



Legal Briefings

Equality

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Equality Legislation

Equality is a principle revered in constitutional rights for many centuries. Of course, it has many interpretations, principally along the lines of the market-based equality of opportunity and the more fundamental equality of outcome debate. Equality legislation has been a core feature of ensuring non-discrimination and equality in access to housing. The first significant Equality Act was introduced in Ireland in 1998. Its constitutionality was upheld by the Supreme Court after being referred by the President.¹ In 2004 the Equality Act was introduced, partly in order to implement the requirements of three European Community Directives – the Race Directive, the Framework Directive and the Gender Directive (a directive is a legislative act of the European Union which requires countries to achieve a particular result but leaves some discretion to them in how to achieve that result). There is an obligation to comply with EU law, which is directly applicable in national and local courts.

The Equal Status Acts 2000–2004 state that discrimination in the provision of goods and services is prohibited on the nine specific grounds of age, gender, marital status, family status, sexual orientation, religious belief, disability, race or membership of the Traveller Community.

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Section 6 of the Equal Status Act 2000 states that a person shall not discriminate in disposing of any estate or interest in premises, terminating any tenancy or other interest in premises or, most importantly here, providing accommodation or any services or amenities related to accommodation or ceasing to provide any of these. There are recognised exceptions to this, e.g. disposal of an interest in premises by will or gift, or where premises are reserved for persons in a particular category, such as a home for disabled persons.

The most important (and most litigated) provision relating to housing authorities is section 6(6), which states that despite the above discrimination prohibition, a housing authority or a similar approved body is not prevented from affording, when dealing with housing accommodation, different treatment of persons based on family size, family status, marital status, disability, age, or membership of the Traveller Community.

In connection with equality in access to housing, under the Housing Acts, a housing authority is required to make a scheme detailing the order of priority to be given to applicants for housing, and in so doing may provide that certain categories of persons have priority, such as applicants living in dwellings deemed unfit or dangerous, applicants living in overcrowded conditions and applicants who lack suitable or adequate accommodation. However, the authority must act in line within its legal equality and non-discrimination obligations.

Article 8 of the Race Directive introduced a shift in the burden of proof in equality cases.² Previously, it had been the responsibility of the complainant to establish discrimination. Now, once the complainant has established a *prima facie* case, the onus is on the person alleged to have committed the act of unlawful discrimination (the respondent) to prove that he/she did not commit such an act. If there is a case to answer and the respondent has not brought forward a satisfactory defence, or fails to respond, the Tribunal will find against the respondent.³

The Equality Tribunal is a key part of the equality structure and was established by the Employment Equality Act 1998. It is the impartial forum to hear or mediate complaints of alleged discrimination under equality legislation. It is independent and quasi-judicial (akin to a court). The Equality Tribunal's principal role is the investigation and mediation of complaints of discrimination in relation to employment and in relation to access to goods and services, disposal of property and certain aspects of education. A Tribunal mediator will facilitate parties to reach a mediated agreement which is legally binding. Where parties object to mediation, a case will be heard by a Tribunal Equality Officer, who will hear evidence from both parties before issuing a legally binding Decision.

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The Equality Authority is a statutory body set up to work towards the elimination of unlawful discrimination, to promote equality of opportunity and to provide information to the public on the equality legislation. It can advise and support a person bringing a claim to the Tribunal but it has no power to decide a case.

Equality Law and Housing

A number of housing-related cases have been taken by persons alleging discrimination on grounds of Traveller and disability status. These are summarised here.

A. Traveller Status

In *McCann v Dun Laoghaire-Rathdown County Council*,⁴ the complainant was refused a key to the barrier at the entrance of the halting site where he resided, and could not remove his camper van as a result. The Equality Officer treated the case as falling under the housing authority's obligation contained in S.6(6) of the Equal Status Acts (prohibiting discrimination while exercising its functions), because the Council regarded the barrier as a standard structure, part and parcel of a halting site.

