

# EQUALITY HOW?

## AN ICTU GUIDE TO TAKING CASES UNDER THE EMPLOYMENT EQUALITY ACTS, 1998–2011

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STRONGER TOGETHER

**CONGRESS**

Irish Congress of Trade Unions



**EQUALITY**  
IN THE WORKPLACE

# PREFACE

Congress is the largest civil society organisation on the island of Ireland, representing and campaigning on behalf of some 832,000 working people. There are currently 55 unions affiliated to Congress, north and south of the border.

Congress seeks to achieve a just society – one which recognises the rights of all workers to enjoy the prosperity and fulfillment which leads to a good quality of life. Quality of life embraces not just material well-being, but freedom of choice to engage in the arts, culture and all aspects of civic life. This vision applies in the context of Ireland, Europe and the wider world and challenges the existing economic order.

Congress strives to achieve economic development, social cohesion and justice by upholding the values of solidarity, fairness and equality.

Even a casual glance backwards at history will inform of the many gains and advances that have been won for all in society, by trade unions – safer working conditions, paid holidays, maternity leave, the minimum wage, paid overtime, to name but a few. The list is virtually endless and many of the most basic rights that people now take for granted have been hard won over many years. Of course the greatest danger is that we begin to do precisely that – take them for granted. The single most effective way to protect established rights and break new ground in pursuit of greater equality for all in society is through the trade union movement. A single voice can be drowned out or dismissed. That becomes a little more difficult when over 832,000 people speak out as one.

Congress believes in equal rights for all workers and is committed to combating all forms of discrimination and promoting equality. As part of that commitment, we are publishing this guide to taking an equality case. We would like to thank Eilis Barry B.L. for her work on this resource.

We would also like to acknowledge the support and assistance of the Equality Authority's Equality Mainstreaming Unit which is jointly funded by the European Social Fund 2007-2013 and by the Equality Authority.

*Equality How?* is a practical aid to trade unionists supporting or representing trade union members in taking cases under the Employment Equality Acts 1998-2008. It gives basic information on the relevant provisions of the Legislation and the procedures to be followed by Trade Union representatives in processing claims under these Acts on behalf of their members. It also provides information on the various institutions involved in implementing the legislation. It provides copies of relevant forms and leaflets from the Equality Tribunal and the Labour Court.

*Equality How?* is a response to the needs expressed by Trade Union Organizers across the country for help in taking action under the equality legislation, so that Trade Union organizers can continue to contribute ever more effectively to workplace equality across the nine grounds covered by the equality legislation.

# INTRODUCTION

This is a guide to how to take a case under either the Employment Equality Acts 1998-2011 (which will be referred to from now on as the EE Acts). It focuses on the practices and procedures used. It is not exhaustive and should not be considered as legal advice or legal text and the original text of the Employment Equality Acts should always be consulted. The EE Acts have been amended on a number of occasions.

# STRUCTURE OF THE GUIDE

This Guide briefly outlines the main provisions of the Employment Equality Acts, 1998-2011. It also highlights the provisions of the Acts that are most relevant to trade unions. It describes the role and function of the relevant institutions involved. It then sets out the procedures for taking a claim. It provides guidance on what to look out for and gives examples of the sort of questions that an organizer should be asking of an individual member when first approached. It also suggests questions that should be asked in a variety of situations to ascertain if the member may have a potential claim under the Employments Equality Acts. It highlights the importance of the organizer being aware of the statutory time limits that apply. It provides advice on using the right to look for information provisions in the EE Acts and the Data Protection legislation, in order to get information that would assist in deciding whether there is a claim. It provides guidance on filling in the requisite forms and how to prepare for and what to expect at a hearing

before the Equality Tribunal and an appeal before the Labour Court. It also provides information on the mediation service that is offered by the Equality Tribunal.

This is followed by an indication of support services available. A number of forms and the current procedures of the Equality Tribunal are contained in the appendices.

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# STRUCTURE OF THE GUIDE

Trade unions have a number of potential roles under the EE Acts. The most usual role is the provision of advice and representation to a member who wants to refer a claim of discrimination under the EE Acts. A member may also approach an organizer for assistance in cases where the member has been accused of harassment/sexual harassment. If a union has criteria about granting assistance to members, it is important that these criteria are transparent and equality proofed. It would be useful for an organiser to go through the criteria with a member and explain clearly what level of assistance that a member can expect from the union. In certain instances, the union's equality officer, equality unit/in house legal adviser may be able to provide assistance and different unions will have different practices in this regard. Some unions may provide access to a solicitor in certain situations. Unions will also usually have policies about what to do in cases of conflict and an organiser should consult these if the need arises. Again it would be important that these

policies are applied in a transparent way and do not discriminate in themselves. A member who has been identified as a comparator in a claim may also seek advice from the union about the implications of being a comparator (the comparator should be advised that protection against victimization may apply to him/her - see p 12).

Obviously union reps/organizers have a duty of care in relation to the service that they provide to their members in terms of the advice/assistance they give to the individual members about referring a claim of discrimination. In any case whether or not full representation is granted, a union rep/organizer should make sure to advise a member about the time-limits involved in taking a claim and make these clear to the member who is taking responsibility for the lodging of the claim in time. If the union organizer/rep is unsure as to what to do, he/she should refer the matter to or seek advice from the union's equality unit/equality officer/union solicitor, for

advice on how best to proceed. Time-limits cannot be ignored. If a claim is not lodged in time, the member may not be able to proceed with a claim.

Trade unions also play key roles in the preparation of equality policies and procedures as well as policies and procedures that deal with sexual harassment and harassment at work. They are also active in equality campaigns in the workplace. A number of the EU Equal Treatment Directives require Member States to foster dialogue between the social partners with a view to fostering equal treatment. Trade unions may also be the key motivators in persuading employers to provide positive action.

A union may also invite the Equality Authority to carry out an equality review or Inquiry or bring proceedings in relation to a general practice of discrimination or where there is discriminatory advertising.

A Trade union may itself be the subject of a discrimination claim under the EE Acts. It may be named as respondents in claims under the EE Acts in two respects. Firstly the prohibition against discrimination, sexual harassment, harassment and victimization applies with equal force to trade unions in relation to any benefit provided by it

to its members (other than pension rights). This benefit may include the provision of advice or assistance in a discrimination claim. Organisers need to ensure that when they are making decisions about assisting members or providing assistance that they are not discriminating. Trade unions are also obliged to provide reasonable accommodation to members with disabilities in this regard.

Unions are also centrally involved in collective agreements. A union may be a respondent in a discrimination claim under the EE Acts if a member (or the Equality Authority) claims that a provision in a collective agreement is null and void and refers the matter to the Equality Tribunal. A member may allege to a union rep/organizer that a term of a collective agreement is discriminatory and the organizer may need to look for advice as to what to do in such a situation.

In both instances it is important to remember that the union member should not be victimized for pursuing such a claim. (See p 12)

# SOURCES OF LAW

## National Measures

The Employment Equality Act 1998 was amended by the Equality Act 2004, Section 27 of the Protection of Employment [Exceptional Collective Redundancies and Related Matters Act 2007, Sections 18-29 of the Civil law (Miscellaneous Provisions) Act 2011. The Acts are known as The Employment Equality Acts 1998-2011).

## European measures

- Article 141 of the Treaty establishing the European Union
- Parliament and Council Directive on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation (recast ) (Directive 2006 /54/EC)
- Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin( Directive 2000/43/EC)
- Council Directive establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC).

These Directives take precedence over Irish law which should be read and interpreted having regard to the provisions of the Directive.

## Statutory Instruments

- Employment Equality Act 1998 (section 76 - Right to Information) Regulations (S.I. 1999 No. 321);
- Employment Equality Act 1998 (section 12) (Church of Ireland College of Education ) Order (S.I. 2008 No.251);
- Employment Equality Act 1998 (Code of Practice) (Harassment ) Order (S.I. 2002 No. 78);
- Circuit Court Rules (Employment Equality Act 1998) (S.I. 2004 No. 880);
- Rules of the Superior Courts (Proceedings under the Employment Equality Acts 1998 and 2004) (S.I. 2005 No. 293);
- District Court (Employment Equality Act 1998) Rules ( S. I. 2006 No. 263).

Copies of the legislation are available from the Government Publications Sales Office, Molesworth Street, Dublin 2. (Tel: 01 647 6000) or on [www.oireachtas.ie](http://www.oireachtas.ie). They are also available from the Equality Tribunal website - [www.equality.ie](http://www.equality.ie).

# EMPLOYMENT EQUALITY ACTS, 1998-2011: A BRIEF GUIDE

The following is a summary of the main provisions of the legislation. It is not legal text or legal advice. At all times the organizer should consult the text of the legislation.

The Employment Equality Acts 1998-2011 prohibit discrimination in the employment context. It prohibits discrimination (with some exceptions) across nine grounds. It also prohibits sexual harassment, harassment and victimization. Employers are obliged to take appropriate measures to enable a person who has a disability to have access to employment, participate or advance in employment or undergo training unless the measures would impose a disproportionate burden. The Acts allow positive action measures to ensure full equality in practice across the nine grounds.

The legislation has very particular precise definitions of unlawful discrimination and the terms used in the Acts are often very different from normal everyday usage of language. There are a number of striking features

about the Acts. They are very broad in scope. They are unlike other employment protective legislation in a number of respects. They apply even before the employment relationship begins; there is no requirement to have a minimum amount of service. Discrimination may occur at any stage of the employment relationship e.g. recruitment, treatment at work, transfer, promotion, training, pay, benefits, disciplinary action, work allocation etc, dismissal. They also apply in relation to conduct that occurs after the relationship ends, e.g. an unfavorable reference.

There does not even have to be an identifiable complainant for the prohibition on discrimination to have effect. The motive or intention of the employer to discriminate is not a necessary precondition to liability. An employer may in certain situations be vicariously liable for the discrimination of other employees or clients. One of the most striking features is that there is no defence to direct discrimination.

There is no justification of direct discrimination (except in relation to the provisions on age) (though it does arise in indirect discrimination claims.) There are significant and detailed exemptions. Another unusual feature is that unions may appear as respondents either in relation to collective agreements or under section 13. Unions may represent their members in hearings before the Equality Tribunal and Labour Court.

## The Nine Grounds

These grounds have specific meanings and are defined within the Act.

The nine discriminatory grounds are:

- **Gender** – A man, a woman or a transsexual<sup>1</sup> (specific protection is provided for pregnant employees and in relation to maternity leave)
- **Civil status** – this is currently defined as single, married, separated, divorced or widowed, in a civil partnership, or being a former civil partner in a civil partnership that has ended by death or being dissolved

<sup>1</sup> The European Court of Justice in *P v S and Cornwall Council* held that discrimination against a transsexual person constituted discrimination on the gender ground.

- **Family status** – A parent of a person under 18 years or the resident primary carer or a parent of a person with a disability
- **Sexual orientation** – gay, lesbian, bisexual, or heterosexual
- **Religion** – different religious belief, background outlook or none,
- **Age** – this applies to all ages above the maximum age at which a person is statutorily obliged to attend school
- **Race** – a particular race, skin colour, nationality or ethnic origin
- **Traveller Community** – people who are commonly called Travellers, who are identified both by Travellers and others as people with a shared history, culture, and traditions, identified historically as a nomadic way of life on the island of Ireland
- **Disability**
  - 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 part of a person's body



- d a condition or malfunction which results in a person learning differently from a person without the condition 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 behaviour, 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.

### The Acts apply to:

- public and private sector employment
- full-time, part-time and temporary employees
- vocational training bodies
- employment agencies
- trade unions, professional and trade bodies
- self employed contractors
- partners in partnerships
- people employed in other people's homes.

### What is Discrimination?

Discrimination has a specific meaning in the Acts and there are different types of discrimination covered by the Acts including indirect discrimination, discrimination by imputation and discrimination by association. It is defined as **less favourable treatment** than another person is, has been or would be treated in a comparable situation on any of the nine grounds which exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. An instruction to discriminate is also prohibited.

### Scope

- Aspects of employment that are covered unequal pay
- advertising
- access to employment
- vocational training and work experience
- terms and conditions of employment
- promotion
- classification of posts
- dismissal
- collective agreements.

**Indirect discrimination** occurs where there is less favourable treatment by impact or effect. It happens where people are, for example, refused employment or training not explicitly on account of a discriminatory reason but because of a provision, practice or requirement which they find hard to satisfy. If the provision, practice or requirement puts people who belong to one of the grounds covered by the Acts at a particular disadvantage, then the employer will have indirectly discriminated, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

**Discrimination by Association** happens where a person associated with another person (belonging to a specified ground) is treated less favourably because of that association.

An employer shall not have rules, instructions or practices that would result in discrimination against any employee or class of employees.

An employer cannot discriminate against an employee or prospective employee in relation to any arrangements made to determine to whom a position is offered or by specifying entry requirements that are designed to discriminate against a person or class of persons.

Employers must not discriminate in relation to working conditions overtime, shift work, transfers, lay-offs, redundancies, dismissals and disciplinary measures. Similarly, discrimination in relation to access to counselling, training (whether on or off the job), work experience, and promotional opportunities is prohibited.

### Equal Treatment Clause

The Act implies that a non-discrimination equality clause should be inserted into every worker's contract of employment.

### Equal Pay

The Acts provide for equal pay for like work. Like work is defined as work that is the same, similar or work of equal value. Equal pay claims can be taken on any of the nine grounds.

Equal pay clause - It is a term of everyone's contract of employment that there is an entitlement to equal pay - whether or not such a provision has actually been agreed verbally or in writing.

Employees need no longer be employed in the same place but must be employed by the same employer or an associated employer. An associated employer would include different plants within the same group and subsidiary or associated companies controlled directly or indirectly by the same body corporate.

## Pensions

The EE Acts define remuneration in relation to an employee as *not* including pension rights. Equal treatment in respect of rights under occupational benefit schemes (including occupational pension schemes) is provided for under the principle of equal pension treatment contained in the Part VII of the Pensions Act 1990-2008. The Pensions Act contains the same discriminatory grounds that are contained in the EE Acts. There are a number of significant exemptions which allow what would otherwise be unlawful discrimination. In relation to remedy, the Pensions Act incorporates an amended version of parts of the Employment Equality Acts (see section 81J and the fourth schedule of the Pensions act 1990). For information and guidance on pensions and equality matters see Appendix B.

## Sexual Harassment and Harassment

Sexual harassment and harassment of an employee (including agency workers or vocational trainees) is prohibited in the workplace or in the course of employment by another employee, the employer, clients, customers or other business contacts of an employer. These include any other person with whom the employer might reasonably expect the victim to come into contact and where the circumstances are such that the employer ought reasonably to have taken steps to prevent it

The EE Acts prohibit the victim being treated differently by reason of rejecting or accepting the harassment (or where it could reasonably be anticipated that he or she would be so treated).

The Act defines sexual harassment as *any form of unwanted verbal, non-verbal or physical conduct of a sexual nature.*

Harassment is defined as *any form of unwanted conduct related to any of the discriminatory grounds.*

In both cases it is conduct which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Such unwanted conduct may consist of acts, requests, spoken words, gestures, or the production, display or circulation of written words, pictures or other materials.

Sexual harassment or harassment of an employee is discrimination by the employer. It is a defence for an employer to:

- prove that the employer took reasonably practicable steps to prevent the person harassing or sexually harassing the victim; or
- prevent the employee (where relevant) from being treated differently in the workplace or in the course of employment (and to reverse its effects if it has occurred).

