbar v Good Counsel College, New Ross<sup>34</sup>. The background of this case is that the complainant brought a claim on the grounds that the respondent had discriminated against him on the grounds of age in respect of promotion in employment in contravention of sections 6 and 8 of the 1998 Act. The facts of the case were that another person had been appointed to the post of Assistant Principal as a result of a competition. The appointment of the other person was made on the grounds of seniority. Of note here is that he also claimed victimisation contrary to section 74(2) of the Act. This section defines victimisation as follows: -

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<sup>33</sup> [2002]ELR 124

<sup>34</sup> DEC-E2003-051

*For the purposes of this Part, victimisation occurs where the dismissal or other penalisation of the complainant was solely or mainly occasioned by the complainant having, in good faith –*

- (a) sought redress under this Act or any enactment repealed by this Act for discrimination...,*
- (b) opposed by lawful means an act which is unlawful under this Act or which was unlawful under any such repealed enactment,*
- (c) given evidence in any criminal or other proceedings under this Act or any such repealed enactment, or*
- (d) given notice of an intention to do anything within paragraphs (a) to (c).*

The Complainant claimed two incidents of victimisation. The Equality Officer did not find the first incident complained of to constitute victimisation contrary to the Act. The second incident complained of was when a notice was placed on the staff notice board in the school stating that there was a delay in filling the post of Assistant Principal. This notice appeared shortly after the complainant lodged his appeal to an Arbitrator. The notice did not refer to the complainant by name. It remained on the notice board for a period of six months and the complainant claimed that he suffered hostile remarks in relation to this notice board from other staff members. The Equality Officer accepted that other staff members would have been fully aware that the complainant had referred his appeal to an Arbitrator and that this was the reason for the delay. There was one occasion in particular when the complainant was the subject of hostile remarks from other staff members at a union meeting. The Equality Officer found that the only reason for this hostility was because the complainant had chosen to exercise his legal rights. The Equality Officer found that the posting of the notice contributed to the behaviour of the other staff members. The Equality Officer found therefore that the complainant was penalised in circumstances amounting to victimisation within the meaning of section 74(2) of the Act. What is interesting to note however is that there was no redress awarded on the grounds of victimisation. The Equality Officer did note however in his decision that the complainant was advised of the Arbitrator's findings in March 2001 but the respondent was not notified for another two months due to an error on the Arbitrator's part and the complainant did not bring it to the respondent's attention. The Equality Officer noted that this was

odd in the circumstances and that he was taking it into account in assessing the level of redress. The Equality Officer went on to find that the complainant was penalised within the meaning of section 74(2) but did not compensate him for the victimisation suffered. He did order monetary compensation in the amount of €6,500 for discrimination on the age ground and distress suffered.

The above decision in relation to the redress (or lack thereof) for victimisation is at odds with a previous comment of the Equality Tribunal in the case of A Complainant v A Department Store<sup>35</sup>. In this case the Equality Officer was satisfied that the complainant had referred her grievances under the Act in good faith and that the resultant behaviour of the respondents constituted victimisation of the complainant in that they penalized her for bringing her grievances to the attention of the Equality Authority. The complainant sought compensation, an apology and employment with the respondents as redress. The Equality Officer took the opportunity to emphasise that victimisation is a matter that would be considered very seriously. The Equality Officer stated:

*“The purpose of section 74(1) is to protect those who consider they have been the victims of discrimination. If this protection is not supported in Equality Officer decisions, the legislation will be ineffective and the rights of individuals involved will be compromised.”*<sup>36</sup>

To indicate how seriously the Equality Officer considered the consequences of victimisation, she chose to award the maximum compensation for the actions of the respondents – that being €12,700<sup>37</sup> to the complainant when the complainant in the circumstances was not in receipt of remuneration. The complainant had also sought employment by way of redress but this was not something that the Equality Officer thought should be compelled.

Consider Article 11 of the Employment Directive which addresses victimisation, it provides:

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<sup>35</sup> DEC-E-2002/017

<sup>36</sup> *ibid* at page 9

<sup>37</sup> Section 82(4) of the Employment Equality Act 1998

*Member States shall introduce into their legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.*

In relation to the above cases the more commendable approach to adopt in order to give credibility to the aims of the Article would be the latter. However it is clear from the case of Dunbar v Good Counsel College, New Ross, that where there are other factors at odd with the finding of victimisation, the Equality Tribunal in Ireland will find that the compensation for such victimisation should be affected accordingly. This does not compliment well established European case law that sanctions imposed should be effective, have deterrent effect and be adequate in relation to the damage sustained<sup>38</sup>.

