

**ODEI -the equality tribunal**

# **Annual Report 2001**

## **Legal Review**

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## **Case Summaries 2001**

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The full text of all decisions and recommendations mentioned in this Review is available without charge on ODEI's website at [www.odei.ie](http://www.odei.ie), together with summaries and indexes for ease of reference. Hard copies are also available on request from ODEI at 3 Clonmel St, Dublin 2, Ireland.

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# 1. Introduction



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ODEI – the equality tribunal<sup>1</sup> is the independent quasi-judicial body which is primarily responsible under Irish equality legislation for deciding complaints of discrimination in employment or in the provision of goods, services and facilities<sup>2</sup>. ODEI's full statutory title is the Office of the Director of Equality Investigations. It is staffed by the Director, a number of Equality Officers who investigate and decide on complaints referred to them, the Legal Adviser and support staff. ODEI is strictly impartial in the exercise of its functions. Its decisions are legally binding, and it has wide-ranging statutory powers to support its functions, including powers to require persons to give evidence and to enter premises for the purposes of its investigations.

Legal representation in ODEI hearings is possible, but is not obligatory, and ODEI seeks to provide a relatively simple, straightforward and accessible forum for resolving claims of discrimination. ODEI also provides a statutory mediation service, where both parties agree to resolve a complaint by alternative means. The mediation service is provided by five trained mediators who also act as Equality Officers.

This Legal Review of ODEI's caselaw during 2001 is published as part of our overall policy of transparency and accessibility. It seeks to give a convenient and informative overview of the wide range of legal issues considered by ODEI over the past year. The criterion for inclusion has been whether the issue is likely to be relevant, and of interest, to parties involved in cases before ODEI. For example, some of the 2001 decisions deal with grounds of discrimination which are newly protected in Irish equality law, and are often new to protection in other countries, such as age, disability, race including nationality, religion, family status and membership of the Traveller community. At the same time, new and thought-provoking issues were considered on the long-protected ground of gender.

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<sup>1</sup>In July 2002, the Office of the Director of Equality Investigations adopted "ODEI-the equality tribunal" as its business name.

<sup>2</sup>There are some statutory exceptions: for example, complaints of discriminatory dismissals are proper to the Labour Court, while cases about discrimination by licensed clubs go to the District Court.

Of course, this Review is not, and cannot be, comprehensive. In accordance with its statutory obligation to publish its Decisions, ODEI has also made the full text of all its caselaw available on its website at [www.odei.ie](http://www.odei.ie). The website is updated regularly and includes summaries and indexes. We hope that it will provide a useful and practical resource for all users. A slightly abridged version of the website summaries is included in appendix to this Review.

At present, ODEI deals with complaints of discrimination referred under two new equality Acts (the Employment Equality Act 1998, and the Equal Status Act 2000), based on any of nine protected grounds: gender, marital status, family status, race including nationality, religion, age, disability, sexual orientation or membership of the Traveller community. These Acts came into force on the 18th October 1999 and the 25th October 2000 respectively. The 1998 Act covers employment and related areas such as vocational training or membership of trade and professional bodies. The 2000 Act covers the provision of goods, and of a wide range of services and facilities available to the public or to a section of the public, including access to places, transport, banking, insurance, cultural activities, refreshment, and many aspects of education. Some disposals of property, and the provision of accommodation, are also covered. There are a number of exceptions and exclusions to both Acts. The full text of the Acts is published on the ODEI website.

ODEI also has a residual jurisdiction to deal with some outstanding claims of discrimination referred under two earlier equality Acts which were repealed on 18th October 1999 (the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977), on the grounds of sex or marital status only.

Altogether, ODEI issued 67 rulings<sup>3</sup> during 2001, which covered 223 individual claims. There were 25 decisions under the Equal Status Act, and 42 rulings on employment equality issues. The employment equality rulings comprised 16 decisions issued under the Employment Equality Act 1998, 5 recommendations under the Anti-Discrimination (Pay) Act 1974, 18 recommendations under the 1977 Act, and 3 rulings issued under a combination of the 1977 and 1998 Acts. There were no recommendations under the Pensions Act 1990<sup>4</sup>.

The Legal Review and Case Summaries are published as part 2 of our Annual Report, as part of our overall policy of transparency and accessibility.

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<sup>3</sup>Where cases are decided under the 1974 or 1977 Acts, the Equality Officer issues a *Recommendation* under those Acts. This is not legally binding. Where a case is decided under the 1998 or 2000 Acts, the Equality Officer issues a *Decision*, which is legally binding. During 2001, ODEI issued a small number of Recommendations in respect of older cases brought under the 1974 or 1977 Acts. Where reference is made in this Review to a group of Decisions and Recommendations, the umbrella term “*rulings*” is used.