The Equality Authority has published a Code of Practice on Sexual Harassment and Harassment at Work, which has been approved by the Minister (S.I. No. 78 of 2002). This is available from the Equality Authority or on [www.equality.ie](http://www.equality.ie). The LRC and the HSA have issued codes of practice in relation to bullying and harassment.

It should be noted that the Equality Authority, Labour Relations Commission (LRC) and Health & Safety Authority (HSA) have all issued codes of practice relating to bullying and harassment. It should be noted that the Equality Authority Code of Practice is based specifically on the Employment Equality Act, 1998 and it should be consulted in relation to sexual harassment or harassment based on any of the nine discriminatory grounds. This Code sets out that it is essential that employers have in place accessible and effective policies and procedures to deal with sexual harassment and harassment. It also recommends that these measures should be agreed with relevant trade unions. The provisions of the Code of Practice are admissible in evidence and if relevant may be taken into account in any investigation.

## Reasonable Accommodation - Appropriate Measures to Accommodate Those with Disability

Employers must take appropriate measures to enable employees with disabilities to have access to employment, participate or advance in the employment, and to undergo training unless the measures would impose a disproportionate burden on the employer.

In determining whether a disproportionate burden is imposed, account shall be taken of the financial and other costs entailed, the scale and financial resources of the company/ employer, and the possibility of obtaining public funding or assistance.

Appropriate measures are effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned. They can include the adaptation of premises and equipment, patterns of working time, distribution of tasks, provision of training or integration of resources. It does not include any treatment, facility or thing that the person might ordinarily provide for her/him.

The provision of appropriate measures will usually involve consultation with the employee and may necessitate the obtaining of medical reports or health and safety assessments.

It should be noted that a parent guardian or other person acting in place of a parent can be the complainant, where a person is unable by reason of an intellectual or psychological disability to pursue a claim effectively. Where necessary, cases for those with a disability may now be taken on their behalf by a parent or guardian.

So a case could be brought to a trade union by a parent or guardian acting on behalf of a member suffering from an intellectual or psychological disability.

### **Positive Action on Equal Opportunities**

The Acts are without prejudice to any measures maintained or adopted with a view to ensuring full equality in practice between men and women in their employment, and providing for specific advantages to make it easier for an under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

### **Positive Action on Other Grounds**

The EE Acts allow measures to be maintained or adopted to ensure full equality in practice between employees to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than gender); to protect the health and safety at work of persons with a disability; or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

### **Vicarious Liability**

Employers are liable for the acts of employees done in the course of employment (whether or not the acts were done with the employer's knowledge) unless the employer can prove that he/she took reasonably practicable steps to prevent the discrimination. An employer may also be liable for acts by agents of the employer.

### **Victimisation**

It is unlawful for an employer to penalise an employee for taking action around the enforcement of the Employment Equality Acts 1998-2011 or the Equal Status Acts 2000-2011. Victimisation occurs where the dismissal or other adverse treatment of an employee is a reaction by the employer to:

- a a complaint of discrimination made by the employee to the employer
- b any proceedings by a complainant
- c an employee having represented or otherwise supported a complainant
- d the work of an employee having been compared with that of another employee, for any of the purposes of these Acts, or any enactment repealed by these Acts

- e an employee having been witness in any proceedings under these Acts or any such repealed enactment
- f an employee having opposed by lawful means an act which is unlawful under these Acts or any such repealed enactment, or
- g an employee having given notice or an intention to take any of the actions mentioned in the preceding paragraphs.

### **General Exemptions**

All forms of discrimination may not be covered by the Acts. While there is no defence to direct discrimination (except in relation to age), the prohibition on discrimination is subject to a number of general and specific exemptions which may be relied on by the employer. Some of the exemptions apply to

- particular types of employment
- all kinds of employment
- particular grounds, and
- provisions in other legislation.

The full number and extent of the exemptions go beyond the scope of this guide. Any exemptions to the prohibition on discrimination have to be construed strictly and with regard to the provisions of the EU Directives. It is

arguable that some of the exemptions contained in the EEA 1998-2011 may be in breach of some of the EU Directives.

### **Exemptions in relation to All Types of Employment**

- a *Capacity and competence*  
An employer is not required to employ someone who will not undertake the duties or is not fully competent or capable of doing the job. However, a person with a disability is fully competent and capable of undertaking any duties, if the person would be so fully competent and capable on reasonable accommodation being provided by the employer.
- b *Educational, technical or professional qualifications*  
The Acts allow requirements in relation to the holding of specified educational, technical or professional qualifications which are generally accepted qualifications in the State for the post in question. The Acts allow requirements in relation to the production and evaluation of information about any qualification other than such a specified qualification.

- c *Benefits in respect of an employee's family*  
The Acts allow employers to provide certain benefits in respect of employees' families and family events and in relation to the provision of childcare or other care provision. The Civil Partnership Act 2010 amends the definition of 'member of the family' to include same-sex partners so this exemption extends to same-sex partners as well.

### **Exemptions in relation to Occupational Requirements/Particular Types of Employment**

- a *In relation to officers or servants of the State*  
This includes the Garda Síochána and the Defence Forces and officers or servants of a local authority, a harbour authority, a health board or a Vocational Education Committee. The application of any provision in relation to residence, citizenship and/or proficiency in the Irish language is allowed.
- b *In relation to teachers in primary and post primary schools*  
The application of any provision in relation to proficiency in the Irish language is allowed.

- c *In relation to the Defence Forces*  
There is an exemption on the age and disability grounds.
- d *In relation to employment in another person's home for the provision of personal services*  
There is an exemption in relation to access to such employment (this exemption does not extend to other areas such as conditions of employment etc).
- e *In relation to employment in the Garda Síochána or the Prison Service*  
There is an exemption on the gender ground in relation to the assignment to a particular post based on issues of privacy or decency, the control of violent individuals or crowds and the rescue of hostages.  
  
There are exemptions in relation to the application of different height criteria for men and women and to the maintenance of a sufficient number of either men or women in the Garda Síochána or Prison Service.

### **Ground-based Exemptions**

- a *All grounds – occupational requirement*  
Difference in treatment is allowed which is based on a characteristic related to any of the nine grounds in respect of access to employment, but only to the extent that the characteristic constitutes a genuine and determining occupational requirement and the objective is legitimate and the requirement proportionate.
- b *The Gender ground and the Marital Status ground – pregnancy, maternity and breastfeeding*  
Treatment which confers benefits on women in connection with pregnancy and maternity including breastfeeding is allowed. Anything done in compliance with any provisions of the Maternity Protection and Adoptive Leave legislation is not discrimination on the marital status ground.
- c *The Age ground*  
An employer may set a minimum age not exceeding eighteen years in recruitment and may offer a fixed term contract to a person over the compulsory retirement age in that employment.

Exemptions are provided in relation to age-based criteria for occupational benefits schemes and entitlement to benefits and severance pay provided it does not constitute discrimination on the gender ground.

Exemptions are provided in relation to terms in collective agreements to the effect that where length of service would otherwise be regarded as equal, seniority may be determined by reference to relative ages of employees.

An employer can set different ages for the retirement of employees.

*(There is a degree of uncertainty as to the extent to which an employer can rely on these exemptions and a number of conflicting judgements. An organiser may need to obtain advice on this area.)*

Anything done in compliance with the Protection of Young Persons (Employment) Act 1996 or the National Minimum Wage Act 2000 is not discrimination on the age ground. A number of other sections of various Acts are also exempted.

d *The Age ground and the Race ground*

Different treatment is allowed by vocational or training bodies in relation to fees and the allocation of places to people who are nationals of an EU Member State.

Different treatment is allowed by vocational or training bodies in relation to assistance to particular categories of persons by way of sponsorships, scholarships, bursaries but only to the extent that the assistance is reasonably justified having regard to traditional and historical considerations.

Different treatment is allowed by universities or other third level institutions in relation to allocation of places for mature students.

e *The Religion ground*

Certain religious, educational and medical institutions may give more favourable treatment on the religion ground to an employee or prospective employee, where it is reasonable to do so, in order to maintain the religious ethos of the institution.

Certain religious, educational and medical institutions may take action which is reasonably necessary to prevent an employee, or a prospective employee, from undermining the religious ethos of the institution.

Certain religious, educational and medical institutions may reserve places on specified vocational training courses and schools of nursing, in such numbers (as seem necessary to the relevant Minister) to ensure the availability of nurses and primary teachers.

f *The Race ground*

There is an exemption for any action taken in accordance with the Employment Permits Act 2003.

g *The Disability ground*

There is an exemption in relation to the provision of a particular rate of remuneration for work of a particular description where, due to disability, the amount of work done during a particular period is less than the amount of similar work done or which could reasonably be expected to be done over that period, by an employee without a disability.

# A BRIEF GUIDE TO THE PROCEDURE FOR MAKING A COMPLAINT OF DISCRIMINATION

The Equality Tribunal, the Labour Court and the Circuit Court all have roles in relation to claims of discrimination. All employment discrimination claims (except for gender discrimination claims) must be referred in the first instance to the Equality Tribunal. Gender discrimination claims have the option of going to the Circuit Court. The Equality Tribunal is the quasi-judicial body established to investigate, hear and decide on claims of discrimination.

## *Right to Look for Information*

Any person who believes that they have experienced discrimination may write to the person who may have discriminated against them. The person may ask for certain information which will assist in deciding whether to refer a claim. Employers are not obliged to reply, but an Equality Officer may draw such inferences as seem appropriate from an employer failing to reply or supplying false, misleading or inadequate information.

An employer is not obliged to disclose confidential information.

Information should be requested using a standard form of questionnaire and reply (form EE 2 and EE 3 are set out at appendix B)

## *Time Limits*

A complaint of discrimination, harassment or victimisation must be made within the 6-month time limit from the last act of discrimination. The 6-month time limit can be extended up to 12 months by the Director of the Equality Tribunal 'for reasonable cause'.

## *People with Intellectual or Psychological Difficulties*

A parent, guardian or other person acting in place of a parent, can be the complainant, where a person is unable, by reason of an intellectual or psychological disability, to pursue a claim effectively.

## *The Onus of Proof*

A different onus of proof applies in discrimination claims. If an employee can establish facts from which it may be presumed that discrimination has occurred then the onus shifts to the employer to prove the contrary.

## **The Equality Tribunal**

### *Mediation*

The Director of the Equality Tribunal can at any stage with the consent of both parties appoint an Equality Mediation Officer. If a settlement is reached through mediation then the terms are legally enforceable (see later section on mediation).

### *Investigation*

If either party does object to mediation or if the process of mediation is unsuccessful, the case will be referred to an Equality Officer for investigation. Investigations are held in private. People can represent themselves or be represented by a trade union or other representative. The Equality Officer will issue a determination which is enforceable through the Circuit Court.

## *Dismissal of a Claim*

Cases can be struck out after a year if the Director of the Equality Tribunal decides they are not being pursued. The Director may dismiss a claim at any stage if of the opinion that:

- it has been made in bad faith; or
- is frivolous, vexatious; or
- misconceived; or
- relates to a trivial matter.

## *Representation and Costs*

Complainants may represent themselves or be represented by a lawyer, trade union or other representative. Costs are not awarded. Expenses in respect of travelling and other expenses (except expenses of representatives) can be awarded where a person obstructs or impedes the investigation or appeal.

## *Remedies*

Where the Equality Officer finds in favour of the complainant, the following orders can be made:

- In equal pay claims, an order for equal pay and arrears in respect of a period not exceeding three years;



- In other cases, an order for equal treatment and compensation for the effects of discrimination of up to a maximum of 2 years pay or €40,000, or €13,000 where the person was not an employee, can be made. **The maximum** compensation applies even where there was discrimination on more than one ground. However a separate award can be made for victimisation in addition to an award for discrimination.
- An order for reinstatement or re-engagement, with or without an order for compensation;
- An order that a named person or persons take a specific course of action.

There are specific provisions in relation to claims of discrimination by the Civil Service Commissioners, the Local Appointments Commissioners, and the Minister for Defence and the Commissioner of the Garda Síochána.

#### *Gender Claims*

In gender discrimination claims which are initiated in the Circuit Court, the Circuit Court, in equal pay claims, may order arrears of pay in respect of 6 years before the date of referral. There is no limit to the amount of compensation that may be ordered by the Circuit Court.

#### *Appeals*

Decisions of the Tribunal, including decisions on time limits, may be appealed to the Labour Court, not later than 42 days from the date of the decision.

#### *Enforcement*

A final decision of the Director of the Equality Tribunal or the Labour Court may be enforced through the Circuit Court.

#### *Appeal to the High Court on a Point of Law*

Where a decision is made by the Director of the Equality Tribunal or a determination is made by the Labour Court on an appeal, either party may appeal to the High Court on a point of law.

#### *Reference to the European Court of Justice*

Where matters of European law may be at issue, the Equality Tribunal or the Labour Court may refer matters to the European Court of Justice for guidance and clarification.

# A BRIEF GUIDE TO THE PROCEDURE FOR MAKING A COMPLAINT OF DISCRIMINATION

The purpose of this section is to highlight the roles and functions of the three main institutions involved - the Equality Tribunal, the Labour Court and the Equality Authority. In the past there may have been some confusion in particular about the roles of the Equality Tribunal and the Equality Authority but they have separate and distinct roles. The Equality Tribunal and the Labour Court are quasi judicial bodies. The function of the Equality Tribunal is to investigate, hear and decide claims of discrimination under the EEA 1998-2011 and the ESA 2000-2011. The Labour Court hears and decides appeals of determination of the Equality Tribunal under the EEA 1998-2010. The Equality Authority does not hear and decide claims of discrimination. It is a specialised equality body which promotes equality and seeks to eliminate discrimination. It is important to highlight that if you contact the Equality Authority, you have not made a complaint of discrimination under the EEA 1998-2011. Only the Equality Tribunal has

jurisdiction to adjudicate on claims of discrimination (and the Labour Court on appeal). On occasions in the past trade union organisers, solicitors and employers and others have mistakenly written to or contacted the Equality Authority, for example, lodging claims of discrimination with the Equality Authority or looking for an extension of time to put in a submission or looking for adjournments of hearings that are going on before the Equality Tribunal. The Equality Authority has no role of function in relation to receiving claims of discrimination or the management of claims before the Equality Tribunal. It is important that the Organiser doubly checks that he/she has the correct address or phone number when it is lodging a claim for discrimination, seeking extensions of time or contacting the Equality Tribunal in respect of any case-management issue.

## The Equality Tribunal

The Equality Tribunal is quite separate to and independent from the Equality Authority. The Equality Tribunal is an independent statutory office which investigates or mediates complaints of unlawful discrimination under the EEA 1998-2011 and the ESA 2000-2011.

Its decisions and mediated agreements are legally binding. The Equality Tribunal is a quasi judicial body and it must operate in accordance with the principles of constitutional/natural justice, which means that it must act impartially in complaints before it and ensure fairness for both parties in its procedures. The Equality Tribunal has devised its own 'Guide to Procedures in Employment Equality and Pension Cases. These procedures are attached at appendix B They are non statutory procedures which may be varied in individual cases.

Where a complaint of discrimination is upheld, redress can be awarded.

The Equality Tribunal cannot give legal opinion or advice on the content or merits of any case brought before it. The Equality Tribunal will, however, provide information on its procedures and practices.

The Tribunal may also investigate complaints of discrimination on the grounds of gender under the Pensions Act, 1990-2008, where an employer has failed to comply with the principle of equal treatment in relation to occupational benefit or pension schemes.