The Equality Officer held that the complainant must establish a *prima facie* (at first view) case of discrimination, and only then does the burden shift to the respondent to rebut the presumption of discrimination. In this context, this means that the complainant must prove that (i) he is a member of the Traveller Community (a Traveller), (ii) that the actions complained of actually took place, and (iii) that he suffered treatment less favourable than that offered to a person who is not a Traveller in similar circumstances.

The Officer noted that S.6(6) was intended as a positive action measure which includes categories of people who may otherwise be disadvantaged in relation to their housing needs.

The Equality Officer stated that the complainant's photographic evidence, that the barrier could be left open for non-Travellers, e.g. circus staff, created a presumption of discrimination. She rejected the respondent's justification that the complainant was not treated any less favourably than any other Traveller. She stated that the comparator on the Traveller ground complaint must be that one is a Traveller and the other is not. Only Traveller-specific accommodation had barriers, and this design feature placed those who chose Traveller-specific

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accommodation at a particular disadvantage compared with a Traveller living in standard local authority housing.

The Council's argument that providing a key may lead to overcrowding in the residential halting site through intimidation did not justify the less favourable treatment experienced by the complainant. The Equality Officer concluded that not trusting Mr McCann with a key had nothing to do with his personal traits but was entirely based on his membership of the Traveller Community. She awarded €2,000 redress for the discriminatory effects and ordered that the complainant be issued with a key. The Officer also instructed an urgent review by the Council as to whether there is a continued need for site entrance barriers.

The case of *Christina Boland v Killarney Town Council* also concerned an allegation on grounds of membership of the Traveller Community.⁵ The complainant claimed that the failure to provide her with accommodation, the failure to carry out a proper assessment of her housing needs and the delay in processing her housing application by the respondent amounted to discrimination.

The Equality Officer first discussed the scope and manner in which the exemption in S.6(6) should be interpreted. He quoted the Circuit Court case of *Dublin City Council v Grace Deans* where the judge stated: *I cannot construe subsection 6 as exempting the housing authority in its entirety from all application of equality legislation. It appears to me simply to provide that the housing authority is entitled to base its priorities and its housing plan on different treatment to persons based on family size, family status and other considerations set out in the subsection.*⁶

The Officer therefore was of the view that S.6(6) does not allow the housing authority to discriminate against categories of person outlined therein, but rather facilitates it to prioritise in favour of such categories.

The complainant was awarded a house 6 years after her initial application. The Officer was satisfied that it was not unusual for housing applicants to be on waiting lists that long before being allocated housing, and indeed the complainant's case was given a high level of priority and was placed in the priority band for the category of house she needed.

In addressing the allegation that the respondent operated a 'quota system' (that would only re-house Travellers in houses already occupied by Travellers), the Equality Officer stated that the housing authority was obliged to maintain reasonable social balance in allocating houses to categories of persons in the Act, in which Travellers are included. The respondent's scheme took account of a reasonable social mix in allocating houses as there were a number of houses reserved for Travellers, and they were also considered for casual vacancies. This was

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seen as implementing a positive action measure for including Travellers who may otherwise be disadvantaged regarding housing needs. The evidence also showed that houses were allocated to Travellers which had been occupied by non-Travellers in the immediate past. There was no evidence therefore that the respondent's policy operated discriminatively against Travellers and the no *prima facie* case of discrimination was established.

In *Thomas O'Donnell v Roscommon* it was alleged that the complainant was treated less favourably than a person who was not a Traveller was or would have been treated, in being refused access to housing by the respondent (he applied in 1999, was later placed in mobile home accommodation and was eventually housed in 2005).

The Equality Officer also considered the meaning of S.6(6) and agreed that the section must appear to be enabling rather than prohibitory. He disagreed with the respondent and stated that S.6(6) did not prevent him from considering the matters at hand, although he did concede that it allows for differential treatment and that accommodation could therefore be set aside for Travellers, or they could be provided with different forms of accommodation.