#### ***4. Cases under the Equal Status Act 2000***

##### ***4.1. Discrimination on the Race Ground***

In the case of Sajjadi v Turk's Head Bar the Equality Officer found that where a student was refused admission to a pub constituted discrimination under the Act. The facts of the case were that the student was an Irish citizen but of Middle Eastern origin, and was asked for identification on entering the pub. The Equality Officer noted that there was evidence that younger people had entered the pub earlier in the evening and had not been asked for identification. He found that in refusing access to the plaintiff constituted discrimination on the race ground and awarded compensation of €1,500 for distress, humiliation and loss of amenity.

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<sup>38</sup> Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891

#### ***4.2. Discrimination on the Membership of the Travelling Community Ground***

As noted above, the majority of claims that come before the Equality Tribunal are by way of this ground and under this Act. Some of the more interesting cases in terms of remedies are outlined below.

The Equality Officer found discrimination against members of the travelling community in the case of McDonagh v The Castle Inn<sup>39</sup> when the claimant was refused access to the respondent pub. This refusal had occurred on three or four previous occasions. The claimant alleged that the respondents operated a discriminatory policy against members of the travelling community. The Equality Officer found that a discriminatory policy ‘totally contrary to the provisions of the Equal Status Act’<sup>40</sup> did exist and that the respondents actively discriminated against members of the Travelling Community. In determining the level of compensation appropriate, the Equality Officer took account of the fact that the incident complained of occurred just two weeks after the coming into force of the relevant Act and that perhaps the respondents had not been fully aware of the provisions of the Act. However he also noted that the respondents had not indicated in any way before him that they were willing to reconsider their policy on the restriction of access of Travellers to the pub. Therefore he ordered that the respondents pay the claimant €1,270 for the embarrassment and humiliation suffered on the occasion complained of. The Officer further ordered that the Respondents review their practices immediately as regards access by everyone to their services in the pub so as to comply with the 2000 Act.

In O’Reilly v Ryan<sup>41</sup>, the Equality Officer found that refusals of service to the claimant on a number of occasions by the respondent chemist were discriminatory. The respondent admitted to the Equality Officer that he had had the medicine in stock at the times complained of but that the claimant was part of a group that had threatened him on other occasions. The Equality Officer held that the respondent’s allegations were not substantiated with any evidence. He ordered that €4,000 be

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<sup>39</sup> [2002] ELR 355

<sup>40</sup> *ibid* at page 364

<sup>41</sup> DEC-S2002-136

awarded to the claimant and he further ordered that the Respondent in future ensure that his policies complied with the Act.

Another case in which the Equality Tribunal found that there was discrimination on grounds of membership of the Travelling Community when three Travellers were refused admission to a hotel, it awarded that each of them be paid €600 in compensation<sup>42</sup>.

### ***4.3. Discrimination on the Disability Ground***

The Equality Officer found that discrimination had occurred in the case of Kelly v Kelly's Lounge<sup>43</sup> when the claimant, who is disabled, had his drink taken off him and was told to leave the bar area and to go and sit with his mother. The claimant was of full age at the time of the incident. The respondent stated that it had not meant to discriminate against the Claimant and accepted that the incident complained of was wrong and should not have happened. The Equality Officer ordered that the Respondent issue a written invitation to the Claimant with his mother and four others of the Claimant's choice for two complimentary drinks each in the Respondent's bar. He further ordered that the Respondent pay to the Claimant €250. In deciding on the redress ordered, the Equality Officer took account of the fact that the Respondents had apologised directly to the Claimant and the Claimant's mother during the course of the hearing; that the Respondent had indicated that the Claimant and his family were welcome in the pub at any time and that there was evidence that the Respondent had treated the Claimant in a suitable manner in the pub previously. He noted too that the Respondent's pub provided for disabled persons and did have some special facilities for disabled persons on the premises.