The Tribunal has jurisdiction in all areas covered by the equality legislation with the exception of service in licensed premises and registered clubs (claims should be referred to the District Court).

### *Investigation and Mediation*

An investigation is a quasi-judicial process carried out by a Tribunal Equality Officer who will consider submissions from both parties before arranging a joint hearing or hearings of the case to enable him/her to reach a Decision in the matter. Investigations are conducted by Equality Officers who have extensive powers to enter premises and to obtain information to enable them to conduct an investigation. Decisions are binding and are published.

Mediation is an internationally recognised process carried out by a Tribunal Equality Mediation Officer who will assist parties to reach a mutually acceptable agreement.

Mediated agreements are binding and confidential.

The Equality Tribunal can be contacted at the following address and numbers:

The Equality Tribunal,  
3 Clonmel Street,  
Dublin 2

tel: + 353-1- 477 4100

Lo-Call; 1890 34 44 24

fax: +353-1 477 4141

e-mail: [info@equalitytribunal.ie](mailto:info@equalitytribunal.ie)

website: [www.equalitytribunal.ie](http://www.equalitytribunal.ie)

The Equality Tribunal website carries all Equality Officer Decisions since 1996 and links to Labour Court Determinations. All of the forms can be downloaded and there are a number of information leaflets. This is an invaluable source of information especially for the preparation of submissions. The site also carries press releases on new cases. In addition to the Equality Tribunal's *Annual Report* which is a valuable source of information for Trade Union Organisers, the Equality Tribunal publishes an annual *Legal Review and Case Summaries*, which is essential reading and vital reference point for anyone bringing an equality claim or representing a member. This *Review* provides an annual overview of the legal issues arising in the decisions issued.

## The Labour Court

### *Functions of the Labour Court*

The function of the Labour Court in an employment equality claim is different to its function in relation to the resolution of industrial relations disputes. The Labour Court is operating as a quasi judicial body when it exercises its jurisdiction to hear appeals under the EEA 1998-2011. It is adjudicating on legal rights and entitlements; unlike industrial relations matters, it is not trying to get the parties to resolve the issue between them. The determinations of the Labour Court under the EE Acts 1998-2011 are legally binding and enforceable even though they may be called 'recommendations'. It also hears appeals under the equality provisions of the Pensions Acts, 1990.

The Labour Court investigates appeals of determination from the Equality Tribunal under the EE Acts 1998-2011, by requiring the parties to an appeal to provide it with written submissions in relation to the appeal, and, subsequently, by holding hearings which both parties attend. The hearings are held in private.



In equality appeals, the procedures somewhat different to those that apply to the industrial relations disputes – these are advised to the parties by the Court in time of referral of the case to the Court.

The Labour Court is located at Tom Johnson House, Beggars Bush, Haddington Road, Dublin 4, Ireland. The phone number of the Labour Court is +353 1 613 6666 (Lo-call Service (if calling from outside (01) area): 1890 220 228); the fax number is +353 1 6136667; e-mail address is [info@labourcourt.ie](mailto:info@labourcourt.ie); the website address is [www.labourcourt.ie](http://www.labourcourt.ie).

As well as detailed, up-to-date information on the Labour Court, the website contains a database of Recommendations, Determinations, Decisions, with searching facilities.

### **The Equality Authority**

The Equality Authority is a specialized equality body. There has been some confusion between the role and functions of the Equality Tribunal and the Equality Authority. The Equality Authority does not hear and decide claims of discrimination under the EE Acts. On occasion it provides legal representation to complainants in claims under the EE Acts (and Equal Status Acts) in the Equality Tribunal and

the Labour Court. The functions of the Equality Authority under the EE Acts 1998-2011 and the ESA 2000-2008 include:

- to work towards the elimination of discrimination in employment, and in relation to matters covered by the ESA 2000-2011;
- to promote equality of opportunity ;
- to provide information to the public;
- to monitor and review the operation of the Employment Equality Acts, 1998-2004; and Equal Status Acts, 2000-2011.

#### *Applications for assistance*

Anyone (including a union member) who feels they have been discriminated against can apply to the Equality Authority for assistance in bringing proceedings under the Employment Equality Acts, 1998-20011.

The Equality Authority has discretion to grant assistance if:

- it is satisfied that the case raises an important point of principle;
- if it appears that the person may not present the case adequately without assistance.

The advice given may include any or all of the following:

- provision of case law precedent
- legal advice
- advice in relation to running a case
- advice on mediation
- legal representation.

Cases will normally only be referred to the Equality Authority's Legal Section if they appear to fall within the Equality Authority's current criteria. The current criteria can be obtained from the Equality Authority.

It should be noted that the Equality Authority will normally refer any trade union member to his or her trade union for further advice and assistance. The Equality Authority has on occasion provided assistance to a trade union member. If a complaint is complex and the union is unable to deal with the matter, the organizer should consider contacting the Equality Authority on the member's behalf to see if the Authority can provide any form of assistance.

The Equality Authority may initiate proceedings in its own name in a number of instances for example

- discriminatory advertising
- where there is a general practice of discrimination or victimization

- where it is not reasonable to expect a person to refer a claim of discrimination or victimization
- where there is a failure to comply with an equal remuneration term or equality clause
- procurement of discrimination.

#### *Equality Authority as Source of Information*

The Equality Authority provides information to the public on the Employment Equality Acts 2000-2011. It has a series of published supports available in a range of formats, including guides to the Acts and training DVDs.

The Public Information Centre of the Equality Authority, which is based in Roscrea Co. Tipperary, provides information in various formats:

- i additional information through [www.equality.ie](http://www.equality.ie)
- ii an automated telephone voice message service (LoCall 1890 245 545) which also refers the caller directly to a Communications Officer who may provide more detailed information on their enquiry
- iii guides to the legislation in various languages and formats.

The Public Information Centre of the Equality Authority also provides information on the working of the Equal Status Acts, 2000-2004, as well as the Maternity Protection Acts, 1994-2004; Adoptive Leave Acts, 1995-2005; and Parental Leave Act, 1998-2006.

e mail [info@equality.ie](mailto:info@equality.ie)  
web-site <http://www.equality.ie>

The Equality Authority website contains useful information and access to the regular bulletin *Equality News*. Trade union Branches should download relevant material and put it on an Equality Authority file for handy access. Union staff should visit the site on a regular basis, keeping their information up to date.

## **Other Powers of the Equality Authority that May Be Relevant to Trade Unions**

*Equality Reviews, Action Plans and Inquiries*

The Equality Authority may invite particular businesses to voluntarily carry out an equality review and prepare an action plan or may itself carry out an equality review or action plan (in relation to businesses with more than 50 employees.) An equality review is an audit of the level of equality of opportunity and an examination of the policies, practices and procedures to determine whether these are conducive to the promotion of equality.

The Development Section of the Equality Authority has prepared materials to assist in equality audits, action plans and training in partnership in association with the ICTU and IBEC. Particular supports have been prepared in relation to anti-racism in the workplace and the employment of people with disabilities.

The Equality Authority also has a broad power to conduct an inquiry for any purpose connected with the performance of its functions.

# **A GENERAL EQUALITY FILE**

It is suggested that every organiser should maintain and update regularly a *General Equality File*. This should include:

- *Equality How*
- The Employment Equality Act, 1998-2011 and amendments
- *Your Employment Equality Rights Explained – the Equality Authority Guide to the Employment Equality Acts 1998-2010*
- relevant Statutory Instruments/ Regulations
- The EA Codes Of Practice On Sexual Harassment and Harassment at Work
- Equality Tribunal Annual *Legal Review & Case Summaries*
- Equality Tribunal 'Principles of Mediation', FAQs on Mediation, and Annual Mediation Reviews
- any materials downloaded from the Equality Authority, Equality Tribunal or other websites
- course or workshop materials
- copies of significant case law, newspaper and other articles on recent case-law
- Equality Tribunal – Guide to procedures in Employment Equality and Pension cases – revised October 2009;
- Form EE.1 – Complaint To The Equality Tribunal Of Discrimination Relating to Employment;
- Equality Tribunal Explanatory notes for filling in the form;
- Statutory Form of Request to Employer for Information – section 76 – Form EE.2 – Respondent
- Statutory Form of Reply from Employer to request for Information – Form EE.3;
- Consent Form to Mediation – Form ET.1;
- Appeal from decision of the Director of the Equality Tribunal – Section 77(12)(extension of time);
- Appeal from Decision of the Director of the Equality Tribunal – Section 83(1);

- Appeal from Decision of the Director of the Equality Tribunal – Section 87(2) – Collective agreement.;
- standard template for submissions;
- back up discs or hard copy of any materials stored electronically.

The websites of the Equality Tribunal, the Labour Court and the Equality Tribunal should be consulted regularly. Your union may also subscribe to the Employment Law Reports. These reports include significant employment equality cases of the Equality Tribunal, Labour Court and the Superior Courts.

## Time Limits

It is difficult overestimate the importance and significance of time limits. A complaint must be referred within six months of the date of the discrimination. If a claim is not lodged in time then the employee will not be able to pursue the claim. Time limits can be extended to up to twelve months for 'reasonable cause' but it is not safe to rely on this. You cannot assume that a time limit will be extended because an employee for example is invoking a grievance procedure or trying to resolve the matter informally. An application has to be made to extend the time limit. An employee wishing to apply to extend time limits should include all necessary detail about why reasonable cause exists to grant an extension. Supporting evidence such as medical certificates should be included where relevant. The time limit will not be extended beyond twelve months in any circumstances. The date of referral is taken as the date on which the Equality Tribunal receives a completed form.

Section 77(5) provides:

*'...a claim for redress may not be referred... after the end of the period of 6 months from the date of occurrence of the discrimination or victimization to which the case relates or, as the case may be, the date of its most recent occurrence'*

The Tribunal deadline is in effect six calendar months less one day.

- So if the discrimination occurred for example on the 5<sup>th</sup> of February, then the claim should be submitted by the 4<sup>th</sup> of August.
- Count time from when the discrimination is committed, not from when the employee finds out about it, and not from the outcome of any appeal or grievance procedure.
- If the act of discrimination is a disciplinary warning, count the time from the date the warning is given, not from the outcome of any appeal.
- If the act of discrimination is a dismissal, count time from the termination date, not from the date of any appeal.
- If the discrimination is a failed promotion, count time from when the employer decided not to promote, not from when the employee found out and not from the outcome of any related grievance.

If there are several distinct discriminatory acts, each one needs to be kept in time. It is essential when you first meet the employee that you establish the time limit for all of the incidents. A sequence of events may constitute a continuing discriminatory act and be ongoing. It may be difficult

to rely on this. Never rely on this to deliberately allow a time limit to pass. In a reasonable accommodation claim, where the employer has failed to provide reasonable accommodation, count time from when the employer refused to provide the accommodation or if the employer has said nothing, from the date when you would expect a non-discriminatory employer to have made the accommodation.

- List every alleged discriminatory action and omission (including a failure to provide reasonable accommodation);
- Note its date;
- Note the deadline for each in red pen or highlighter;
- Circle the earliest date that you need to submit the claim for everything to be in time. Put this date on the outside of the file and in your diary and any system of alerts that you have;
- The employee should be advised of this six-month limit and it should be clearly agreed who has the responsibility for lodging the claim.

## **Interviewing the union member - getting key information - key points to remember**

You will often be the first port of call for members with potential discrimination cases. Your union probably has an equality policy and it may help put the member at ease to indicate at the outset, that the stand-point of the union and your stand-point are anti-discrimination. This is of course a separate matter from whether discrimination can be proved in any individual case. Be aware of not being influenced by your own opinion, for example whether you think that women's maternity rights are excessive, whether you think that the employee should have revealed his/her disability before being appointed. Be careful not to make unconscious stereotyped assumptions about what workers can or cannot do for example because of their age/gender/disability.

Some employees will confidently mention discrimination to you from the outset. Others will wait for you to raise the issue. Don't assume that the employee doesn't think that there has been discrimination just because she/he doesn't bring up the issue unprompted.

## **Always ask yourself whether discrimination has occurred.**

As a general rule if the union member is a member of a commonly discriminated against group, and is complaining of unfair treatment (as opposed for example to a straight-forward query about a pay-slip), this should be enough for you to ask yourself whether discrimination is a possibility.

There are a number of ways to raise discrimination. Don't feel embarrassed to raise the issue. The majority of employees will be pleased that you are ready to consider the matter and comfortable about discussing it.

*There are a number of ways to raise it.*

**Prompt questions** - Why do you think you have been treated that way? Does everyone get treated like that? Why do you think it is unfair?

**Offer a menu** - The law prohibits discrimination on grounds of gender, civil status, family status, disability, age, sexual orientation, religion, race and membership of the Traveller community. Could any of these apply in your situation?

**Direct questions** - Do you think it was race discrimination? Do you think you would have got the job if you were younger?

## **Sensitivity may be required in certain situations**

If you suspect that the employee is gay or lesbian and has been discriminated against but the employee has not told you that he/she is gay or lesbian it may be better not to ask a direct question at first. The best way to raise the issue would probably be a general 'prompt' question or make it easier by offering a 'menu'.

If you think that the employee has a disability but has not self-identified as disabled, it may be best to explain that the law protects people against discrimination for various kinds of illnesses and not just conventionally understood physical disabilities.

It may take longer to talk to a member about a potential discrimination case than other types of case. Remember, the information contained in this booklet is only a guide, not an authoritative interpretation of the law. The law and advice contained here is simplified and summarized. You always need to check the text of the legislation.

## **Duty of Care**

Trade Union Organisers owe their members a duty of care to take all necessary steps to ensure that their member's case is treated in an

efficient and professional manner and that all reasonable steps are taken to ensure that the information, advice and representation are of the highest quality reasonably possible. This duty is particularly relevant in relation to the lodging of a claim within the statutory time limits as a member's claim may not be heard if it is statute-barred. The scope of the EE Acts also extends to the provision of benefits by unions to their members.

## **Confidentiality and privacy**

Trade Union Organisers need to ensure that members' cases are treated in the utmost confidence. Any meeting with the employee should be held in private. Specific details of cases should not be discussed with friends, family members, co-workers, or other union members or the employer without the member's explicit permission. An individual case-file for the member should be opened should be filed and stored securely.

Section 97(2) of the EEA 1998-2008 makes it **a criminal offence** to publish or disclose any information furnished to, or otherwise acquired by the Labour Court, the Director or otherwise in the course, or for the purposes of any investigation, mediation or hearing (except for the purpose of the investigation hearing or mediation, or in

a decision of the director, Labour Court etc.) See the wording of the section 97(2) for other exceptions). This means that the employee and the organiser cannot be distributing or discussing with the union (or anyone else) documents that have been furnished by the employer to the Equality Tribunal/ Labour Court during the course of the investigation.

#### Case Recording

Effective case recording mechanisms should be put in place. A Case File should contain comprehensive written attendance of any meetings with the member including a detailed account of the allegation grounding the claim, actions planned and a copy of all correspondence, to and from the member, to and from the employer, to and from the Equality Tribunal and/ Labour Court. A detailed attendance of any telephone conversations should also be taken. Copies of any e-mails, faxes, and any other documentation should also be securely attached to the file. Explanation as to why action or no action was taken should also be included. Copies of any correspondence, referral forms/ submissions sent to and from the Equality Tribunal, the Labour Court and the employer should be date marked and stored securely on the file.

### Key facts to find out from the employee in every case

Stories of workplace discrimination tend to be long and detailed. It helps to have a structure.