The Officer was satisfied that the offer of mobile home accommodation to the complainants would not have been made to a person who was not a Traveller, but he refused to treat this as less favourable treatment because the respondent had considered that he had no choice but to offer this accommodation. He believed the offers of accommodation made to the complainant were not influenced by his membership of the Traveller Community, and that there were budgetary constraints on the respondent in attempting to obtain housing for the complainant. The respondent had acted *bona fide* (in good faith) and a person in the complainant's circumstance who was not a Traveller would not have been treated more favourably than the complainant was.

In 2008 a series of cases were brought by Travellers against Clare County Council, relating to the service provided by Clare County Council arising from the Travellers' application for housing and related accommodation needs. In an unusual move, the Equality Office required that the Travellers attend for a series of 'callovers/hearings' which would take place on 2 particular days. When families did not turn up, even though their advocate, Ms Rosen, was present, the Officer concluded that no *prima facie* case of discrimination had been proved and the cases failed.

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Mr X v A Town Council concerned an allegation that the respondent discriminated against X on various grounds under the Equal Status Acts in not being provided with local authority housing since making his application in 1997.⁷

The Equality Officer first set down the burden of proof in allegations of discrimination. The complainant is required to establish in the first place the facts upon which he can rely in asserting that he suffered discriminatory treatment. Only when a *prima facie* case is established does the onus (burden) shift to the respondent to rebut the inference of discrimination raised (S.38A).

On the allegation of discrimination on grounds of gender and marital status, the comment ‘single male not recommended’ on the complainant’s application following an assessment by a Housing Officer was enough to raise an inference of discrimination. The respondent rebutted this allegation, as the evidence showed that of the 14 houses allocated to single persons between 1997 and 2007, 10 were male.

The discrimination on grounds of age also failed, as the Officer was satisfied that the respondent was not prohibited from providing special housing for elderly people and that such policy does not constitute less favourable treatment on grounds of age. In addition, any exceptions setting aside certain houses for the elderly were due to the applicant’s needs being considered more urgent than the complainant’s and were not due to his age. He therefore failed to establish a *prima facie* case of discrimination.

Finally, in *A Complainant v Tralee Town Council*,⁸ the Equality Officer found that the refusal by the Housing Officer to hold a meeting in private with the Traveller complainant who did not have a prior appointment did not constitute discrimination. She also found as acceptable the practice whereby people who voluntarily give up their houses and who later wished to be considered for housing be treated as entering the housing list as new applicants.

See also: Orla Crowe and Dr Padraic Kenna’s legal briefing on Travellers.

B. Disability Status

Discrimination on grounds of disability occurs where a person is treated less favourably than another person is, has been, or would be treated and one has a disability and the other does not, or has a different disability. 'Disability' is defined in the Act as an inability to perform one or more major life activity because of impairment. The term is extremely wide and covers

- total or partial absence of a person's bodily or mental functions, including the absence of part of a person's body
- body organisms causing or likely to cause chronic disease or illness
- malfunction, malformation or disfigurement of a person's body; condition or malfunction that results in a person learning differently than a person without the condition or malfunction
- condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment, or which results in disturbed behaviour.⁹

When dealing with housing applications for disabled persons, S.4 of the Equal Status Act states that the housing authority must do all that is reasonable to accommodate (reasonable accommodation) the needs of a person with a disability by providing special treatment or facilities. A refusal to provide special treatment is considered not reasonable unless it would give rise to more than a nominal cost, or if the failure to provide the service would not constitute discrimination.

One of the earlier cases on disability was *Jones v Dun Laoghaire Rathdown-County-Council*.¹⁰ The complainant, who had a physical disability and was on the housing list, argued that the respondent had discriminated against him. He based this on the fact that the Council had not provided him with special facilities to allow him to move up the housing list, or that it did not have a special list for people with disabilities, as it had for elderly people.