<sup>4</sup>ODEI Decisions are numbered (with effect from August 2000) according to the year of issue, the Act under which decided and the order of issue. Thus DEC-S2001-003 refers to the third decision issued by ODEI during 2001 under the Equal Status Act, and DEC-E2001-003 to the third decision issued by ODEI during 2001 under any of the employment equality Acts.

## 2. The grounds of discrimination

The new equality Acts protect against discrimination based on any of nine grounds: gender, marital status, family status, age, disability, religion, race (including nationality), sexual orientation and membership of the Traveller community. Earlier equality legislation covered only the gender and marital status grounds. Gender continued to account for the majority of new claims received in the initial period, and it was only during 2001 that a significant number of decisions started to issue regarding the “new” grounds<sup>5</sup>.

There were four decisions in 2001 under the **race ground**, all based on nationality and regarding employment. Two were decided to be inadmissible for jurisdictional reasons (discussed below) and a third failed to prove discrimination<sup>6</sup>. The fourth, *Eng v St James Hospital*,<sup>7</sup> found discrimination under the 1998 Act. It concerned a Malaysian doctor employed as an unpaid intern in a hospital, where it was admitted that he did like work with doctors of Irish and other nationalities occupying paid intern posts. The Equality Officer’s investigation established that the complainant had in fact been entitled on merit to a paid post, and had been displaced to an unpaid post in order to give priority to an EEA national. The hospital argued that work permit rules, or alternatively European Community law, obliged it to give Irish and EEA nationals preference when allocating paid intern positions. The Equality Officer, after a detailed examination of Irish and Community caselaw, held that Community law obliged employers to treat other EEA nationals equally favourably with Irish nationals, but did not oblige them to treat non-EEA nationals less favourably, and accordingly did not supersede their obligations under the 1998 Act. She also held that the work permit rules required employers to give preference to Irish and EEA nationals in employment opportunities, but did not oblige them to offer paid posts to the former and unpaid posts to non-EEA nationals. She made an award of equal pay.

The only decision in 2001 under the **religion ground** was to dismiss a claim as trivial in accordance with section 22 of the Equal Status Act.<sup>8</sup> The complainant had objected to the fact that a number of bibles were freely available for the use of the public in a Garda (police) Station. The Equality Officer investigated the matter and submitted the case to the Director for consideration under section 22. The Director referred to the importance of the religion ground and to the State’s constitutional obligations to guarantee freedom of conscience. However, she held that the complainant had failed to show any discrimination or any personal detriment to

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<sup>5</sup>The only decision issued on a “new” ground during 1999-2000 was *Equality Authority v Ryanair*, DEC-E2000-14, which concerned a job advertisement found to discriminate on the age ground.

<sup>6</sup>*Damery v Italian Embassy* DEC-E2001-039 and *O’Shea v Italian Embassy* DEC-E2001-040, (*Damery* was under appeal to the Labour Court on 1st April 2002); *Martinez v Network Catering*, DEC-E2001-004

<sup>7</sup>*Eng v St James Hospital*, DEC-E2001-041. This decision was under appeal to the Labour Court on 1<sup>st</sup> April 2002.

<sup>8</sup>*An Individual v a Garda Station*, DEC-S2001-025.

himself in such a practice, including in not showing that he was of any other religion or of no religion, or showing in what respect the respondent failed to provide equivalent facilities for those of other religions or of no religion.

There were five decisions in 2001 on the **disability ground**. Two failed to establish a case of discrimination<sup>9</sup>. An employment case<sup>10</sup> found that the employer had failed to provide reasonable accommodation, and awarded compensation to the employee. The case concerned a manufacturing operative on probation who had a “slow hand” resulting from cerebral palsy. He could achieve the production targets required by the employer during short periods, but his speed reduced during the day, and overall fell well below the average of his co-workers. The employer, although aware of his disability, took no action other than negatively reviewing his performance. The Equality Officer noted that the employee was unable to meet standards which were a condition of his employment, but found that the employer had failed to consider in any way what reasonable accommodation might have assisted him to do so, as required by section 16(3) of the Employment Equality Act 1998.

In two Equal Status cases, the Equality Officers awarded redress in respect of a discriminatory comment made in refusing a wheelchair user access to a nightclub<sup>11</sup>, and considered the issue of access to pubs for visually impaired customers using guide dogs<sup>12</sup>. While no actual discrimination on the disability ground was found on the facts of the second case, the Equality Officer considered that refusing to allow a guide dog into the pub under a “No dogs” rule would have amounted to refusing reasonable accommodation under section 4(1) of the Equal Status Act in that particular situation.

The “nominal cost” ceiling on the reasonable accommodation requirement under both Acts has not arisen in any of the 2001 decisions.