#### Personal information

- Name Of Complainant
- Address
- Telephone work home mobile
- What is the best way of contacting the employee
- Email
- Need for assistance/sign language interpreter/translator/ or other assistance

#### Employment Details

- Name & Address Of Employer, (Registered Head Office)
- Nature Of Employment
- Telephone Fax E Mail
- Manager Dealing With Case Telephone (work and/or mobile)
- Contract of Employment (Service) Or Apprenticeship-is it in writing?
- If Employed Through An Employment Agency, Give Details Of Agency
- Who Pays Wages? P60? P45?

#### Background

- details of the employee's job
- job description-contract of employment,
- the employer's business, the size of the employer, the size of the employee's department or section,
- the general pattern of staff and jobs according to gender, disability, sexual orientation etc (as relevant to the employee's complaint)

#### Key dates

- when did the employee start work?
- When did the discrimination start? When was the last occurrence of the discrimination? Is it ongoing? Any other discriminatory incidents or remarks.

#### Does the employee believe that discrimination has occurred and why?

This is one of the most important questions to ask, in some instances it may be that the employee believes that he/she has been treated unfairly but does not contend that the behavior complained is in any way connected to any of the discriminatory grounds. Get the employee to be as specific and detailed as possible in answering this question.

#### What reason has the employer provided for the different/less favourable treatment?

- Has the employer ever given any reason?
- Has the reason changed over time?
- Is the employer withholding material information?

#### How have workers belonging to the same discriminatory ground been treated?

- Have other employees made allegations of discrimination on the same discriminatory ground?
- Have other employees made allegations of discrimination on different discriminatory grounds?
- How are workers of the employee's gender, race (as appropriate to the employee's circumstances) been generally treated?

#### Comparator

- Has anyone else of a different gender, race, sexual orientation (as appropriate to the employee's circumstances) been treated differently, more favourably?
- If so, why does the employee think this is?

- What reason does the employee think that the employer would give for the different/more favourable treatment?
- Are there potential non-discriminatory reasons for the more favourable treatment of the other employee?

### **Witnesses**

- Are there any potential witnesses to the discrimination?
- Would they be prepared to talk to the organiser?
- Would they be prepared for the organizer to make a note or statement of what they had witnessed?

### **Is there anything in writing that is relevant to the claim?**

You should obtain copies of any notes letters, correspondence, written contract, advertisements, job descriptions, policies and procedures that may be relevant to the claim

### **What policies and procedures does the employer have in place for dealing with claims of discrimination?**

- Are they well known?
- Are they up to date and comprehensive?
- Are they relied on and applied?
- Has the employee relied on them?

### **Has the employee ever complained to the employer of discrimination?**

- If so when?
- How did the employee complain?
- Was the complaint in writing?
- What was the response of the employer?
- Get full details of the complaint made to the employer and the employer's reaction.
- If the employee has not complained to the employer, why not?

## **ADDITIONAL KEY FACTS TO FIND OUT IN PARTICULAR TYPES OF CASES**

The following checklists/pointers/questions are designed to help you find out some basic facts in different types of claims/situations which will give you an idea as to whether there is an issue worth exploring further.

### **Direct Discrimination**

This is where the employer treats your union member differently on account of his/her sex, civil status, family status race, sexual orientation, religion or belief, age, disability, membership of the Traveller community (as relevant to the employee's circumstances) for example:

- A woman fails to get a promotion, a male colleague with fewer qualifications and less experience is promoted instead.
- An Indian worker is dismissed for sleeping on duty. Three months previously, a non Indian worker only received a written warning for the same offence.

- An employer finds a pretext to dismiss the employee after the employee is visited at the office by a gay friend.
- An employer dismisses the employee who is a Traveller, after the probation period because he/she is too slow to learn the job. Another probationer who is not a Traveller is kept on, even though he/she has taken even longer to learn the job.
- An employer refuses to recruit someone to a job because he/she looks too young.
- An employee who is disabled is absent for over 90 days in one year and as a consequence is dismissed. Another worker, who is not disabled, is also absent for 90 days but is not dismissed.



## **Different Treatment - Unfair Is Not Enough**

Unfair treatment is not enough.

Always look for different treatment – the less favourable treatment has to be connected to one of the discriminatory grounds. Keep asking yourself how the employer would have treated the employee if for example she was a man, or Irish, younger, or heterosexual, etc. (as appropriate).

For example, 'if the employee was a man, Irish, heterosexual etc, would the employer have promoted her? made her redundant?'

It is a good question to ask the employee also as it helps the employee focus on the need to prove different- less favourable treatment on the discriminatory ground and not just general non-specific unfair treatment.

- 'Do you think they would have given you the job if you were a man? not gay?'
- 'Do you think your employer would have sacked you for poor work if you were white?'
- 'Do you think the employer would have carried out a proper investigation if you were not Muslim?'

## **Useful Evidence**

- **Comparators:** The best evidence is an actual comparator, i.e. a person for example of the opposite sex, a different racial group, who is not gay, a different religion etc, (as appropriate) who has been treated differently or better in similar circumstances. The employee may know of someone. If not it may be possible to find out about a comparator by using the statutory procedure to obtain information (see p 43)
- Sexist remarks/racist remarks/homophobic remarks/ageist remarks/offensive remarks – the difficulty with such remarks is that they are usually denied and there may not be witnesses. Make sure you find out from the employee right at the beginning whether any such remarks were made and make an accurate note of the actual words used.
- Workplace profile - the relevant numbers, status and treatment of people belonging to the protected category may be revealing, although it may not be sufficient on its own

- Workplace atmosphere (as appropriate) Consider, for example, the extent to which there is a sexist bias in the workplace; the extent to which workers feel comfortable to 'come out' in the workplace, the level of openness about gay issues; the extent to which different religious practices are accommodated; the way people of a certain age are treated. These may all be revealing and or significant in the appropriate context but may not be enough in themselves.
- Unexplained behavior by the employer – The employer cannot provide a good explanation for how the employee has been treated. This works best when there is some other evidence of discrimination.

## **Ask the Employee**

- What explanation has the employer given for dismissing you /not promoting you/disciplining you etc. (as appropriate)? Did the employee ask for the reason in writing? Is the employer's explanation in writing?
- Is there a comparator? Is there for example a man, heterosexual person, white person (as appropriate) etc who has committed the same offence but was not sacked?

- Are the circumstances of the comparator identical or could the different treatment be due to other factors? What reason is the employer likely to give for treating you differently to your comparator?
- Does your employer usually act unfairly towards everyone or are other people treated better than you?
- Were any ageist comments/sexist comments/racist comments/homophobic comments (as appropriate) made? (Don't rely on the employee to volunteer to you that such remarks were made. Always ask. Employees sometimes may be concerned that the union rep will not consider certain remarks or 'jokes' to be unacceptable.)

There is no defense to direct discrimination (except in relation to age). There are however a number of exemptions which the employer may rely on (see p for a summary of the exemptions).

## Indirect Discrimination

Indirect discrimination occurs where the employee is disadvantaged because of a provision criterion or practice which appears to be neutral or applies to everyone, but in fact tends to particularly disadvantage those for example of the employee's gender, sexual orientation, religion, age, ethnicity etc or someone with a particular disability or someone who is a Traveller etc (as appropriate to the employee's circumstances):

- a requirement to work full-time, for example, may disadvantage women because more women than men tend to have child-care responsibilities.
- a requirement, criteria or provision which disadvantages part-timers or job sharers, for example, may indirectly discriminate against women as more women tend to work part-time or job-share for child-care reasons.
- A requirement that a job applicant speaks fluent English would tend to disadvantage migrant workers from non-English speaking countries.

- If an employer were to refuse to allow any worker to wear head coverings, this would particularly disadvantage a Muslim woman who wore a headscarf for religious reasons.
- imposing dress requirements which clash with religious obligations, or Imposing shifts or working hours which interfere with religious holidays could disadvantage members of particular religious communities.

Requirements for certain qualifications, experience and length of employment may disadvantage women, people with disabilities, certain racial groups, Travellers or older people.

The employer can seek to defend imposing a discriminatory provision, criterion or practice by proving that it is a proportionate means of achieving a legitimate aim. The employer needs a very good reason.

Some exemptions in the EE Acts allow employers impose certain requirements or provisions and an employer may seek to rely on these exemptions (see p to) for a summary of the exemptions)

## Sexual Harassment and Harassment

When discussing sexual harassment or harassment with an employee, it may be helpful to indicate that your standpoint and the standpoint of the union is anti-harassment (this is separate to whether sexual harassment or harassment can be proved in a particular case). It is also important not to be overly influenced by your own opinions for example as to whether certain racist/sexist comments were not badly intended or meant as a joke.

Sexual harassment occurs where the employee is subject to unwanted verbal or non verbal conduct of a sexual nature.

Harassment occurs where an employee is subjected to any form of unwanted conduct related to any of the discriminatory grounds

In both cases it is conduct which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Such unwanted conduct may consist of acts, requests, spoken words, gestures, or the production, display or circulation of written words, pictures or other materials.

The EE Acts prohibit the victim being treated differently by reason of rejecting or accepting the harassment (or where it could reasonably be anticipated that he or she would be so treated)

An employer may be liable if a third party for example, co-employee, client or customer subjects the employee to sexual harassment or harassment in the course of his/her employment and the employer has failed to take such steps as are reasonably practicable to prevent it.

Examples may include:

- Display of pornographic material, crude or sexist jokes
- Racist abuse
- Homophobic remarks or if the employee is 'outed' against his/her will
- Anti-Muslim remarks, or so-called jokes referring to terrorism
- Ageist remarks - constant 'banter' about the employee getting old
- Mimicking a disability.



## Check

- What policies and procedures does the employer have in place to deal with sexual harassment and harassment at work?
- Are they up to date? Do they comply with the Equality Authority Code of Practice on Sexual Harassment and Harassment at Work?
- How are the policies and procedures made known to all employees and clients and customers of the employer?
- Are the policies and procedures applied in practice?
- To what extent have they been applied in this case?
- Workplace atmosphere (as appropriate), for example, the extent to which sexist/racist/homophobic/ageist comments etc are common in the workplace.
- To what extent is the conduct/harassment complained of connected to one of the discriminatory grounds or is it more like non-specific bullying?

## Victimisation

Victimisation occurs in a number of cases and the Equality Tribunal and the Labour Court take it very seriously. The victimisation that is defined in the EE Acts is different to the normal everyday meaning of victimization. It should not be confused with harassing someone or generally picking on someone or bullying them.

It is victimization to punish or penalize the employee because he/she has complained about discrimination in some way for example verbally, in a letter, using the grievance procedure, in a Tribunal case. The protection against victimization extends for example to witnesses in a grievance, Tribunal or Labour Court case. It would also extend to an identified comparator who gave evidence.

It does not matter if it turns out that the employee was initially wrong to believe that discrimination had actually occurred, as long as the complaint was made in good faith.

## Check

- The employee must have complained about discrimination and not just unfair treatment.

- The complaint must be that discrimination connected to one of the nine discriminatory grounds took place and not just 'discrimination'. What did the employee actually say/write? Did he/she make it clear that he/she was talking about discrimination based on gender, age, disability etc?
- The employee need not have actually made a complaint but intends to.
- It may be that the employer anticipates that a complaint is going to be made.
- What was the employer's reaction?
- Has the employer treated the employee differently before and after the complaint?
- Has the employee been treated differently from colleagues who made no complaint?

## Access to Employment/Promotion

- Was the job advertised? If so look for a copy of the advertisement. If not, how was the vacancy made known?
- Is the job advertisement discriminatory? If so, has the Equality Authority been contacted about it?
- What is the job? Is there a job description?
- What were the stipulated conditions for the job? What qualifications are essential? What conditions are desirable?
- Does the employee have the essential qualifications/experience?
- To what extent are the 'essential' requirements necessary for the job?
- To what extent does the employee have the 'desirable' qualifications?
- Has the employee a copy of his/her job application?
- Were any discriminatory comments made to the employee prior to the interview?
- Did the employer provide any form of training or coaching for the interview? Did the employee avail of this?
- Was the employee called for interview?

- What happened at the interview? Did the employee think that the interview was fair? If not, why not?
- Were any discriminatory comments made? If so, get specific details?
- Who was successful in getting the job/promotion? Did the successful candidate belong to a different gender /race/age etc. (as appropriate to the employee's circumstances)?
- Did the employee believe that he/she should have got the job/promotion?
- What gender/race/sexual orientation (as appropriate to the employee's circumstances) did the other unsuccessful candidates belong to?
- Was the employee given any feedback after the interview?
- Has the employee sought details of his/her interview using the Data Protection legislation?

### **Poor Performance/Misconduct/ Disciplinary/Dismissal**

- Key dates - In addition to the ones set out above you also need to obtain the dates of the alleged poor performance, the dates of the alleged offences, the date of disciplinary action or dismissal and any appeal/appeal outcome.
- The nature of the alleged poor performance/alleged misconduct and the employee's comments.
- Has a work colleague of a different race, gender, age etc (as appropriate to the employee's circumstances) also poorly performed/committed a similar offence but received a lesser punishment or a more supportive approach?
- Has the employee had appraisals/reviews? Have these been good? Did they raise any issues for which he/she is now being disciplined/dismitted?
- The employee's disciplinary record - were poor performance/ other disciplinary matters raised previously? Had he/she been disciplined previously?

- Does the employee accept that he/she has poorly performed? Would the poor performance have anything to do with an employee's pregnancy? (see the section on pregnancy on page x). Would the poor performance have anything to do with the employee's disability (see section on reasonable accommodation on page x)
- Can the employer provide a good reason for the disciplining/ dismissing the employee? Do the reasons change?
- If the employee accepts that there has been poor performance or misconduct, is the response of the employer proportionate?

### **Redundancy**

- The date of any consultation regarding redundancy, the date he/ she was made redundant.
- How many redundancies were made and roughly who else was made redundant?
- What is the pattern of those made redundant , compared with those retained by reference to gender, race, sexual orientation etc (as relevant to the employee's complaint)?
- What reason was the employee given for his/her selection? What are the employee's comments on those reasons?
- Can the employer provide a good reason for selecting the employee for redundancy? What were the redundancy selection criteria? To what extent did the employee match the criteria?
- Do the redundancy criteria tend to discriminate against those of the employee's gender/religion/ race (as relevant to the employee's complaint) - for example 'last in first out' may disadvantage women/ younger workers. 'Part-timers' could disadvantage women.
- Was the employee pregnant/ on maternity leave when the redundancy occurred?

## Pay

'Pay' is defined widely. The following have been held to be pay – sick pay, travel concessions, grading systems, inconvenient hours supplement, termination/redundancy payments, maternity benefits, bonus payments, and share allocations. (However an allowance paid to a woman on maternity leave has been held not to constitute pay. The ECJ has also held that an employee who is absent by reason of a pregnancy related illness is not entitled to maintenance of full pay).

An employee has two main hurdles to meet. First she/he must establish like work and she/he must identify a comparator engaged in like work who is paid a greater amount on the basis of a discriminatory ground. The entire basis of an equal pay claim is that the employee is doing like work with an identified comparator. Like work is defined as work that is:

- Identical or interchangeable;
- Similar in nature where the differences are infrequent or of small importance in relation to the work as a whole; or

- Equal in value in terms of the demands made in relation to matters such as skill, physical or mental requirements, responsibility, responsibility or working conditions.

### Identical or interchangeable

Identical work is self explanatory. The idea that work is interchangeable suggests that the employee can take over from the comparator at short notice.