The Equality Officer ordered that €3,000 be ordered in compensation to a visually impaired man who was refused access to a pub in January 2001. The Claimant in the case of Roche v Alabaster Associates Limited t/a Madigans<sup>44</sup> suffered humiliation,

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<sup>42</sup> DEC-S2003-159/160

<sup>43</sup> DEC-S2003-161

<sup>44</sup> [2002] ELR 343

distress and loss of amenity on the night in question as a result of the discriminatory treatment of the Respondents in refusing him admission. The background here was that the respondents refused to allow the Claimant's guide dog on the premises as they said that it was in contravention of the Food Hygiene Regulations 1950 as there was food being served on the premises. The Equality Officer felt that the Respondents had not made sufficient attempts to accommodate the Claimant in the case and in the circumstances, found that he had been unlawfully discriminated against. In addition to the award of €3,000 in compensation, the Officer ordered that the Respondents place a notice at the entrance to the premises stating that persons with disabilities including persons with guide dogs were welcome to the premises. The Respondents were also required to ensure that staff were made aware of the provisions of the Equal Status Act and the relevant provisions of the circulars pertaining to guide dogs and food hygiene.

#### ***4.4. Discrimination on the Age Ground***

There are two decisions I will look at on this ground in terms of remedies. The first is the recent decision of the Equality Tribunal in Suzanne & Margaret Crawford v The Bootlegger Bar<sup>45</sup>. The background of this case is that Claimants were refused admission to the Bootlegger Bar in May 2001 when they were told they were 'too old'. The Equality Officer found that the claimants had been discriminated against on the grounds of their age. In considering the amount of redress to be awarded, the Officer took into account the Respondent's submission that they also operated as a restaurant and that a policy of discrimination as alleged by the Plaintiffs was not in their business interests. The Officer went on to hold that this was a once off incident of discrimination. He noted too that when the Respondents were made aware of the complaint they acted promptly in extending an invitation to the Claimants to visit the premises again. He ordered in the circumstances that the Respondents pay the Claimants €300 in compensation each for the hurt and humiliation that resulted from the refusal of admission on the night in question in May 2001.

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<sup>45</sup> DEC-S2003-146 &147

The second case that I will consider in this area is that of O'Reilly v Q Bar<sup>46</sup> in which the Equality Tribunal found that the Claimant had established a prima facie case of discrimination on the grounds of age when he was refused admission to the Respondent premises in January 2001. The Respondents submitted that in accordance with licensing laws they operated a strict admission policy but that all doormen and staff were made aware of the requirements under the Equal Status Act 2000. The Respondent further submitted that there could have been any number of reasons not related to the Claimant's age as to why he was refused admission. However the Equality Tribunal held that the Respondent's had failed to rebut the prima facie case of discrimination that the Claimant had put forward. On arriving at this conclusion the Equality Officer ordered that the Respondents pay the Claimant €1,000 as compensation for embarrassment and stress suffered on the night in question as a result of the refusal to admit. The Equality Tribunal further ordered that the Respondents place a sign behind the bar to the effect that it was committed to complying with the Equal Status Act 2000 for one month after this finding.

## **5. Effective, Proportionate and Dissuasive Sanctions**

Therefore to summarize the position in Ireland to date in light of the case law and legislative provisions outlined above, it is quite evident that adjudicative bodies in determining sanctions and in particular monetary compensation have been restrictive or restricted in their approach. This restrictive approach is adhered to in practice by the application of the Redress provisions in the Employment Equality Act 1998 and the Equal Status Act 2000.<sup>47</sup> A wide range of possible discrimination in relation to conditions to access to employment, including recruitment and selection criteria, has its resulting effects limited to a maximum amount of €12,700 when the claimant is not in receipt of remuneration. This ceiling applies no matter how severe the discrimination and its effects are. How dissuasive actually is such a sanction for an Employer when it carries with it an upper limit such as the above amount? An Employer might consider it a relatively small amount to pay if in the long term it can

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<sup>46</sup> [2003] ELR 35

<sup>47</sup> Section 82 and Section 27 respectively.

avoid having to accommodate prospective Employees it does not wish to provide for. The smallest award in 2002 given by the Equality Tribunal was that awarded to a claimant who was asked a discriminatory question at an interview, this was in the amount of €500.<sup>48</sup>

Furthermore even where the claimant is an employee there still applies a limit or upper ceiling of two years pay, as to the redress in the form of compensation that the Equality Tribunal or the Labour Court can award.<sup>49</sup>