There were three decisions in 2001 under the **age ground**. In an employment case, *Perry*,<sup>13</sup> the Equality Officer held that a severance gratuity forming part of a voluntary early retirement scheme discriminated on grounds of age, because its design incentivised retirement most strongly for employees aged under 60.<sup>14</sup> However, it was saved by section 34(6) of the Act, which

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<sup>9</sup>*Martinez* DEC-E2001-004, *Gorry v Manpower* DEC-E2001-017

<sup>10</sup>*Kehoe v Convertec* DEC-E2001-034 (under appeal on 01.04.02). See also a Labour Court determination on the same ground issued during 2001, *A Computer Company v a Worker* DEE013 of 2001.

<sup>11</sup>*Forrestal v Hearn's Hotel*, DEC-S2001-018

<sup>12</sup>*Maughan v Glimmer Man Pub*, DEC-S2001-020

<sup>13</sup>*Perry v Garda Commissioner*, DEC-E2001-029

<sup>14</sup>The respondent argued that the scheme was not discriminatory because it intended to compensate younger retirees for giving up more future earnings. The Equality Officer tested this by considering the hypothetical example of two early retirees with identical service records aged respectively 60 plus one day and 60 minus one day. It transpired that the scheme would result in the younger retiree gaining almost £6,000 more, which clearly was not proportionate to the one-day difference between the two retirees' loss of future earnings. The Equality Officer concluded that the disparity in severance gratuity was based exclusively on age, and no clear actuarial or other evidence had been presented which would make such discrimination permissible under section 34(3).

allows employers a three-year transition period (until 17 October 2002) before age-related remuneration becomes unlawful under the Act. Other aspects were saved by section 34(7) of the Act, which allows differences of treatment based on relative seniority or length of service, and by section 17(4) which exempts certain redundancy payments.

A claim of age discrimination against younger men in the provision of car insurance failed for jurisdictional reasons<sup>15</sup>. Two complainants successfully challenged a night club's refusal, on the grounds that there were "already too many young people on the premises", to admit them to a function for which they had purchased tickets<sup>16</sup>. The Equality Officer emphasised that his decision in that case was also influenced by the fact that the complainants were legally of age to enter the premises, had bought tickets for the function well in advance, and had arrived early, and by his view that the respondents had treated the complaint and the requirements of the Act in a perfunctory manner.

There were no decisions on the **sexual orientation** ground during 2001.

There were 22 decisions in 2001 on the **Traveller ground**, concerning access to employment, pubs and restaurants, hotels, a supermarket, a community centre, and the exercise of policing functions. The only employment case<sup>17</sup> involved a young Traveller woman who was not offered further employment following a trial day working as a cleaner in a hotel. The hotel claimed that she was unable to do the work satisfactorily, but the complainant produced references from her subsequent employer supporting her ability to do hotel cleaning to a good standard. The Equality Officer found that the hotel's assessment of performance and treatment of the complainant had in fact been inadequate and inconsistent, but held that an unreasonable or unfair sequence of events did not in itself necessarily prove discrimination. However, she accepted evidence of a comment by the complainant's supervisor that she "*did not have the same concept of cleaning as other people, but then how could she be expected to, given the way that they lived,*" and that this was a discriminatory reference to the complainant's membership of the Traveller community. The comment established that, on the balance of probabilities, the overall adverse treatment had been due to discrimination. The Equality Officer awarded €6,349 compensation and ordered the respondent to draw up an equal opportunities code of practice and to instruct all staff in it.

A number of decisions under the Equal Status Act considered the scope of the Traveller ground. An issue was raised in several early cases as to whether settled Travellers came within the definition at section 2 of the Act. A number of decisions have followed the approach originally

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<sup>15</sup>*Green v Quinn Direct*, DEC-S2001-024. (This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.) The Equality Officer held that the case was outside her jurisdiction because the insurance contract was concluded before the Act's entry into force.

<sup>16</sup>*Scanlon and Ryan v Russell Court Hotel*, DEC-S2001-013

<sup>17</sup>*Nevin v Plaza Hotel*, DEC-E2001-033 (under appeal to the Labour Court on 1<sup>st</sup> April 2002.)

taken in *Connors v Molly Heffernan's Pub* in holding that this definition can include settled Travellers: *"From [the definition in section 2 ] .... it is clear that for someone to be considered as a member of the Traveller community, they do not have to be actively leading a nomadic way of life. This is because the definition states that Travellers are people with a shared history, culture and traditions, "including, historically, a nomadic way of life". In my view the.. word "historically" in this context is important, and ....was put in the definition to include people who were nomadic in the past but who are now settled, and the settled descendants of people who led a nomadic way of life in the past."*<sup>18</sup>

The Equality Officer in *Connors* also held that *"for someone to be considered a Traveller within the meaning .. of [section 2 of] the Act, they must identify themselves as a Traveller and must also be identified by others as a Traveller."* These two factors were specifically considered in a number of decisions.<sup>19</sup> In *O'Brien v Killarney Ryan*, the complainant stated that he did not regard himself as a Traveller, explaining that while his parents were Travellers and led a nomadic life, he had never travelled. He and his wife had lived in a private housing estate for thirty years and had brought up their family as part of the settled community. The Equality Officer also considered the case under section 3(1)(a), which covers discrimination based on imputed as well as actual membership of a ground, and found that the respondent had imputed Traveller status to the complainant.