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The Equality Officer stated that a number of criteria must be met before a *prima facie* case of discrimination is proven. The following questions must be asked:

- a. Is the complainant covered by the discriminatory ground?
- b. Is there evidence that he/she has been subject to special treatment by the respondent?
- c. Is there evidence that the treatment received by the complainant was less favourable than that which would have been received by someone with a different disability, or by someone not covered by the discriminatory ground?
- d. Did the respondent's actions amount to a refusal or failure to provide "reasonable accommodation" for the complainant's needs as a disabled person, which made it impossible or unduly difficult to obtain accommodation from the respondent?
- e. Would providing for these needs have given rise to more than a nominal cost to the respondent?

The Officer held that:

- a. The complainant's physical disability constituted a disability.
- b&c. The respondent's Medical Officer awarding medical points to persons with difference disabilities did not constitute discrimination. It means that people can be allocated housing in preference to the complainant where their needs are objectively greater than the complainant's needs.
- d. "Reasonable accommodation" requires the Council to show it did everything it could reasonably do to accommodate the complainant. While the respondent does not have a special list for people with disabilities, it does have a system where they are awarded points and, where that person reaches the top of the housing list, the Council consults that person and specifically adapts the allocated house to suit the person's particular disability. If "reasonable accommodation" required housing the complainant within a reasonable waiting period of application, it would mean the respondent would have to house all those whose need were objectively greater than the complainant's with at least the same speed or at the same time as the complainant. This could not have been the intention of the Equal Status Acts.
- e. The cost of the above would be beyond minimal; therefore there was no discrimination by the respondent.

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In *Mark Gallagher & Frances Wilson v Donegal County Council*,¹¹ the complainants claimed that they were discriminated against on grounds of disability when they were refused approval to purchase a house under the Shared Ownership Scheme. They were not given any reasons for the refusal. Both applicants were receiving Disability Allowance payments and were working under the Community Employment Scheme (CES). When they were eventually approved, the house price had increased.

The Equality Officer stated that the respondent's assessment of the complainants' application did not examine whether more flexible factors could have been used, but instead it used the standard rules. However, this was found to be a failing on the respondent's part, rather than a conscious act of discrimination on foot of a disability, as all other applicants were treated the same.

On the other hand, the respondent should have recognised the complainants as people with disabilities on receiving their application, and that they were therefore entitled to be afforded special treatment under the Equal Status Acts. The Council did not check whether there was a link between the Disability Allowance Scheme and the complainants' temporary employment in the CES when it refused to recognise the income from the CES in its calculations (if this employment stopped, the complainants would have received increased Disability Allowance). It therefore did not ensure that it was in full possession of all material facts concerning the complainants' circumstances.

The Officer awarded the complainants €3,700 each (the amount of the first-time buyer's grant which they missed out on) but stated that the Council could not be held responsible for the rise in housing prices.

In *A Complainant v A Local Authority* the complainant was refused an application for an extension to her house under the Disabled Persons Alteration Scheme for her autistic son (L).¹² She was eventually approved after two appeals and was given a level 3 priority, which meant a low level of need. The respondent later refused to build an extension due to a change in policy.

The Equality Officer found that a *prima facie* case of discrimination was established which had not been rebutted by the respondent. She stated that the complainant's initial application was not properly considered in terms of an application to cater for the needs of a disabled person and it was turned down on the basis of overcrowding, not disability. Also, the Director of Public Health and Medicine, who categorised the complainant's application, was asked merely to categorise applications under the scheme according to predetermined criteria and there was no proof that he prioritised applicants due to the urgency of the cases.

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In relation to the provision of “reasonable accommodation”, the Officer stated that the respondent entirely misconstrued the requirements of S.4 of the Equal Status Act to mean the provision of physical accommodation. The particular circumstances and needs of L were not properly considered and the complainant’s application was approved only because of her dogged persistence.

The Equality Officer also considered the issue of nominal cost and stated that it relates to size, structure, financial turnover and level of available resources of service providers. Due to the less favourable and arbitrary comparison of L’s disability with physical disabilities under the scheme, the Officer ordered that an extension, or nearby housing, be provided and that the respondent draw up a suitable formal policy. She also awarded €6,350 for the distress and hardship caused.