### Similar in nature

This suggest that the work is not identical or interchangeable, but that the work is alike in many respects, and whatever differences exist are not significant or of small importance in relation to the job as a whole.

### Equal in value

An assessment of a claim of equal value is complex any time consuming and will involve making a comparison of both jobs across a series of criteria- skill, physical and mental efforts, responsibility and working conditions. The equality officer will visit the workplace and inspect the work.

There is a need for a real comparator and not just a theoretical one (though not necessarily known to the employee). The comparator must be in an identical situation with the employee.

Even if an employee can establish like work, it is still open to the employer to justify the difference in treatment. It is open to the employer to argue that the difference is not on the discriminatory ground, but for some other valid non-discriminatory reason.

If there is a difference of treatment on the discriminatory ground and this difference amounts to indirect discrimination, the employer may be able to objectively justify the discrimination.

# ISSUES FOR PARTICULAR WORKERS

## Pregnant workers

Discrimination on grounds of pregnancy is direct discrimination on the gender ground. A woman must not for example be refused a job, disciplined or dismissed for pregnancy-related reasons such as pregnancy-related illness or inability to carry out certain duties on account of the pregnancy.

### Useful evidence - ask the employee

**Remarks** - Have there been any hostile or negative comments made about the employee's pregnancy or requests for time off or negative comments about pregnancy generally?

**Before and After** - Has there been a change in attitude or treatment since the employer became aware that she was pregnant - has she been given more difficult/antisocial shifts? Ask the employee to be specific about this. Does the change in treatment apply to everyone?

**Comparator** - While there is no need to have a comparator in pregnancy-related cases, it would be useful to find out whether a non-pregnant person is treated better for example they both failed to meet targets but only the pregnant employee was disciplined.

## Migrant workers

### Check

- What arrangements has the employer put in place to translate or ensure that the employee understands key instructions and documents including terms of employment, health and safety manuals, grievance disciplinary, bullying, sexual harassment, anti-discrimination policies and procedures?
- To what extent does the employer accommodate cultural and linguistic differences?
- Does the employee understand the allegations that have been made against the employee?
- Have the allegations been fully explained or translated? Has the employee been made aware of and understands the policies and procedures that the employer is relying on?
- Can the employee make him/herself understood to the employer?

## Older Workers

The law in the areas of compulsory retirement and occupational benefits is complex uncertain and evolving and an organizer will need to keep himself/herself updated on latest developments. There are a number of judgments of the European Court of Justice that deal with retirement ages. There are conflicting High Court authorities in relation to compulsory retirement.

### Check

- Does the employee have a written contract of employment?
- Does it specify a retirement date?
- Does it apply to every employee? Have exceptions been made?
- Is there provision for extending the retirement date?
- If the retirement date is not specified in writing, what is the custom and practice in this regard?
- What sort of pension does the employee have?
- What will be the effect of retirement on the employee?
- Has the employee asked the employer to remain on in employment?
- What reasons has the employer given for refusing to allow the employee to remain on?

The law in relation to occupation benefits is also evolving. For example the UK Court have tended to scrutinize the criteria used in occupational benefits scheme to see if they unnecessarily discriminate on the grounds of age. There are a number of cases on retirement, and occupational benefits referred to the European Court of Justice and judgement is awaited. You may need to get advice and it would be important to check the up to date position.

## Employees with disabilities

### Disability and reasonable accommodation

The definition of disability is set out at p X. It is broadly defined to include people with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions.

The following disabilities are examples that have arisen in the case-law to date:

- cerebral palsy, visual impairment, astrocytoma, wheelchair user, schizophrenia, brain haemorrhage, embdectomy, diplopia (double vision), various heart conditions, anxiety/depression, manic depression, multiple sclerosis, psoriatic arthritis, asthma, irritable bowel syndrome, respiratory tract and lung infections, ulcerative colitis, dyslexia, epilepsy, diabetes, curvature of the spine, quadriplegia, alcoholism, vertigo, HIV, adhd dyspraxia (this is not an exhaustive list).

The disability does not have to be of a specific severity or severely limiting to come within the definition. However, a very short minor illness may not come within the definition.

### Failure to provide reasonable accommodation

If the employee is at a disadvantage at work due to an effect of his/her disability, the employer must make all reasonable and appropriate measures to correct this disadvantage (unless these measures would impose a disproportionate burden on the employer).

The employer is expected to take what could be described as a form of positive action - it may mean treating the employee with a disability more favourably than other employees. The purpose is to level the playing field, not to create an unfair advantage.

### Examples of possible arrangements

- Adjusting premises-for example doors or stairs)
- Acquiring or modifying equipment (for example specialist headsets may assist employees with hearing disabilities. Specialist software may assist people with visual impairments, dyslexia or typing problems
- Adjusting or modifying instructions or manuals
- Providing a reader or sign language interpreter
- Providing supervision, training or mentoring

- Adjusting assessment procedures - for example, a worker with dyslexia may need more time
- Adjusting hours of work
- Allowing someone to work from home
- Easing someone back into work after a long period of absence
- Relieving the employee from carrying out some tasks or reallocating some duties
- Providing a parking space
- Transferring the employee to suitable available alternative employment.

### What is the employer expected to do?

The employer is expected to be proactive about making arrangements for people with disabilities. At a minimum, an employer should ensure that he/she is in possession of all the material facts concerning the employee's disability, including the degree of impairment or incapacity arising from the disability and its likely duration. This would involve looking at or obtaining appropriate medical reports that are sufficiently specific. It may be necessary for an employer to carry out a safety audit in certain jobs. If it emerges that the employee is not fully capable of doing the job, then the employer has to consider what

arrangements (or for example training) could be put in place to enable the employee carry out the job. It is vital that the employee is consulted at every stage of the process and allowed to present relevant medical evidence etc.

Don't rule an accommodation out because you think it may be too much. The Tribunal or Labour Court will consider factors such as the size and resources of the employer, the cost and practicality of the arrangement, the availability of grants etc. in deciding whether it is a disproportionate burden.

While it is not necessary for the employee to ask for specific arrangements, it helps if they can identify something that would work.

### **Check with the employee**

- Has the employee any difficulty in carrying out any workplace tasks because of the disability?
- Are there any steps or arrangements which could be put in place, which the employee could take to remove the difficulty?
- Is the employer aware that the employee has a disability?

- Has the employer been told that the employee needs help or has difficulties doing the job/task/training/assessment because of the disability?
- Has the employer discussed with the employee the nature of the problem and potential solutions?
- Has the employee furnished the employer with any medical reports or vocational assessments?
- Has the employer carried out any assessments? Are they relevant and up to date?
- Has the employee been sent for a medical assessment by the employer?
- Do the employee and/or the employee's doctors agree with any assessment that has been obtained by the employer? Is the employee able to get their own medical reports and provide these to the employer?
- Has the employer taken any steps at all to deal with the issue?

## **BEFORE THE CASE STARTS – CONTACT WITH THE EMPLOYER**

It may be helpful and appropriate and/or the employee may want to write a letter to the employer raising his/her concerns at the outset. There may also be an appropriate grievance procedure or for example a sexual harassment procedure which needs to be invoked. However strict time limits apply and it may not be possible to resolve a matter informally before a statutory time limit expires. If this is the case and you need to lodge a claim to protect the employee's interests, make sure the employer is informed that this is what is happening and that the employee is anxious to resolve the matter informally notwithstanding that a claim has been lodged. If the claim is not lodged on time, the fact that the employee was trying to resolve the matter informally does not mean that the time will be extended by the Tribunal.

These preliminary letters/statements need to be drafted with great care and attention. The employee may say something incorrect or exaggerated or may fail to include something relevant and significant and this may cause problems later at an Equality Tribunal/Labour Court hearing. For example if the letter only asks about outstanding wages but does not refer to discrimination, this may cause difficulty as the Equality Tribunal/Labour Court will have expected your client to have mentioned discrimination/harassment etc if the employee believed it had occurred.

Keep in mind the following if you are helping an employee draft a letter/make a complaint/grievance.

- If any racist/sexist or similar remarks had been made to the employee, it is usually crucial to mention it the first time the employee makes a written complaint
- The letter/statement should clearly describe every act of discrimination complained of



- The letter/statement should identify what type of discrimination is complained of, for example-gender, disability etc
- The tone of the letter should not be abusive or lose credibility by alleging conspiracies or making wild accusations without solid evidence. The employee is of course entitled to express his/her/feelings
- If the issue is discrimination, it may not be helpful to raise numerous other issues and complaints at the same time
- It may be tactically better for the letter to come from the employee at the outset rather than from the organizer so as not to unnecessarily aggravate a situation. The employer may be less defensive and more amenable to deal with the issue if the union does not appear to be involved from the start.

### **A Right to Look for Information/ Right to Personal Information**

There are two methods for obtaining information that will help you decide if there is a case and may be useful evidence in a subsequent hearing – (1) a request for information under section 76 of the EE Acts and (2) obtaining a copy of the employee’s file under the Data Protection legislation.

### **Right to Look For Information**

The right to look for information in section 76 of the EE Acts is a way that you can gather information and/ evidence that may be necessary or is of assistance in proving the case. Section 76 of the Employment Equality Acts, 1998-2011 entitles any person who believes that s/he may have experienced discrimination to write to the person who may have discriminated against them, asking for certain material information that will assist in establishing what really happened. This may be essential in order to decide whether or not to make a complaint under the Act. It can be hard to obtain detailed evidence by any other method. This can be done before a case is referred to the Equality Tribunal. Do not delay in referring a case because, if an employer is slow to reply, the time limits for referring cases may run out. Information sought may include an explanation as to why an employer took – or refused to take – a particular course of action with regard to the remuneration or treatment of another person in the same or similar position to the employee seeking the information. Be sure you ask:

- Who made each key decision about the employee
- When and what were their reasons

- Details about any comparator that has been identified
- Questions which may help identify comparators.

Keep all such written requests for information and any replies received on file. They may form part of the evidence in any subsequent case.

Employers are not obliged to reply or to give the information sought, but the Act states that the Equality Tribunal/Equality Officer may draw such inferences as seem appropriate from a respondent failing to reply or supplying false, misleading or inadequate information. Requests are best sent by Registered Post or other recorded method so that a record may be kept. An employer is not obliged to divulge confidential information. The Act states that confidential information is information that would identify the particular person it relates to and that person does not agree to disclosure.

Information should be requested using a standard form of questionnaire (Form EE.2) and reply (Form EE.3). These forms are laid down by law and must be used. See Appendix B.

The employee is not obliged to fill out a questionnaire but if Form EE.3 is not used the Equality Tribunal/Equality Officer may not draw inferences from any failure to supply information or from misleading information on completed questionnaires.

### **Accessing the Employee’s Personal File - Data Protection Acts 1988-2003**

One of the most practical implications of this legislation for many employees is that it provides a right of access to personal information held by the employer. This may be a most useful facility for employees in considering discrimination claims as it allows employees seek to obtain the contents of his/her personal file. Data access is a personal right and the employee should make the request themselves. An employee is entitled on making a written request pursuant to section 4 of the DPA 1988-2003 to be provided with a copy, clearly explained, of any information relating to him/her which is kept on computer or in a structured manual filing system.

See [www.dataprotection.ie](http://www.dataprotection.ie) 'accessing your personal information'. While there is no prescribed format for requests in the legislation, the formula suggested by the Data Commissioner is as follows:

*Dear ...*

*I wish to make an access request under the Data Protection Acts 1988 and 2003 for a copy of any information you keep about me, on computer or in manual form. I am making this request under section 4 of the Data Protection Acts.*

## THE CIRCUIT COURT OPTION FOR GENDER CASES

The EE Acts give complainants on the gender ground the option of bringing the case to the Circuit Court or the Equality Tribunal. This is not an option that is available on the other grounds. An employee should be advised of this entitlement. There are a number of differences between the two fora. The most significant difference is that the Circuit Court is not limited in the amount of compensation that it can order. The only financial limitation is a six-year limit on backdating of compensation or arrears of remuneration.

### **The advantages of a Circuit Court hearing**

- There is no limit on the compensation that can be awarded
- A case may come on much quicker than a complaint before the Equality Tribunal
- An employee can also bring additional proceedings at the same time, for example a personal injury/stress/bullying claim
- It is possible to get an order for discovery in the Circuit Court. This may prove very helpful in proving discrimination.



### **The disadvantages of a Circuit Court hearing**

- The case will be in public and the name of the complainant will not be anonymised. The case may be reported in the press
- It will be a more formal adversarial Court hearing where the rules of evidence will be more strictly applied. The barrister will be wearing gowns and possibly wigs and the complainant may be subject to intensive cross-examination
- If a complainant is unsuccessful, she may have to pay the employer's costs even if the union is paying for her own lawyers.

The union organizer cannot represent the employee at the hearing though it may be open to the union to provide the employee with a solicitor and barrister.

There have not been many cases brought to the Circuit Court. However the Circuit Court has made some very large awards in the cases that have been successful. It would be important for the organiser to discuss in detail the benefits and disadvantages of the different options with the employee and whether the union would be in a position to finance a Circuit Court action or not. The employee is of course free to obtain her own legal representation.

## **PARALLEL/ALTERNATIVE CLAIMS**

An organiser will need to consider the extent to which the complainant has alternative or better claims. A complainant may not obtain relief in respect of discrimination under both the EE Acts and the Protection of Employees (Part-Time Work) Act 2001 or the Protection of Employees (Fixed-Term Work) Act 2003. The position in relation to unfair dismissal, discriminatory dismissal and common law remedies is somewhat unclear. If an employee has brought a case to the Tribunal, he/she will not be entitled to redress under the Unfair Dismissals Acts, unless the Director, having completed the investigation and in an appropriate case, directs otherwise. This may be to allow for a situation where The tribunal is of the opinion that a respondent may have unfairly dismissed but there has not been discriminatory dismissal. Section 79 also provides that an employee who has been dismissed shall not be entitled to seek relief under the EE Acts if, under the Unfair Dismissals Act 1977-2001, a Rights Commissioner has issued

a recommendation in respect of the dismissal, or the Employment Appeals Tribunal has begun a hearing into the matter of the dismissal. An employee may be able to begin proceedings at both common law and before the Equality Tribunal but once a hearing has commenced in one, any action to seek relief in the other must come to a halt. An organiser may need to seek advice in this regard.

# FILLING IN THE COMPLAINT FORM TO MAKE A COMPLAINT OF DISCRIMINATION UNDER THE EE ACTS – FORM EE1

The EE Acts do not stipulate what form should be used to refer a complaint. The Equality Tribunal has produced Form EE1 for this purpose and it is advisable to use it. It is attached in appendix X.

- **Name and address** - be sure to include accurate contact details. If the address, phone number or email changes, be sure to let the Tribunal know or else you may miss important letters from the Tribunal, for example, the date of any hearing.
- **Representative** - if the union is going to represent the employee, the union organizer's name and contact details should be inserted here.

- **The name, organizer or company that you are complaining about** - it may be difficult to identify the exact employer in some cases. An employee may need to look at the pay-slip, contract of employment, P60 etc. Usually the union knows the correct identity of the employer. If you are complaining about a company or organization, you must use their full legal name. If there is a doubt, all possible employers should be listed on the complaint form.
- **Grounds** - it is possible to claim unlawful discrimination on one or more of the nine discriminatory grounds so the employee should indicate on the form each of the grounds that are applicable.