Issues also arose in a number of cases as to whether the respondent had been aware of the complainant's status as a Traveller. In *Moorehouse*, the Equality Officer stated that in contrast to grounds such as gender where it was normally obvious that a person was covered by the ground, he accepted *"that respondents may have difficulty identifying people who claim to be covered by membership of the Traveller community ground."*

However, he added in the same case that he found it *"very difficult to believe that bar staff would not be able to identify a group of Travellers, or the individuals within that group as Travellers, where they have been drinking in the pub on a regular basis over a prolonged period of time."* In that particular case he considered that the manager would have *"distinguished Mr Moorehouse [as] a Traveller either through his own observations, by comments to him from the staff of the pub, or by comments to him from customers of the pub. Mr Moorehouse's association with the other Travellers who were regulars in the pub would also have been a contributory factor..."* In *Donovan v Gort Community Council*, the Equality Officer, in deciding whether the complainant was known to be a Traveller, expressed his view that the incidents had

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<sup>18</sup>*Donovan v Gort Community Council* DEC-S2001-006; *Joyce v Temple Gate Hotel* DEC-S2001-012 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002), *Moorehouse v Ayleswood Ltd* DEC-S2001-009. See also *Coffey & others v Blasket Pub* DEC-S2001-010 (under appeal on 1<sup>st</sup> April 2002), for a similar approach.

<sup>19</sup>*Connors v Molly Heffernan's Pub*, DEC-S2001-003 and *Joyce v Temple Gate Hotel* DEC-S2001-012 (both under appeal to the Circuit Court on 1<sup>st</sup> April 2002), *Maughan v Glimmer Man*, *Donovan v Gort Community Council* DEC-S2001-006, *Coffey & others v Blasket Pub* DEC-S2001-010: (under appeal on 1<sup>st</sup> April 2002), *Moorehouse v Ayleswood Ltd* DEC-S2001-009

occurred in the context of a small and closely-knit rural community where “most people know each other” and where the complainant would be widely identified with his extended family. Similarly in *Ward & another v Quigley* (concerning the first complainant only), *Martin Collins v Kyle*<sup>20</sup>, and in *McDonagh v Tesco*, the Equality Officers also accepted that on the balance of probabilities the respondent would have been aware from previous contacts that the complainant was a Traveller. However, in *Maughan*, the Equality Officer found against the complainant on this point, holding that on the balance of probabilities the respondent did not know the complainant was a Traveller at the point when service was refused to him. Similarly in *Ward & another v Quigley*, the Equality Officer found that the respondent would not have known the second complainant, who was a stranger to him, was a Traveller. However, he held that in that case the respondent had refused service because this complainant arrived with a recognised Traveller, and that this constituted discrimination by association under section 3(1)(b) of the Equal Status Act.

In *Martin Collins v Kyle's Pub*<sup>21</sup>, the complainant argued that “the Traveller community is recognised as being different and these differences are recognised by the settled community by the Travellers’ appearance, voice, accents and pronunciations” or by their “looks, voice and dress.” The Equality Officer did not decide on that particular issue, finding that in the circumstances of that case a non-Traveller would have been treated identically in similar circumstances and that there could not therefore have been discrimination. In *McDonagh v Castle Inn*, however, the Equality Officer was satisfied that the respondent would have recognised the complainants as Travellers “from their speech and appearance”.

## **Gender ground**

A large number of cases were decided during 2001 on the gender ground in the field of employment. There were no decisions during 2001 on gender discrimination under the Equal Status Act.

Among the issues which arose were:

- the weight which may be given to gender imbalance at senior levels within an organisation in considering gender discrimination claims:
- the nature and effect of discriminatory questions at interview: and
- whether refusal of jobsharing or of part-time working may constitute indirect discrimination against females.

These issues are considered in detail in sections 3 (indirect discrimination) and 5 (access to employment, access to family-friendly working conditions).

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<sup>20</sup>*Martin Collins v Kyle's Pub*, DEC-S2001-005

<sup>21</sup>*Martin Collins v Kyle's Pub*, DEC-S2001-005

A further issue was the extent of protection for female employees in respect of illness related to pregnancy, and, more generally, of gynaecological illness.

In the *McKenna* case,<sup>22</sup> a public sector employee was absent from work for a prolonged period during her pregnancy due to pregnancy-related illness. It was uncontested that she had been unfit for work. Under the employer's schemes dealing with sick leave entitlements and pay during illness, the employee was reduced to half pay in respect of the later part of her pregnancy, and her absences were deducted from her sick leave entitlements. The Equality Officer considered a number of relevant judgements of the European Court of Justice<sup>23</sup>, before deciding that the respondent's actions amounted to direct discrimination on the gender ground under Community law, and were in breach of article 141 of the EC Treaty as well as of the Equal Pay and Equal Treatment Directives. The Equality Officer noted that she was bound to apply the provisions of the 1998 Act in the light of the European Community law which the Act seeks to implement.