In *D v A Local Authority*,¹³ the complainant was claustrophobic and agoraphobic and also had a back condition for which she needed physiotherapy equipment to be used in her home. In carrying out an urban renewal scheme, the respondent intended to re-house D in a 50m² apartment, which D claimed was too small. She produced numerous letters from her medical team to the respondent to prove the need for a larger area.

D had to prove that she suffered from a disability; that the actions complained of actually occurred; and that her treatment was less favourable than a non-disabled person or one with a different disability. As the World Health Organisation classified phobic disorders in the mental and behavioural disorder category, D was found to satisfy the first criteria. The respondent did not argue that the actions occurred.

In examining the third criteria, the Equality Officer stated that the respondent relied totally on the medical assessor’s recommendation in refusing D’s application, even though the medical assessor was never mandated by the respondent to directly evaluate her. Although the respondent did offer to make adaptations, it did not have regard to the fact that physical adaptations may not be what are required in the case of certain disability types, as was the case here. It also ignored the recommendations forwarded by her medical team.

The Officer ordered that the prioritisation and assessment criteria for housing provision be broadened to consider the specific requirements of disabled persons; that D be given a larger apartment; and that the respondent pay D €2,500 as redress for the effects of the discrimination suffered.

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In *Kevin and Jackie Buckley v Tipperary Town Council and Tipperary Town Clerk*,¹⁴ the complainants, who were covered by the disability ground, argued that they were discriminated against on grounds of disability. They had complained to the respondent about alleged anti-social behaviour in their area, which they believed was never dealt with, and they were subsequently banned from making any further calls or visits to the Council office. The complainants were served with a notice to quit and stopped paying their rent in protest, but resumed soon after when advised otherwise. The respondent refused any payment from them but eventually agreed that the complainants could pay the rent due by them more gradually.

The Equality Officer found the actions of the respondent to be disproportionate in respect of rent arrears. There were no explanations given as to why it had decided to issue a notice to quit at the time it did (the arrears were not worsening in the 3 months leading up to this). The fact that tenants in a similar situation to the complainants would be able to reach an agreement or settlement with the respondent or go to court before the notice was issued meant that the notice issued on the complainants was victimisation.

“Reasonable accommodation” meant that reasonable adjustments were expected to be made to cater for the needs of disabled persons and entailed an element of more favourable treatment. While the respondent may treat all tenants in a similar manner, in the complainants’ case their actions amounted to a failure to provide “reasonable accommodation” to them, as they were entitled to be given more consideration than persons without a disability.

The complainants were awarded €6,350 in compensation and the Officer ordered that a procedure be introduced to ensure clarity and ease for the complainants and other clients in similar circumstances when using the respondent’s services. Policies relating to rent arrears were to be reviewed to include alternatives to eviction for tenants falling into arrears.

In the *Mr X v A Town Council*¹⁵ the complainant claimed discrimination on disability grounds by the respondents. Mr X suffered from severe depression and was on anti-depressant medication as a result, which he argued that the respondent had not recognised as an illness.

The Equality Officer stated that depression constituted a disability. However, he believed that the respondent was fully aware of this and that the procedure in its Scheme of Letting Priorities facilitated an objective assessment of applications on medical grounds (the Housing Officer carries out an assessment of applicants’ housing needs with the Chief Medical Officer).

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He also examined the meaning of reasonable assessment and stated that it was clear from the *Grace Deans* case that the housing authority was not exempted from its obligation to provide “reasonable accommodation” to disabled persons; however, in doing so, it cannot be forced to make more than a modest departure from its carefully considered allocation scheme.

In *Cleary v Dublin City Council*,¹⁶ the complainant argued that he was discriminated against by the respondent on, among others, disability grounds, in his application for housing. He was placed on the Medical Priority Status due to the severity of his disability – he suffered from depression and panic attacks and also had a congenital back problem. He claimed that the respondent had showed ‘blatant contempt’ for his medical condition.