- **Unlawful discrimination** - the appropriate box should be ticked in this regard. If you do not consider that your complaint is accurately or comprehensively described by one of the boxes, be sure to tick 'other' and provide appropriate details. A failure to tick off an appropriate claim, for example, victimisation does not necessarily mean that you are disbarred from relying on it at a later stage.
- **Comparator** - there is no need to have a comparator in a pregnancy, sexual harassment/harassment/victimization case. The form asks for the name of the comparator in an equal pay claim (see the section on equal pay on page 57).
- **Details of complaint** - this should be prepared with care as it will be referred to at the hearing. The main acts of discrimination, sexual harassment, harassment, victimization, failure to provide reasonable accommodation should be identified in a precise summary form. It is not a written submission but it would be important not to exclude reference to some significant matter. Relevant correspondence can be attached to the claim form.
- **Signature and date** - the Tribunal does not normally accept a complaint without a valid signature of the individual or his/her representative. If a complaint is faxed, the original should also be posted. The Equality Tribunal's 'Frequently Asked Questions' states that complaints are not normally accepted by email. However in the event of a difficulty the Tribunal secretariat should be contacted to see if special arrangements can be put in place.
- **Multiple complainants** - it is better for each complainant to complete a separate form, as there may be differences between individual cases. However where a union is acting for a large number of complainants (for example in an equal pay claim) a single form signed by the representative will be accepted, provided that the names of the complainants are clearly indicated on the complaint. The legislation does not allow for class action - every complainant needs to be identified and clearly named in the complaint form.

- **Under 18** – a parent/guardian of someone under 18 can make a complaint on their behalf. The form should state the child's age, the name and relationship to them and that a claim is being made on their behalf.
- **Person with an intellectual/psychological disability** – a parent, guardian or other person acting *in loco parentis* may be the complainant where a person is unable by reason of an intellectual or psychological disability to pursue a complaint effectively.

An organizer should retain a copy of the complaint form on the case file of the employee. The Tribunal will return incomplete forms to be completed. The complaint form will be acknowledged. The complaint form and any correspondence will be copied to the employer and you should receive copies of all correspondence from the respondent.

# MEDIATION

Mediation is an option that it is provided to every employee and respondent once a complaint is referred to the Equality Tribunal. An organiser at an early stage of the process will have to consider and advise an employee as to whether to choose the option of mediation or proceed to an investigation. The objective of the Equality Tribunal's Mediation Service is to provide an alternative dispute resolution process to that of investigation and determination. It encourages the parties to settle the issue voluntarily.

Once a complaint has been received by the Tribunal, both the complainant and the respondent will be invited by the Tribunal to indicate in writing whether they have any objection to trying mediation. Mediation is an alternative method of resolving complaints, seeking to arrive at a solution through an agreement between the parties, rather than through an investigation and Decision. The Mediator empowers the parties to negotiate their own agreement on a clear and informed

basis, should each party wish to do so. The process is entirely voluntary and either party may terminate it at any stage. A consent form must be signed to enable mediation to proceed, however; it should be noted that time might be saved if a complainant includes a consent form for mediation together with their initial complaint form. This Form ET 1 is reproduced here in Appendix B.

## The Mediation Process

The Tribunal will not disclose to one side whether the other side has or has not objected. If neither party objects and the Director considers the case could be resolved by mediation, he/she will refer the case to an Equality Mediation Officer (mediator).

The Mediator will arrange a mutually convenient meeting between the parties as soon as is practicable after the case has been referred to him/her. A number of such meetings may be necessary. Written submissions are not required from either party in the case

of mediation. The parties will identify will identify the issues they wish to negotiate. It is not necessary to have witnesses or to 'prove' the case. An employee can bring a friend or family member for support. It normally takes 2-3 hours.

- **Mediation is Private.** Mediation will be conducted in private, and will be directly between the parties concerned, with the support of the mediator, who will act as an independent facilitator.
- **Mediation is voluntary.** Either party may withdraw from the process at any time by notifying the mediator in writing that they wish to do so.
- **Power Balancing -** the mediator has a duty to ensure balanced negotiation and to prevent manipulative or intimidating negotiation techniques. Essentially, this is not a negotiation in the accepted and traditional way.
- **Subject matter -** It is up to the parties to identify the issues that should be the subject matter of the mediation. The mediator will not necessarily have read the submissions or have any prior knowledge of the matter before the mediation begins.

- **Third Parties -** Trade Union Organisers, representatives, advisers or other third parties are welcome at mediation.
- **Joint Sessions:** Parties are normally seen together. However, in some cases the mediator may consider it helpful to discuss an issue alone with either of the parties before or during a mediation session. Should the mediator decide to do this, the conditions and procedures for this will be clarified and agreed with the parties beforehand.
- **Confidentiality:** Mediation is conducted in private and the terms of any settlement are not published. Information furnished at mediation or investigation may not be published or otherwise disclosed. Any person who discloses information in contravention of the Acts is guilty of an offence. The Mediation Service further guarantees that any information disclosed to the mediator remains confidential to the Mediation Service and shall not be released to an investigating Equality Officer if the dispute is not resolved at mediation and the investigation is resumed. The mediator cannot be called to give evidence of what occurred at mediation in the course of a subsequent investigation.

- A key point for Trade Union Organisers to note is that the complainant is expected to speak for themselves at various points of the procedure. Formal submissions and representations where the member [complainant] is expected or told to remain silent are not part of mediation.

### **Mediation Settlements**

If the mediation process results in an agreement acceptable to both parties, the mediator will draw up a written record of the terms of the settlement for signature by the complainant and respondent. A copy of the mediated settlement will be given to both parties and a copy will be kept in the Equality Tribunal (unlike Decisions following investigation, the contents of mediated settlements are not published).

Once signed, this agreement is legally binding on both parties. Organisers should make sure that the employee fully understands the binding nature of the mediated agreement. The signed copy should be retained on the case file. A mediation settlement, which has not been complied with, may be enforced through the Circuit Court.

### **Where Mediation is Unsuccessful**

If, during the course of mediation, one party withdraws or the mediator decides for any other reason that the case cannot be resolved by mediation, s/he will send a notice to that effect to both parties.

If the complainant still wishes to pursue their complaint they must respond to the notice in writing **within 42 days** seeking a resumption of the Investigation of the complaint. Where such an application is not made within the specified time limit, the Tribunal has no further jurisdiction in the matter and must close the case file. It is not enough to for the employee to send in the application for resumption of the investigation before they receive the non-resolution notice from the mediator. The application must be sent in within 28 days of having received the non-resolution notice from the mediator.

### **Advantages of mediation**

It empowers parties to negotiate directly to resolve the issue themselves. It allows the parties to come up with a solution that suits them and meets their needs rather than to have one superimposed by a third party. This may be particularly important where there is an ongoing relationship. A mediated settlement can contain terms that cannot be obtained in a hearing, for example, an apology. Mediation hearings are arranged more quickly than an investigation so there can be an early resolution of the matter if the mediation is successful. They are less formal than an investigation and so may suit a particularly shy, nervous or vulnerable employee. Written submissions are not required. The employee does not have to 'prove' the case or have witnesses and does not need to be very familiar with case-law etc. In a mediation hearings both parties have an opportunity to have their say so the employee can have their day in court and still have the matter resolved. Mediated agreements may be a more sustainable method of conflict resolution than a decision imposed by a third party. There could be an improved industrial relations dividend following a successful mediation. There may be nothing to

lose by trying mediation as it can be terminated at any stage by either party. If the organizer believes that a case is not strong, nonetheless it may be possible through mediation to arrive at a satisfactory resolution. If an organiser is of the view that an employee has a very good case, it may be that the employer will be anxious to resolve the matter at mediation and therefore a good settlement can be obtained.

### **Disadvantages of mediation**

Parties may come to mediation with no authority to settle or no intention of settling. Some parties may agree to mediation to see what the other party comes up with or to see if the other party will pursue the issue. Trade Union Organisers may be unfamiliar with mediation process as it is quite different from other processes. It demands different skills and approaches to other conciliation processes. However Organisers should not be put off by their unfamiliarity. It is a straightforward process and the mediator will explain clearly everyone's role.

The process is confidential and so Trade Union Organizers cannot disclose what they have learned in the process to the union. The mediated agreements cannot be used as a case precedent (it can of course be part of the mediation agreement that the terms of the agreement are not confidential though this is unusual). Even though it is the function of the mediator to seek to ensure a balanced negotiation, inevitably there will be disparity in power and resources between the parties which may be reflected in the terms of any settlement. In the past there was a concern that the mediation process was used on occasion to delay an investigation. While there will be

some inevitable delay if mediation fails, the case is no longer put to the bottom of the list and so choosing mediation cannot be used as a delay tactic. If mediation is unsuccessful the dispute will remain unresolved and there may be a negative industrial relations dividend. Either party can walk away from the process until a mediated agreement is reached and so there is no guarantee of an outcome.

Useful information can be obtained from the Equality Tribunal on mediation. There is an Annual Mediation Review and there is also a booklet on the 'Principles of Mediation' and 'Frequently asked Questions'

# THE INVESTIGATION

## Written Submission

If a complaint does not go to mediation or the mediation is unsuccessful, then the complainant is asked for a written submission. This submission will form an important part of the Equality Officer's investigation and it should be carefully prepared and contain a clear and comprehensive written account of the complaint. There is no standard form for the submission and there are different styles adopted. It may be helpful to design a template that can be used and adapted in every case as appropriate. In the submission:

- Clearly identify the complainant, the complainant's representative, the respondent (and representative if known), the reference number that has been provided by the Tribunal.
- Number all pages, paragraphs and appendices.
- A copy of the referral form, the right to information form and the response from the employer and copies of any relevant correspondence should be attached in appendices.

- The factual background—a brief description of how the claim came about, brief background details on the complainant and on the respondent.
- The claim should set out in detail the allegations of discrimination, the discriminatory grounds, including dates, times, frequency, the parties involved, the links between the allegations and the discriminatory grounds and any matters that corroborate the allegations. It should contain sufficient information that will set out the facts that the complainant is relying on.
- Be precise and concise.
- Include any legal arguments that you wish to make - consult the annual legal reviews of the Equality Tribunal for assistance in this regard.
- Identify the effect of the discrimination on the complainant (it may be helpful to attach medical reports).

- Identify what remedy the complainant is seeking. If the complainant is seeking a non-financial remedy, such as reinstatement or a form of reasonable accommodation (either in addition to compensation or as an alternative) this should be specified.
- Make sure that the complainant is satisfied that the contents of the written submission are accurate and comprehensive.

The Director may decide to hear a case on the basis of written submissions only. However if a party to a case objects to having the case dealt with on the basis of written submissions only, the case won't be dealt with only on the basis of written submissions. It is difficult to envisage what sort of case would be suitable to be dealt with by written submissions only.

The Tribunal will send a copy of the complainant's written submission to the respondent and they will be asked for a replying submission. A copy of the respondent's written submission will be sent to the complainant. It should be examined and discussed with the complainant and areas of agreement and dispute and any discrepancies should be identified.

Some consideration should be given as to how the areas of dispute will be dealt with and whether it is sufficient and possible to deal with these matters properly at the hearing or whether it would be worthwhile preparing a supplemental submission.

Due to a large volume of cases there may be a delay in the assignment of the case to an equality officer. The Organiser should keep in touch with the Tribunal and highlight in writing the need to get the matter on for hearing. If a case has a particular urgency, the Tribunal should be informed of this in writing.

The role of the Equality Officer is different to a judge in a traditional court or the Labour Court when it is exercising its industrial relation functions. The Equality Officer has an investigative role. The function of the Equality Officer is to investigate and decide claims of discrimination. The Equality Officer has a number of powers which can be directed to either party or a third party, including, for example, the power to order any person to attend before the hearing and to provide information which is considered relevant.



The Equality Officer will contact the parties with a time and date for the hearing of the complaint. The parties will usually get notice of a number of weeks. If the parties have any special requirements, these should be notified to the Equality Officer with as much notice as possible. Each party will be asked to furnish a list of persons they propose to bring as witnesses.

### **Adjournments**

These are not given routinely and may be difficult to obtain. If there are substantial reasons for looking for an adjournment, an application in writing for an adjournment should be made to the Director of the Equality Tribunal as soon as possible. The application should set out the reasons along with all relevant documentation for example a medical cert which certifies the incapacity of a party or witness to attend a hearing.

If a party fails to show up at a hearing, the case will be deferred only where the Equality Officer is satisfied that the party has been prevented from attending by factors which are outside their control (for example a sudden illness vouched by medical evidence).

### **The Hearing**

The hearing of a discrimination claim before the Equality Tribunal is very different from a hearing in a traditional court or for example before the Employment Appeals Tribunal. The Tribunal does not have statutory rules governing the hearing and the Equality Tribunal has devised its own Guide to Procedures (a copy of which is attached at appendix X). The Equality Officer is exercising a quasi judicial function and is bound by the principles of fair procedures. S/he may receive unsworn evidence, act on hearsay and depart from the strict rules of evidence but is required at all times to act fairly and in accordance with the principles of natural and constitutional justice. The Equality Officer derives his/her jurisdiction from the EE Acts. The European Court of Justice has ruled that bodies like the Equality Tribunal are required by the Community law of equivalence and effectiveness to apply directly effective provisions of a relevant directive even though they have not been given express jurisdiction to do so under the provisions of the national law.

The format of the hearings may differ slightly from case to case. The Equality Officer will direct the hearing and may look for formal identification of the parties, representatives and witnesses. The Equality Officer will ask a number of questions of each party. The Organiser may be allowed to answer some questions though some of the questions will be asked specifically of the complainant/witnesses. The parties will be given an opportunity to give evidence, make legal points ask questions of the other side and respond to the other side. The evidence is not given on oath. The Organiser should ensure that all relevant facts and legal points are brought to the attention of the Equality Officer and not rely on the questions asked by the Equality Officer. The Organiser needs to ensure that all information and documentation is before the Equality Officer.

The witnesses may be allowed to remain or may be asked only to come in for their own evidence depending on what is appropriate.

A hearing may be adjourned to another day. The investigation generally concludes with the hearing but on occasion an equality officer may decide to seek further information from the parties after the hearing.

### **Privacy and anonymity**

An investigation into a claim of discrimination must be held in private and therefore the general public, the press or observers will not be allowed attend hearings.

The Equality Officer in certain circumstances will anonymise the identity of the parties in the written decision. This usually occurs in cases of sexual harassment, or particular disabilities or cases on the ground of sexual orientation. There is no entitlement to have the names of the parties anonymised. An Organiser should discuss with the employee whether the equality officer should be asked to anonymise the names.

### **Equal pay**

In equal pay cases, the Equality Officer may decide to hold an initial inquiry as soon as possible. This provides the Equality Officer with an opportunity to clarify the nature and background of the complaint with both parties. If the complainant(s) and the respondent disagree on whether the complainant was doing "like work" with the selected comparator, the Equality Officer may arrange with both parties at this stage to conduct a work inspection.

The Equality Officer will also ask the complainant(s) to set out in their submission why they consider that they are doing equal work, or work of equal value, to the comparator(s) they have named. S/he will also ask the complainant to include a job description for their own work and one for the named comparator's work.

The Equality Officer will ask the respondent to set out why the complainant(s) are not doing equal work, or work of equal value, to the named comparator(s). S/he will also ask the respondent to include a job description for the complainant's work and the named comparator's work.