However, in another case<sup>24</sup> the Equality Officer found that neither Community nor national law created any entitlement to special protection for a female employee in respect of gynaecological illness generally. The employer in this case had invoked disciplinary procedures, and reduced pay as provided by its sick pay scheme, after a female employee had incurred frequent absences due to a gynaecological illness which was not related to pregnancy or childbirth. The Equality Officer considered a number of decisions of the European Court of Justice, and concluded that the high level of protection afforded to pregnant employees on the gender ground by Community law was specifically stated in those cases not to extend beyond the protected period lasting from the beginning of pregnancy to the end of the statutorily-protected maternity leave. Thereafter, the employee must show that she was treated less favourably than a male employee in similar circumstances, and he found that it was clear in this case that male employees with a similar pattern of illness-related absence would have been treated exactly the same as the complainant.

## **Marital status ground**

The marital status ground was argued, unsuccessfully for the complainant, in two decisions issued during 2001 under the 1998 Act<sup>25</sup>: in *O'Hanlon* the complainant was held not to have established a prima facie case, and in *Geasley*, the Equality Officer found that the difference in treatment was in fact based on factors unconnected with marital status.

Four cases were decided during 2001 under the 1977 Act on this ground<sup>26</sup>: it should be noted that the definition of this ground in the 1977 Act differs significantly from that in the 1998 and 2000 Acts, in that the comparison must be made with a person of the same sex but different marital status. In *Sheils O'Donnell*<sup>27</sup>, the Equality Officer found against the female claimant on the

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<sup>22</sup>*McKenna v North Western Health Board*, DEC-E2001-025 (under appeal on 01.04.02).

<sup>23</sup>She referred particularly to *Pedersen*, Case C-66/96, 1998 ECR I-7327.

<sup>24</sup>*Rattigan v Boots*, DEC-E2001-027

<sup>25</sup>*O'Hanlon v EBS*, DEC-E2001-022, *Geasley v Watermans Printers Ltd*, DEC-E2001-027

<sup>26</sup>*McKernan v UCD* DEC-E2001-026, *Weir v St Patricks Hospital*, DEC-E2001-011 and *Burke v National University of Ireland Galway* DEC-E2001-012 (all three under appeal on 1st April 2002), *Barry v Virgin Mary Schools* DEC-E2001-031.

<sup>27</sup>*Sheils O'Donnell v St Baithin's National School*, DEC-E2001-008 (under appeal on 01.04.02)

marital status ground, because the successful appointee, who was her comparator, was male and therefore could not satisfy the Act's requirements. Conversely in *Barry*, another disputed appointment case, the Equality Officer found that the interviewers discriminated on the marital status ground by asking the claimant (a married woman with children) about her ability to reconcile her family life with the job's requirements. He was satisfied that no such question was asked of the female appointee, who was single.

## **Family status ground**

There were two decisions on the family status ground in 2001, one under each of the new Acts.

In *Geasley*, an employer had recruited to a number of full-time posts but had not offered the complainant, who was an existing employee, the option of applying. The complainant had originally worked full-time, had moved to part-time working some years previously in order to facilitate her family commitments, but was now interested in returning to full-time work. She considered that the employer was now discriminating against her on grounds of her gender, marital and family status. The Equality Officer held that the respondent's approach had been based on factors unconnected with any of these grounds. However, he expressed concern about some aspects of the respondent's recruitment practices, and made non-binding recommendations that the employer review them in order to accord with good equality practice.

In *Maughan*, a complainant was refused service in a pub during the afternoon because he was accompanied by his thirteen year old son, and was only served after his son left the premises. The respondent stated that its policy was not to admit any one aged under 18 to its premises. This meant that it would not serve parents who were accompanied by their children. The complainant argued that this constituted discrimination against him under the Equal Status Act, on the family status ground. The respondent argued that this policy was maintained in order to comply with the Licensing Acts, and that parents tended not to supervise children properly, leading to a risk of disorderly conduct.

The Equality Officer considered the relevant provisions of the Act in detail. Section 2(1) of the Act defined family status as "*having responsibility as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years*". He found that the complainant satisfied this definition, since his son accompanied him to the pub. He also considered the defences available to the respondent, both under section 15(1), and under section 15 (2) of the Act which provides that:

*"Action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the Licensing Acts, 1833 to 1999, shall not constitute discrimination."*

The Equality Officer noted the obligations on the respondent under the Licensing Acts to ensure that minors did not consume alcohol on its premises and not to permit violent, disorderly or riotous conduct. However, he also noted the complainant's argument that section 34(2) of the Intoxicating Liquor Act 1988 specifically permits a child to be present in a pub at any time when intoxicating liquor can be sold there, provided only that the child is accompanied by their parent or guardian, and that no other provision in the Licensing Acts had been adduced which appeared to prohibit or limit children's presence in pubs.