The Equality Officer first held that the complainant suffered from a disability. He took note of the fact that the procedure adopted by the respondent facilitated an objective assessment of housing applications on medical grounds – it was carried out by a Housing Officer and was further assessed by the Chief Medical Officer. He was satisfied that the complainant’s disability was taken into account and that he was placed on a much shorter list than applicants on the general housing list. The reason he had not yet been housed was due to the number of applicants prior to his application.

A recent case affirmed the Equality Tribunal’s power to decide what constitutes a disability. In *Eagle Star Life Assurance Company of Ireland v the Equality Tribunal and ors*,¹⁷ the applicant applied to prevent the Equality Officer from investigating a complaint by Ms Treason who claimed that the applicant insinuated to others in 2002 that her income continuance policy was loaded 100 per cent because she was clinically obese. Ms Treason alleged discrimination by the insurer on grounds of ‘disability’ and further alleged victimisation in breach of the Equal Status Acts 2000–2004. Eagle Star rejected the complaints and claimed that the loading was on the basis of information following a medical examination of the applicant by its chief medical officer. It brought a case before the High Court to halt the investigation of the Equality Officer.

The High Court first rejected that the Tribunal had breached its powers under the Act, in refusing to dismiss the complaint on grounds of Ms Treanor’s alleged failure to actively pursue it. The backlog of cases before the Tribunal could not be attributed to Ms Treason.

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The court also ruled that the Tribunal had jurisdiction to investigate the matter but stressed it was not determining the merits of the complaint or the issue of whether obesity is a disability within the meaning of the Equal Status Act 2000. While it was undoubtedly ‘questionable’ whether a particularly high body mass index fell within the categories of disability under the 2000 Act, such was for the Tribunal to determine. There was also a right to appeal the Tribunal’s decision in that regard to the High Court.

Conclusion

The following can be gleaned from the above decisions:

- The *prima facie* burden lies on the complainant to prove that he/she has suffered discrimination by a housing authority, which must then rebut this presumption once established.
- In the context of disability cases, applicants are entitled to special treatment and the local authority must show it did everything it could reasonably do to accommodate persons with disabilities. It must be in possession of all material facts and take account of medical professional assessments produced by the applicant. However, it may reasonably rely on General Practitioner’s notes.
- “Reasonable accommodation” does not oblige the housing authority to prioritise a disabled person’s place on the housing list if this would require it to be unfair to others on the list. While a housing authority is not exempted from an obligation to provide “reasonable accommodation” to disabled persons, in doing so it must have regard to the Scheme of Letting Priorities it has adopted.

Notes

- 1 Re article 26 of the Constitution and the Employment Equality Bill 1998 [1997] 2 IR 321.
- 2 Directive 2000/43/EC, published on 19 July 2000.
- 3 Office of the First Minister and Deputy First Minister, *Race Directive: A Note on Implementation in Northern Ireland* (UK Gov, 2003).
- 4 DEC-S2008-004, 29 January 2008, Tara Coogan.
- 5 DEC-S2008-069, 21 October 2008, Enda Murphy.
- 6 *Ibid*, at 4. Dublin City Council v Grace Deans, unreported, Circuit Court, 15 April 2008, Hunt J.
- 7 DEC- S2008-042, 3 July, 2008, Enda Murphy.
- 8 DEC-S2008-046, 31 July 2008, Tara Coogan.
- 9 Section 2 of the Equal Status Act, 2000.
- 10 DEC-S2004-081, 5 July 2004, Marian Duffy.
- 11 DEC-S2006-060, 18 August 2006, Brian O’Byrne.
- 12 DEC-S2007-049, 1 May 2007, Dolores Kavanagh.
- 13 DEC-S2007-057 29 June 2007, Mary O’Callaghan.
- 14 DEC-S2007-066, 14 August 2007, Bernadette Traenor.
- 15 DEC- S2008-042, 3 July, 2008, Enda Murphy.
- 16 \- S2009-0028, 30 April, 2009, James Kelly.
- 17 Unreported, Judgment on 18 March 2009, High Court, Hedigan J.

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