We have seen how there is an option to initiate a gender equality case in the Circuit Court. This would be the appropriate option where the level of compensation sought exceeds the maximum which the Equality Tribunal or Labour Court could award. There is no limitation on the amount of the award that may be given but there is a six year limit on the backdating of compensation or remuneration.<sup>50</sup>

The average amount awarded in compensation under the Equal Status Act in 2002 was €1,149 per person. Most of the individual awards ranged from €200 to €2,000<sup>51</sup>. An upper limit of €6,349 applies under the legislation. What is of note here is the relatively low average amount awarded in comparison to the upper limit. It is evident there is a relatively low maximum compensation amount provided for yet that amount is very rarely awarded in practice. The question could be asked whether such monetary awards of compensation are effective and dissuasive and indeed are they proportionate to the discrimination found to have occurred?

The Equality Tribunal does make use of its powers under section 82(1)(e) and section 27(1)<sup>52</sup> frequently in ordering that specific courses of action be taken. While these orders do indicate a dedication on the part of the Tribunal towards preventing further discrimination from occurring and ensuring compliance with Equality legislation, it is questionable whether sanctions in this form provide effective redress for the complainant in question.

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<sup>48</sup> Byrne v Fas DEC-E2002-045

<sup>49</sup> Section 82 Employment Equality Act 1998

<sup>50</sup> Section 77 Employment Equality Act 1998

<sup>51</sup> Legal Review of the Equality Tribunal 2002

<sup>52</sup> Employment Equality Act 1998 and Equal Status Act 2000 respectively

What has happened in Ireland is that European case law requiring compensation be adequate in relation to the damage sustained, and that a sanction guarantee real and effective judicial protection has only been applied in gender equality cases. In all other equality cases to date there has been an upper limit in practice in terms of compensation. I would submit that the Race and Employment Directives remove any upper limits imposed on compensation by requiring sanctions to be effective, proportionate and dissuasive. Obviously Irish law needs to be reconsidered in light of the Directives' provisions on sanctions.

The Equality Bill 2004, as recently published, does not however propose to amend existing legislation so as to remove upper limits. The Bill does amend the relevant sections of the legislation pertaining to redress that may be ordered, but the proposed amendments do not go towards removing upper limits. In contrast, the sections of the Bill reaffirm that the maximum amount of compensation specified in the existing legislation continues to apply, and further states notwithstanding that a case may contain claims of discrimination on more than one of the discriminatory grounds.<sup>53</sup> This in effect is placing an even more stringent upper limit on monetary compensation in that the same existing ceiling applies no matter how many findings of discrimination there are and on however many different grounds. This does not appear to guarantee real and effective judicial protection and it is questionable whether resulting compensation would in any event be adequate in relation to the damage sustained.<sup>54</sup> The amendment to the Employment Equality Act 1998 does not include non-compliance with an equal remuneration term as a claim of discrimination to be included in the calculation of the amount of compensation. Nor do the proposed amendments appear to include victimisation in the calculation of compensation. Therefore if a claimant is successful in showing discrimination on one ground and is awarded the maximum compensation for that, and also successfully shows a prima facie case of victimisation, then it appears that the award of compensation for victimisation could be calculated separately, thereby the total award for the two would exceed the maximum limit on compensation. What is clear from the proposed

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<sup>53</sup> Section 33 Equality Bill 2004 to amend section 82 EEA 1998 and Section 55 Equality Bill 2004 to amend Section 27 ESA 2000

<sup>54</sup> requirements of European case law

amendments is that victimisation may not be claimed under both the Employment Equality Act and the Equal Status Act.<sup>55</sup>

A further proposed amendment to both Acts is that an order for compensation may not be made in favour of the Equality Authority when that body is exercising its enforcement powers under the relevant Acts.<sup>56</sup>

What is certainly questionable about the proposed amendments is that the Bill does not appear to address the need for change in the form of removing the upper limits of compensation that exist. This is an issue that must be addressed in order to comply with Directive requirements for effective, proportionate and dissuasive sanctions.

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<sup>55</sup> Section 33 Equality Bill 2004 to amend Section 82 with subsection (8)

<sup>56</sup> Section 33 Equality Bill 2004 to amend Section 82 EEA 1998 and Section 55 Equality Bill 2004 to amend Section 27 ESA 2000