The Equality Officer commended the respondent for having a rigorous policy to ensure alcohol was not served to minors. However, he concluded that the respondent had no reason in this particular case to assume that there was any risk of the complainant serving alcohol to his son. Moreover, no reasonable person in the position of the respondent would have supposed, in the circumstances of this particular case, that the son's presence gave rise to a risk of disorder, criminal conduct, damage to property, or the other situations prohibited by the provisions under consideration. Accordingly, the respondent's refusal of service could not be said to be taken in good faith for the sole purpose of ensuring compliance with the Licensing Acts, and did not satisfy the requirements of the defences provided at sections 15(1) or 15(2) of the Act. He accordingly held that *"having a blanket ban on under 18 year olds being in pubs with their parents is a discriminatory policy against parents of under 18 years olds on the family status ground under the Equal Status Act 2000... Although there are strong moral and social arguments why parents should not bring children under 18 years old into pubs with them, I consider that under current legislation parents are entitled to [do so] if they wish."* He awarded compensation of £2000/ €2539 and directed the publican to remove signs indicating that parents could not be served if accompanied by children.

The Equality Officer added that *"However, my findings on this point should not be interpreted as meaning that publicans must serve parents when accompanied by their children under 18 years old in all circumstances."* He emphasised that publicans could be entitled to refuse service to a parent accompanied by a minor child, either under section 15(2) or under other provisions of the Act, in a number of situations. For instance, if the child was seen to consume alcohol, if the parent was drunk, or if parent or child were disorderly.

# 3. General equality issues

## The nature of discrimination

A number of rulings referred to the classic statement by the European Court of Justice in the *Schumacker* and *Gillespie* cases<sup>28</sup> that “It is well settled that discrimination involves the application of different rules to comparable situations, or the application of the same rule to different situations”.<sup>29</sup> One decision<sup>30</sup> referred also in this context to section 4 of the Equal Status Act on reasonable accommodation, and to the decisions of the US Supreme Court in *Jenness v Fortsom*<sup>31</sup> and of the Irish Supreme Court in *O’Brien v Keogh*<sup>32</sup> and *de Burca v Attorney General*<sup>33</sup>.

## The relevance of European Community Law

The provisions of Article 141 of the European Community Treaty, the Equal Pay, Equal Treatment and Burden of Proof Directives, and the European Court of Justice’s caselaw on gender equality, were widely considered and applied in employment equality rulings<sup>34</sup>. *Eng*<sup>35</sup> also considered European Community law concerning the free movement of workers and the nature of workers or of vocational training. A number of decisions also referred to *Schumacker*, a nationality discrimination case<sup>36</sup>.

*Damery v Italian Embassy*<sup>37</sup> considered Article 13 of the European Community Treaty, but held that it could not be used as a base for legal action before an Equality Officer as it was essentially an enabling provision permitting measures to be taken against discrimination, and did not itself render discrimination unlawful. It also refused to accept an argument based on the Race Directive<sup>38</sup>, pointing out that the Directive would not enter into force until 2003. Similarly the Council Recommendation on childcare was considered, but was held to have no relevant legal effect, in *Walsh v Tesco Ireland*<sup>39</sup>.

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<sup>28</sup>*Finanzamt Koeln v Schumacker*, ECJ Case no C-279/93, *Gillespie v Northern Health and Social Services Board*, ECJ Case no C-342/93

<sup>29</sup>*Rook v Tesco* DEC-E2001-037, *66 Female Workers v Tesco* DEC-E2001-024, *Sheils O’Donnell v St Baithin’s National School* DEC-E2001-008 (under appeal on 01.04.02) *Martinez v Network Catering*, DEC-E2001-004, *Collins & others v Bartra House Hotel*, DEC-S2001-015)

<sup>30</sup>*Maughan v Glimmer Man Pub*, DEC-S2001-020

<sup>31</sup>*Jenness v Fortsom* 403 US 431 (1971)

<sup>32</sup>*O’Brien v Keogh* 1972 IR 144

<sup>33</sup>*de Burca v Attorney General*, 1976 IR 38.

<sup>34</sup>see for example *McKenna v NorthWestern Health Board* DEC-E2001-025 (under appeal as of 1<sup>st</sup> April 2002), *Rook v Tesco* (above), *Rattigan v Boots*, DEC-E2001-027, *Kennedy v Thurles Golf Club* DEC-E2001-020, *66 Female Workers v Tesco* DEC-E2001-024, *70 Named Female Employees v Superquinn* DEC-E2001-028, *Weir v St Patricks Hospital*, DEC-E2001-011 (under appeal on 1<sup>st</sup> April 2002), *Hanley and Kelly v Eircom* DEC-E2001-006.

<sup>35</sup>*Eng v St James’ Hospital* DEC-E2001-041 (under appeal on 01.04.02).