In some cases, the Equality Officer can consider firstly whether any difference of pay is based on non-discriminatory grounds. S/he will ask the respondent to make a submission on why the difference is based on non-discriminatory grounds and the complainant(s) will then be asked to reply to this submission. If the respondent claims that the different rate of pay is based on grounds other than any of the discriminatory grounds, the Equality Officer may decide to hold a preliminary investigation on this point. In this case, the Equality Officer will first investigate and decide this

specific issue before considering the rest of the case. The Equality Officer's preliminary decision will give reasons for the conclusion reached. It will also be published in the same way as other decisions. Such a preliminary decision may be appealed to the Labour Court.

If the decision upholds the respondent's claim, then the difference in pay is not contrary to the Act and there will therefore be no further investigation. If the preliminary decision does not uphold the respondent's claim, the Equality Officer will then proceed to investigate the rest of the case and will issue a substantive decision.

### Dismissal of a Claim

Cases can be struck out after a year if the Director of the Equality Tribunal decides they are not being pursued. The Director may dismiss a claim at any stage if of the opinion that:

- it has been made in bad faith; or
- is frivolous, vexatious; or
- misconceived; or
- relates to a trivial matter.

### Remedies

Where the Equality Officer finds in favour of the complainant, the following orders can be made:

- In equal pay claims, an order for equal pay and arrears in respect of a period not exceeding three years;
- In other cases, an order for equal treatment and compensation for the effects of discrimination of up to a maximum of 2 years pay or €40,000, or €13,000 where the person was not an employee, can be made. The maximum compensation applies even where there was discrimination on more than one ground. However, separate awards can be made for different forms of discrimination or victimisation;
- An order for reinstatement or re-engagement, with or without an order for compensation;
- An order that a named person or persons take a specific course of action.

### Costs

The Equality Officer has no power to award costs to either side. Expenses in respect of travelling and other expenses (except expenses of representatives) can be awarded where a person obstructs or impedes the investigation or appeal.

### Decisions

The Equality Officer will issue a written decision. All decisions are published (and will be published on the Tribunal website. It is important to read the decision carefully. What are the implications of the outcome for the complainant? Is the complainant satisfied with the outcome? Does the decision have wider implications? If the decision is positive or partially positive, is the employer likely to appeal? Should a cross appeal be contemplated? Should the decision be circulated to the branch and beyond the branch to the union and to other unions? Should the union be briefed on the implications of the decision, the lessons learned? Would a press release be appropriate? Should a note be prepared for the union newsletter? Even if you decide not to publicise the case, it may still get into the public forum as the Equality Tribunal regularly issues press releases which contain summaries of the cases.



# THE INVESTIGATION

Either party may appeal the Equality Officer's decision in writing to the Labour Court within **42 days** of the date of issue marked on the decision. If no appeal is lodged during this period, the decision is legally binding and may be enforced through the Circuit Court. A copy of the appeal must be sent to the Tribunal.

## Appeal to the Labour Court

If the decision is negative an Organiser will have to consider whether an appeal should be lodged. There are a number of matters to consider. What does the complainant want to do? The time limits for lodging an appeal are short and must be complied within the 42 days. There is no facility for applying for an extension of time to lodge the appeal. If there is any doubt as to whether an appeal should be pursued or not, it is safest to lodge the appeal. It is also important to bear in mind that an employer may decide to lodge an appeal either in response to the employee's appeal being lodged or separately.

Even if the decision is successful/partially successful, an appeal may be appropriate if the amount of compensation was too low or in relation to the unsuccessful aspect of the decision. An appeal can be withdrawn if the employee decides not to pursue the matter. Bear in mind that it is likely that an appeal will come on comparatively quickly. Will it be possible to cure the defects on appeal? Can grounds of appeal be identified? Will parts of the decision that were successful be overturned? Is there a concern that the compensation would be reduced by the Labour Court?

The Labour Court has prepared a form for the notice of appeal. It can be downloaded from their website. It is contained at appendix X. It is advisable to use this form. It is very straightforward. The crucial part of the form is the paragraph that looks for a brief summary of the grounds of appeal. It should be made clear whether the appeal is a full appeal or whether only part of the decision is being appealed

against. The grounds of appeal need to be given careful consideration. Was the decision against the weight of the evidence? Was there an error in law and/or in fact? Did the Equality Officer fail to apply the correct onus of proof? Was the remedy effective/proportionate or dissuasive?

The grounds of appeal can be expanded upon in the written submission. Once the Labour Court receives the notice of appeal, you will be requested to furnish seven copies of the written submission usually within six weeks. The same care needs to be taken with the written submission as applied to the written submission before the Equality Tribunal (see page X). In addition, the grounds of appeal will need to be gone into in detail. It may be helpful to append the written submissions that were furnished to the Equality Tribunal to the written submission to the Labour Court. The written submission should be sent to the Labour Court by hand or by post (not fax). The respondent will be asked to furnish a written submission within a set time-frame. This needs to be considered in detail and consideration given as to whether any point raised in the respondent's submission should be dealt with in writing or whether it can adequately be responded to at the hearing.

## The Labour Court Hearing

The Court will allocate and communicate a suitable date and venue for the hearing. Adjournments are not given routinely and must be applied for in writing with substantial reasons identified. The hearing before the Labour Court is somewhat more formal than before the Equality Tribunal. The parties are expected to stand as the Court arrives and leaves. The parties may be asked to read their submission though this does not always occur. Questions may be put by either party but all questions must be asked through the Chairman. The Labour Court in making a decision on appeal is making adjudication as to the rights and entitlements of the parties. It is not seeking to resolve a dispute between the parties.

The hearing is in private. Witnesses may be asked to stay outside.

After the hearing, the Court will issue its written Recommendation. It may uphold the decision of the Equality Officer, vary the decision or overturn it.

## Enforcement

A final decision of the Director of the Equality Tribunal or the Labour Court may be enforced through the Circuit Court.

### **Referral to the High Court**

The Tribunal may adjourn an investigation pending a referral of a point of law to the High Court.

### **Appeal to the High Court on a Point of Law**

Where a decision is made by the Director of the Equality Tribunal or a determination is made by the Labour Court on an appeal, either party may appeal to the High Court on a point of law.

### **Reference to the European Court of Justice**

Where matters of European law may be at issue, the Equality Tribunal or the Labour Court may refer matters to the European Court Of Justice for guidance and clarification.

# **APPENDIX A: USEFUL ADDRESSES**

### **The Equality Tribunal**

3 Clonmel Street  
Dublin 2

Phone: +353 1 477 4100

Lo-call: 1890 34 44 24

Fax: +353 1 477 4141

Website: [www.equalitytribunal.ie](http://www.equalitytribunal.ie)

Email: [info@equalitytribunal.ie](mailto:info@equalitytribunal.ie)

### **The Labour Court**

Tom Johnson House  
Haddington Road  
Dublin 4

Phone: (01) 613 6608/613 6610/613 6611

Lo-Call: 1890 220 228

Website: [www.labourcourt.ie](http://www.labourcourt.ie)

### **The Equality Authority**

*Roscrea Office*  
The Equality Authority  
Birchgrove House  
Roscrea  
Co. Tipperary

Phone: +353 505 24126

Fax: +353 505 22388

Email: [info@equality.ie](mailto:info@equality.ie)

*Public Information Centre*  
Public Information Centre  
The Equality Authority  
Birchgrove House  
Roscrea  
Co. Tipperary

Phone: Locall 1890 245 545

Fax: +353 505 22388

Email: [info@equality.ie](mailto:info@equality.ie)

*Dublin Office*  
The Equality Authority  
2 Clonmel Street  
Dublin 2

### **The Data Protection Commissioner**

Canal House  
Station Road  
Portlaoise  
Co. Laois

Lo-call: 1890 252 231

Phone: +353 57 868 4800

Fax: + 353 57 868 4757

Email: [info@dataprotection.ie](mailto:info@dataprotection.ie)

Web: [www.dataprotection.ie](http://www.dataprotection.ie)

# APPENDIX B: EQUALITY TRIBUNAL FORMS AND LEAFLETS

## Employment Equality Acts, 1998 to 2004

### Reply to a request for information

*Explanatory note:*

- The *Employment Equality Acts 1998 to 2004* provide at section 76 that:
  - where a person thinks they may have been discriminated against, or treated in any other way which is unlawful under the Employment Equality Acts, that person (the “complainant”) may write to the person or organisation whom they think may have treated them unlawfully, (the “respondent”) asking for relevant information to help in deciding whether they should refer a case to the Equality Tribunal or to help in formulating and presenting a case.
- Form EE.2 contains the form prescribed by law for a complainant to use in asking for such information.
- This Form EE.3 is prescribed by law<sup>1</sup> as the form for a respondent to use in replying to a request for information.
- The respondent is not obliged to reply to a request for information.
- However, section 81 of the Employment Equality Acts provides that if they do not reply, or if their replies are false or misleading, this may be taken into account in deciding the case.
- Some types of information are excluded. According to Section 76, information is relevant if it is:
  - information about the respondent’s reasons for doing, or omitting to do, anything relevant
  - information about any relevant practices or procedures of the respondent

<sup>1</sup> See *Employment Equality Act 1998 (Section 76 – Right to Information) Regulations, 1999*, Statutory Instrument no 321 of 1999.

- information (other than confidential information, or information about the scale or financial resources of the employer’s business) about the remuneration or treatment of other persons who are in a comparable position to the complainant
- any other information which is not confidential, and which it is reasonable for the complainant to ask for in the circumstances.

Confidential information means “any information which relates to a particular individual, which can be identified as so relating, and to the disclosure of which that individual does not agree.”



Delete this entire sentence if you have answered all of the questions in the Questionnaire.	<p>5 I have deleted (in whole or in part) the paragraph(s) numbered ..... above, because I am unable / unwilling (delete as appropriate) to reply to those questions for the following reasons .....</p> <p>.....</p> <p>.....</p> <p>.....</p>
	<p>Signature of Respondent</p> <p>.....</p> <p>Date</p> <p>.....</p>

**Notes**

*If there is not sufficient space to enter a reply, please use additional page(s) and sign and date each of them.*

*If a Respondent fails to provide the information sought by the Complainant, or the information provided is false or misleading or is otherwise not such as the Complainant might reasonably require in accordance with the appropriate provisions of the Employment Equality Acts 1998 to 2004, the Director of the Equality Tribunal, the Labour Court or the Circuit Court may draw such inferences as seem appropriate in the circumstances.*

**Guide to procedures in Employment Equality and Pension cases**

*Investigating complaints under the Employment Equality Acts 1998-2008, and Part VII of the Pensions Acts 1990-2008*

Revised October 2009

**The Equality Tribunal**

3 Clonmel Street  
Dublin 2

Phone: 353 1 477 4100

Lo-call: 1890 34 44 24

Fax: 353 1 477 4141

Website: [www.equalitytribunal.ie](http://www.equalitytribunal.ie)

E-mail: [info@equalitytribunal.ie](mailto:info@equalitytribunal.ie)

**Employment Equality Cases**

**Guide to procedures for investigating complaints**

These procedures are set out for the general information of parties to complaints and their representatives, as an accessible summary of the normal working practice of the Equality Tribunal. They are not intended to be exhaustive, nor to provide a legal interpretation of the Acts. A failure to comply with this document in a particular case will not invalidate the proceedings, nor the decision or settlement which has been reached, nor give rise to any legal liability. The Tribunal reserves the right to vary these procedures generally and, as appropriate, in the circumstances of the individual case.

## 1 The Equality Tribunal

The Equality Tribunal is an impartial, independent body, set up to investigate and decide or mediate cases brought under the equality legislation. Its decisions and mediated agreements are legally binding, and it has extensive powers. The Tribunal is a quasi-judicial body, in that that it does not have to decide cases using court procedures, and can follow relatively accessible and informal procedures. It is, however, bound by the principles of constitutional justice, which means that it must act impartially in considering complaints before it and ensure fairness for both parties in its procedures. The service is free, and parties are not required to have legal or other representation. Further information is provided on the website and all decisions issued by the Equality Tribunal are published on it at [www.equalitytribunal.ie](http://www.equalitytribunal.ie)

The Equality Tribunal cannot give legal advice as it must remain strictly impartial in hearing and deciding cases. It is an entirely different body from the Equality Authority, which was set up under the same legislation with a range of other functions which may include the provision of advice and legal representation to those wishing to make a complaint.

## 2 Cases before the Equality Tribunal

The Equality Tribunal investigates, decides, or mediates cases brought under the Employment Equality Acts 1998–2008, the Equal Status Acts 2000–2008 (see Guide to Procedures in Equal Status cases) and Part VII of the Pensions Acts 1990–2008.

Under the Employment Equality Acts 1998–2008, the Equality Tribunal deals with complaints of discrimination based on **gender** (including **pregnancy** or **maternity leave**), **marital status**, **family status**, **age**, **disability**, **race** (including **nationality**, **colour** or **ethnic/national origin**), **religion or belief**, **sexual orientation**, or **membership of the Traveller community**. The complaints may relate to any aspect of employment, job advertising, or vocational training, including access to employment, equal pay cases, complaints of direct or indirect discrimination, harassment, sexual harassment, or failure to provide appropriate measures for a person with a disability. The complaints may also relate to employment agencies, partnerships, membership of professional bodies and trade union membership.

The Employment Equality Acts also specifically protect a person against being penalised in any way by their employer because they have made a complaint about possible discrimination under the Equality legislation, represented or supported a complainant, were named as a comparator or indicated an intention to do any of the above. Penalising a person for any of these reasons is defined as victimisation. The Acts provide for complaints about victimisation to be made to the Equality Tribunal, in the same way as for complaints of discrimination, and with the same provision for redress. It is not necessary that a victimised complainant was successful in their original complaint, only that he or she acted in good faith.

There are a number of restrictions on bringing a complaint under the Employment Equality Acts if the complainant has taken (or later takes) other legal proceedings about the same events. This applies particularly to taking proceedings under common law, the Protection of Employees (Part-Time Work) Act 2001, the Employees (Fixed-Term Work) Act 2003 and the Unfair Dismissals Acts.

Under the **Pensions Acts 1990–2008**, the Tribunal can decide on complaints of discrimination on the same nine grounds in any aspect of occupational pension schemes.

## 3 Referring a case to the Equality Tribunal

Any person who believes that s/he has experienced discrimination which is contrary to the Employment Equality Acts may seek redress by referring a complaint to the Equality Tribunal. The complaint form (Form EE.1) should be used and this is available from the Tribunal or can be downloaded from the website.

The complaint should be signed either by the complainant him/herself, or by his or her representative. Even where a number of individuals are taking a case against the same employer each complaint should be on a separate form, as there may be differences in individual cases. However, where a representative is authorised to represent a large number of complainants (for example, a union representing persons in an equal pay case), a single form signed by the representative will be accepted, provided that the names of all the complainants are clearly indicated in part of the complaint (e.g. an attached list).

***It is extremely important that the Complainant keep the Tribunal informed of his or her current address and contact details as failure to do so can result in the complaint being dismissed.***

#### **4 Right to information**

A person who believes that they may have experienced discrimination is entitled under Section 76 of the Acts to write to the person they believe may have discriminated against them, asking for certain information. A statutory form of questionnaire (Form EE.2) is available from the Tribunal and can be downloaded from the website. A statutory reply form gives the person who receives the questionnaire an opportunity to set out their version of events. This form is available (Form EE.3) from the Tribunal and can be downloaded from the website.

The Acts state that the Director may draw such inferences as seem appropriate from a respondent failing to reply, or supplying false, misleading or inadequate information.