<sup>36</sup>for example *Gorry v Manpower* DEC-E2001-017, *Maughan v Glimmer Man Pub*, DEC-S2001-020, *McKenna* (above, under appeal); *Conroy v Costello’s Bar*, DEC-S2001-014

<sup>37</sup>*Damery v Italian Embassy*, DEC-E2001-039 (under appeal on 01.04.02)

<sup>38</sup>Council Directive 2000/43 of 29 June 2000

<sup>39</sup>*Walsh v Tesco Ireland*, DEC-E2001-042. (Under appeal on 01.04.02).

In *McKenna*, the Equality Officer stated that she was bound to interpret the 1998 Act in the light of relevant European Community caselaw. She noted that the Act was specifically stated in its long title to make further provision in connection with the Equal Pay and Equal Treatment Directives, and cited the Supreme Court's statement in *Bailey Gibson*<sup>40</sup> of Irish courts' obligations to interpret national equality legislation, as far as possible, in the light of the purpose and wording of the relevant European Community Directives<sup>41</sup>.

European Community law was also accorded some persuasive effect in a number of decisions under the Equal Status Act<sup>42</sup>.

The effect of Advocates Generals' Opinions to the Court of Justice was considered in *Walsh v Tesco*.

## Direct and indirect discrimination

Indirect discrimination was argued in ten decided employment cases<sup>43</sup>, and considered marginally in one decided Equal Status case<sup>44</sup>. Most of these arose under earlier employment equality legislation: the only claim of indirect discrimination under the 1998 Act failed to establish a prima facie case of indirect discrimination<sup>45</sup>. The vast majority of decided cases dealt with claims of direct discrimination.

### The distinction between direct and indirect discrimination

This was considered in *Walsh v Tesco*. The claimant had applied for shorter working hours following her return from maternity leave, and argued that the employer's refusal amounted to direct, or alternatively indirect, discrimination based on gender or marital status under the 1977 Act. The Equality Officer stated that in her view a refusal to facilitate childcare arrangements could not amount to direct discrimination based on sex. She referred to *Schnorbus* (a German case challenging certain advantages afforded in public service recruitment to candidates who had completed military service), where the European Court of Justice stated that only provisions which applied differently according to the sex of the person concerned can be regarded as constituting discrimination directly based on sex.<sup>46</sup>

A procedural issue arose in two cases as to whether an Equality Officer should consider the issue of indirect discrimination. In *Walsh v Tesco*, the claim form referred only to direct discrimination although the submissions also raised arguments of indirect discrimination.<sup>47</sup> In *70 Named Female*

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<sup>40</sup>*Nathan v Bailey Gibson*, Supreme Court, 1998 2 IR 162

<sup>41</sup>See similarly *Rook v Tesco* (above), *66 Female Workers v Tesco* DEC-E2001-024.

<sup>42</sup>See for example *Maughan v Glimmer Man Pub*, DEC-S2001-020, and below regarding the burden of proof for Equal Status cases.

<sup>43</sup>*Hanley and Kelly v Eircom* DEC-E2001-006, *66 Female Employees v Tesco* DEC-E2001-024, *70 Named Female Employees v Superquinn* DEC-E2001-028, *Gorry v Manpower* DEC-E2001-017, and *Hughes v Minister for Justice Equality and Law Reform* DEC-E2001-013. See also *Sheils O'Donnell v St Baithin's National School* DEC-S2001-008, *Burke v National University of Ireland Galway* DEC-E2001-012, *Walsh v Tesco* DEC-E2001-042, *O'Dowd v National Museum* DEC-E2001-014, and *Weir v St Patricks Hospital* DEC-E2001-011 (all under appeal on 1st April 2002).

<sup>44</sup>*McDonagh v Quinn* DEC-S2001-007 (the issue whether a "regulars-only" policy in pubs would discriminate indirectly against members of the Traveller community.)

<sup>45</sup>*Gorry v Manpower* DEC-E2001-017

<sup>46</sup>*Schnorbus v Land Hessen*, ECJ, Case no C-79/99. See similarly *Hanley and Kelly v Eircom* DEC-E2001-006, where the Equality Officer stated that a difference of pay arising from a restructuring of grades could not amount to direct discrimination based on sex, referring to *Irish Aviation Authority v IMPTCU*, DEP 99/3.

*Employees v Superquinn*, the claimant had originally claimed both direct and indirect discrimination but had withdrawn the indirect discrimination claim at an earlier hearing and subsequently applied to reinstate it<sup>48</sup>. In *Walsh*, the Equality Officer considered the High Court's order in *Long*<sup>49</sup>, but found it difficult to draw guidance, as no written judgement had been delivered, and the context and reasoning behind the order was therefore not available to her. She nevertheless considered that there was no reason why she should not investigate both direct and indirect discrimination. In *70 Female Employees v Superquinn*, the Equality Officer also considered an earlier Equality Officer recommendation<sup>50</sup> and concluded that in the circumstances "it is appropriate for me to consider the full impact of alleged discrimination, whether it is direct discrimination...or indirect discrimination."