#### **5 Time limits for referring a case to the Equality Tribunal**

The Employment Equality Acts provide that a claim may not be referred to the Director after six months of the date when the discrimination or victimisation occurred (or, in the case of a repeated act, last occurred) unless the complainant has successfully applied for an extension of time. The six month time limit does not apply to equal pay cases (section 77(5)(c) Employment Equality Acts). Another exception is that if the delay was caused by the respondent misrepresenting the facts to the complainant, the time limit runs from the date when the complainant discovered the misrepresentation.

The date on which a claim is referred is the date on which the Equality Tribunal receives a completed complaint form. If the complainant has missed the six month time limit an extension of time is required. That application must be made as promptly as possible as failure to do so will be taken into account, in the interests of fairness, when a decision is made. The complainant must write to the Tribunal **giving detailed reasons** and including any supporting documents (e.g. medical certificates). A copy will be sent to the respondent for their comments together with a copy of

the complaint. The Director or Equality Officer will consider the material presented by both sides in deciding whether or not to grant an extension for reasonable cause. ***Note that the Tribunal has no power to extend the time limit beyond 12 months after the last incident of discrimination.***

If either party disagrees with the Director's decision on an extension of time they may appeal it to the Labour Court within 42 days.

#### **6 When a case is referred to the Tribunal**

The complaint will be acknowledged and a copy sent to the respondent. ***It is important to note that as the Tribunal is impartial as between the complainant and respondent, material received from one party will be copied to the other, so that both parties are fully aware of all the material received by the Tribunal.***

The Acts allow the Tribunal to dismiss a complaint without a hearing **at any stage** if, in the opinion of the Director or an Equality Officer, it has been made in bad faith or is frivolous, vexatious, misconceived or relates to a trivial matter (Section 77A). Where a case is dismissed under this section, the complainant may appeal to the Labour Court within 42 days.

The Tribunal will ask the parties to indicate in writing whether they have any objection to the case being referred for mediation.

#### **7 Mediation**

If neither party objects, **and** the Director considers that a case could be resolved by mediation, it will be referred to a Mediator who will arrange a mutually convenient appointment with both parties as soon as practicable.

Either party may withdraw from mediation at any stage in the process, or the Mediator may decide that the case cannot be resolved through mediation. In either case the Mediator will send a notice known as a non-resolution notice to both parties, indicating that the case cannot be resolved by mediation.

The Acts allow for the investigation to be resumed **provided that within 28 days** of the date of the non-resolution notice the Director receives in writing an application for the investigation to resume (see Section 78). A more detailed information guide to mediation (**Guide MED**) is also available on request from the Equality Tribunal or on the website.



## 8 Statement/Submission

If the complaint does not go to mediation or mediation is unsuccessful then, the complainant is asked for a submission/statement (the procedure may be different for equal pay cases). The complainant's submission/statement will form an important part of the Equality Officer's investigation and should contain a clear and comprehensive written account of the complaint. It should set out details of the link between the ground and the alleged discrimination, the facts of the complaint such as the dates of the alleged discrimination, details of the specific allegations, the parties involved, the date of dismissal if relevant and any other information that is needed to set out the full facts of the complaint. It should include all relevant support documentation such as copies of letters etc. The submission/statement should also include any legal arguments the complainant wants to make. Submissions/statements can be sent electronically to [info@equalitytribunal.ie](mailto:info@equalitytribunal.ie). If the complainant is satisfied all relevant information has been set out in the initial documentation and there is no need for a further submission/statement then he or she should inform the Tribunal.

Please note that any delay by a complainant in sending in a submission/ statement could result in a delay of the hearing.

Under Section 102 of the Acts the Tribunal can dismiss the complaint and close the file after a year, if it appears that a complainant has not pursued, or has ceased to pursue, the complaint. A dismissal notice will be sent to the parties. There is no appeal from this decision.

The Tribunal will send a copy of the complainant's submission/statement to the respondents and ask for a replying submission. This should also contain a clear and comprehensive written account, setting out the specific facts, parties involved and any legal arguments to be made and also containing relevant supporting documentation. This submission will also form an important part of the Equality Officer's investigation. A copy is sent to the complainant for information.

Due to the large volume of cases there may be a delay before a case can be assigned for investigation.

## 9 Investigating a complaint

The complaint will be assigned to an Equality Officer whose role is to investigate and decide complaints referred to the Tribunal. This can be different from the role of a court, which decides only on the evidence brought before it. Extensive powers have been conferred on Equality Officers by the Equality Acts and these powers may be directed to either or both parties, or to third parties including to order any person to attend before the Director or at a hearing, and provide information which is considered relevant.

The Equality Officer will contact the parties with a time and date for the hearing of the complaint. Reasonable notice will be given. If any special requirements are needed by the parties, their representatives or their witnesses, as much notice as possible should be given in order to facilitate any such requirements. Each party will be asked to provide a list of persons they propose to bring as witnesses and the purpose of a particular witness.

If it appears to an Equality Officer at this point that a complainant has not pursued or has ceased to pursue a complaint under Section 102 then that complaint can be dismissed.

Many hearings are held at the Tribunal's own office at 3 Clonmel St, Dublin 2 but hearings are also held outside Dublin. Please note that there are no consultation rooms available at the Tribunal's office.

**There is no automatic right to an adjournment.** Adjournments are given for **substantial reasons** only and requests must be made as soon as possible to the Director. Any party requesting an adjournment must give details of the reasons along with all relevant documentation.

## 10 The hearing and decision

***It should be noted that the Tribunal is not a Court and is not subject to all the attendant formality. The final discretion as to the conduct of the hearing and the presence of any person rests with the Equality Officer subject to fair procedures and in compliance with constitutional justice.***

The investigation generally concludes with the hearing of the case. In exceptional circumstances only **and** if an Equality Officer considers it necessary, s/he may decide to seek further information, after the hearing.

Where a party fails to show up for a hearing the case will be deferred only where the Equality Officer is satisfied that the party has been prevented from attending by factors which were outside their control (e.g. sudden illness vouched by medical evidence). If the full facts about one party's absence are not sufficiently clear, the Equality Officer will decide whether it is appropriate to resume the hearing or not. However, this discretion will be exercised only where it appears to be necessary to ensure fair procedures.

If a party does not appear at the hearing, the Equality Officer can decide to proceed on the evidence available and the case may be decided against that party.

The Equality Officer will direct the hearing and may look for formal identification of either party or any witnesses. It is the responsibility of the parties and their representatives to ensure that all information is before the Equality Officer on the day of the hearing including any documents or witnesses relevant to the case. The Equality Officer will ask questions of each party and of any witnesses they bring. S/he will also give each party the opportunity to give evidence, make legal points, cross-examine and the opportunity to respond to the other side. The witnesses may be allowed to remain or may be asked to come in only for their own evidence. The Equality Officer will decide what is appropriate, taking into account fair procedures, arrangements which will best support the effective and accurate giving of evidence, and the need to protect privacy during sensitive evidence.

Given the Tribunal's objective to provide an accessible forum, the Equality Officer will ensure that unrepresented complainants or respondents are not placed at a disadvantage.

The Employment Equality Acts specifically provide that an investigation into a claim of discrimination must be held "in private". Therefore, the Equality Officer cannot allow members of the general public, the press, or observers to attend hearings.

All parties and representatives are requested to contribute to the objective of a calm, efficient hearing, and to avoid being unnecessarily confrontational or formalistic. If the Equality Officer considers that any person is impeding the effective conduct of the hearing, s/he may direct them to leave or may call a short recess.

***The Tribunal would emphasise in particular that raising substantial new points either by way of additional submissions just before a hearing or orally without adequate notice to the other party, is considered an unfair practice.***

As soon as practicable after completing the investigation, the Equality Officer will issue a written decision. All decisions will be published (including publication on the Equality Tribunal website on [www.equalitytribunal.ie](http://www.equalitytribunal.ie)).

## 11 Redress which can be awarded

Under section 82 of the Employment Equality Acts, a decision of an Equality Officer which finds in favour of a complainant will provide for one or more of the following as appropriate:

- equal pay, from the date of the referral of the claim
- arrears of the shortfall necessary to make up equal pay, for up to a maximum of three years before that date
- compensation for the acts of discrimination or victimisation which occurred
- an order for equal treatment in whatever respect is relevant to the case
- an order that a person or persons take a specified course of action
- an order for re-instatement or re-engagement (in dismissal cases), with or without an order for compensation
- in cases of dismissal where the Equality Officer has found no discriminatory dismissal, that the matter be referred to the Employment Appeals Tribunal to determine if there has been an unfair dismissal

- in cases of gender discrimination, the decision can also order payment of interest under the Courts Act 1981 on all or part of the compensation or the arrears of equal pay.

The Tribunal has no general power to award any costs (legal fees, witness or travelling expenses, etc) to any person. However, if the Tribunal considers that a person is obstructing its investigation, it can order that person to pay travelling or other expenses reasonably incurred by another person in connection with the investigation.

## 12 Appeals and enforcement

Either party may appeal the Equality Officer's decision in writing to the Labour Court within **42 days** of the date of issue marked on the decision. If no appeal is lodged during this period, the decision is legally binding and may be enforced through the Circuit Court. A copy of the appeal must be sent to the Tribunal. Parties should contact the Labour Court for information on the necessary procedure for appeals.

## 13 Particular types of complaint

### *Equal pay*

In equal pay cases, the Equality Officer may decide to hold an initial inquiry as soon as possible. This provides the Equality Officer with an opportunity to clarify the nature and background of the complaint with both parties. If the complainant(s) and the respondent disagree on whether the complainant was doing "like work" with the selected comparator, the Equality Officer may arrange with both parties at this stage to conduct a work inspection.

The Equality Officer will also ask the complainant(s) to set out in their submission why they consider that they are doing equal work, or work of equal value, to the comparator(s) they have named. S/he will also ask the complainant to include a job description for their own work and one for the named comparator's work.

The Equality Officer will ask the respondent to set out why the complainant(s) are not doing equal work, or work of equal value, to the named comparator(s). S/he will also ask the respondent to include a job description for the complainant's work and the named comparator's work.

In some cases, the Equality Officer can consider firstly whether any difference of pay is based on non-discriminatory grounds. S/he will ask the respondent to make a submission on why the difference is based on non-discriminatory grounds and the complainant(s) will then be asked to reply to this submission. If the respondent claims that the different rate of pay is based on grounds other than any of the discriminatory grounds, the Equality Officer may decide to hold a preliminary investigation on this point. In this case, the Equality Officer will first investigate and decide this specific issue before considering the rest of the case. The Equality Officer's preliminary decision will give reasons for the conclusion reached. It will also be published in the same way as other decisions. Such a preliminary decision may be appealed to the Labour Court.

If the decision upholds the respondent's claim, then the difference in pay is not contrary to the Act and there will therefore be no further investigation. If the preliminary decision does not uphold the respondent's claim, the Equality Officer will then proceed to investigate the rest of the case and will issue a substantive decision.

### *Occupational pensions*

Occupational pensions are dealt with under the Pensions Acts 1990-2008 and are specifically excluded from the Employment Equality Acts. Occupational pensions are, broadly speaking, the group of occupational benefits provided by an employer (or to self-employed persons) which deal with termination of service, retirement, old age or death (retirement pensions, lump sums payable on retirement, widow(er)'s pensions, etc.) The Pensions Acts were substantially amended by the Social Welfare (Miscellaneous Provisions) Act 2004. With effect from 5<sup>th</sup> April 2004, it is unlawful (with specified exceptions) to discriminate based on any of the nine protected grounds (gender, marital status, family status, age, disability, race, religion, sexual orientation, membership of the Traveller community) in the rules of an occupational pension scheme. Any person who considers that they have been discriminated against or victimised in this respect may refer a complaint to the Equality Tribunal. It should be noted that the effective date in relation to gender discrimination in pensions is different.

The Social Welfare (Miscellaneous Provisions) Act 2004 changed the procedures and simplified the process for making claims. The procedures are similar to those under the Employment Equality Acts, as described in the rest of this Guide.

- Form PA.1 may be used in referring these cases
- Claims must be referred within six months of the date of termination of the relevant employment (extendable to a maximum 12 months for reasonable cause)
- The right to information procedure applies
- The Pensions Board may also refer a complaint under the Acts, in specified circumstances
- Mediation is available for these claims
- The complainant does not need to show like work (as under the Employment Equality Acts), but may need to show that their situation is comparable with that of any employee they claim is more favourably treated
- The Tribunal can refer questions to the Pensions Board for technical advice where it considers appropriate

- The decision of the Tribunal is legally binding
- The redress available may include a declaration that any discriminatory rule is invalid from one of a range of dates, an order for equal treatment from a specified date, and an order for levelling-up of benefits payable. In dismissal cases under the Pensions Acts, compensation (up to the same maximum ceiling as under the Employment Equality Acts), and/or reinstatement or re-engagement may also be ordered. Decisions may be appealed as under the Employment Equality Acts.

See also [www.pensionsboard.ie](http://www.pensionsboard.ie) for further information.

### *Collective agreements*

Under the Employment Equality Acts, a case may be referred to the Director concerning a collective agreement if it contains any provision which bases differences in pay or treatment on any of the discriminatory grounds. The complainant may be either an employee affected by the collective agreement, or the Equality Authority. These complaints are dealt with under specific procedures laid down in sections 86-87 of the Acts, and may therefore differ from procedures in other types of cases. In particular, the usual time limits do not apply, all the parties to the collective agreements are respondents, mediation is available under the conditions set out in section 86. The **only** form of redress available under the Acts is the Tribunal's decision declaring whether the discriminatory provision is null and void. The Acts provide that if the Tribunal thinks appropriate, it may provide guidance to the parties to the agreement on how lawful alternative provisions might be framed.

### *Complaints against the Public Appointments Service, Minister for Defence and the Garda Commissioner in the recruitment process*

Any complaint of discrimination in relation to the recruitment procedures used by the Public Appointments Service, Minister for Defence and the Garda Commissioner **must first** be made to the respondent as otherwise the Tribunal has no jurisdiction. If the complainant is not satisfied with the response or does not get a response s/he can lodge a complaint with the Tribunal. Time limits apply (see Section 77(7)).

# APPENDIX C: LABOUR COURT FORMS

## The Labour Court

### Employment Equality Acts 1998 To 2008

Section 77(12)

#### Appeal From Decision Of The Director Of The Equality Tribunal

Director of the Equality Tribunal Decision details			
Decision Reference Number		Date of Decision	
Discriminatory Grounds <i>(please indicate below by X where appropriate)</i>			
Age	Family Status	Sexual Orientation	
Gender	Marital Status	Race, colour, ethnic or national origin	
Victimisation <i>(please indicate by X if appropriate)</i>			
Appellant details <i>(see note overleaf)</i>		Respondent details <i>(see note overleaf)</i>	
Name		Name	
Address		Address	

Appellant Representative details <i>(if any)</i>		Respondent Representative details <i>(if any)</i>	
Name		Name	
Address		Address	
Brief summary of grounds on which Appeal from Decision of Director of the Equality Tribunal is being made (you may continue on an additional page if necessary)			

Signed	
Date	

#### Note

Appellant means the party who is appealing the decision; Respondent means the other party in the original case. If the employer in the original case is appealing the decision, he or she is the appellant and the employee the original case is the respondent; if the employee in the original case is appealing the decision, he or she is the appellant and the employer is the respondent.

Please send this form to:

Programming Section  
The Labour Court  
Tom Johnson House  
Haddington Road  
Dublin 4

#### Telephone

(01) 613 6608 or 613 6610 or 613 6611

#### Lo-Call *(if calling from outside (01) area)*

1890 220 228

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AN tÚDARÁS COMHIONANNAIS

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