## The definition of indirect discrimination

In considering claims of indirect discrimination under the 1977 and 1974 Acts, rulings referred particularly to the caselaw of the European Court of Justice, to the decisions of the Supreme Court in *Bailey Gibson* and of the High Court in *Conlon*,<sup>51</sup> and to the definition of indirect discrimination contained at article 2 of Directive 97/80/EC<sup>52</sup>, in deciding what constituted indirect discrimination.

A number of claimants arguing indirect discrimination based their submissions on section 2(c) of the 1977 Act. Several recommendations referred to the Supreme Court decision in *Nathan v Bailey Gibson*, in adopting the approach that indirect discrimination cases under the 1977 Act should correctly be decided not under section 2(c) but under section 3, read in conjunction with the Equal Treatment Directive<sup>53</sup>.

## Disproportionate impact

Two cases applied the statistical tests required by European Community law in testing whether a requirement had sufficiently disproportionate impact as between males and females to constitute indirect discrimination. In both, the difference of treatment arose between different grades, and the Equality Officer was satisfied that the claimant's grade was almost entirely single-sex, but found that the comparator grade was too mixed in composition to satisfy the Community law test. In *Hughes*, the claimant originally worked in a predominantly male manual grade. Its members were upgraded to a new combined clerical grade along with traditionally female clerical grades, but he argued that in practice he and other former manual grades tended to be relegated

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<sup>47</sup>*Walsh v Tesco* DEC-E2001-042 (under appeal on 01.02.04)

<sup>48</sup>*70 Named Female Employees v Superquinn*, DEC-E2001-028

<sup>49</sup>*Long v Labour Court and others*, High Court, unreported, May 1990

<sup>50</sup>*Prima Ltd v Gibson, Reilly and Clarke*, EE08/1991

<sup>51</sup>See for example, *66 Female Workers v Tesco* DEC-E2001-024; *70 Named Female Employees v Superquinn* DEC-E2001-028. See also *Sheils O'Donnell v St Baithin's National School* DEC-S2001-008, *Burke v National University of Ireland Galway* DEC-E2001-012, *Walsh v Tesco* DEC-E2001-042 and *Weir v St Patricks Hospital*, DEC-E2001-011 (all under appeal on 1st April 2002).

<sup>52</sup>*66 Female Workers v Tesco* (above), *70 Named Female Employees v Superquinn* (above)

<sup>53</sup>*Hughes v Minister for Justice Equality and Law Reform* DEC-E2001-013; *Walsh v Tesco* and *Weir* (both under appeal, above), *70 Named Female Employees v Superquinn* (above).

to manual tasks while female clerical grade members were assigned to data entry functions which offered better prospects. However, the Equality Officer found that former manual grades amounted to only a small proportion of males within the new combined grade, and considered that any such practice could not bear more heavily on males than on females given that the vast majority of males in the new combined grade were unaffected by it.

In *Hanley and Kelly v Eircom*, a large company had restructured its clerical and administrative grades, which had formerly enjoyed different pay scales, duties and promotional opportunities. A single restructured grade (TEO1) placed former clerical (CO) and administrative (TO) grades on the same pay scales and working conditions. However, the restructuring agreements provided for an exception whereby former TOs who were now TEOs could avail of a higher pay scale on a personal basis. The female claimants argued that this discriminated against them, since the CO grade and TEO grades were mostly female and the TO grade had been mostly male. The Equality Officer reconstructed as far as possible the gender composition of the relevant groups at the date of the claim. She established that the TEO grade was 54% female, the CO grade had been 57% female, and the TO grade had been 80% male. TEOs eligible for the higher pay scale were 81% male and TEOs not eligible were 58% female. The Equality Officer referred to the Court of Justice's decisions in *Enderby* and *Rinner-Kuhn* in holding that while the comparator grade was predominantly male, the claimants' grade was not predominantly female as required by Community law and that accordingly the gender imbalance was not sufficient to establish a prima facie case of indirect discrimination. She also held that the difference in remuneration was based on "grounds other than sex" and was therefore not unlawful.

*70 named Female Employees v Superquinn*<sup>54</sup> placed in issue a practice whereby the employer assumed responsibility for cleaning uniforms of staff in fresh food departments, but staff engaged in other departments had to clean their own. The Equality Officer concluded that the fresh-food departments were 70% male while the other departments were 65% female. Overall, male employees were nearly twice as likely to have their uniforms cleaned. Referring to the European Court of Justice's decision in *Seymour-Smith and Perez*, he found that the practice did impact disproportionately on female employees. However, he was satisfied that it was objectively justified by the respondent's obligations under regulations implementing a European Community food hygiene directive, to ensure that fresh-food uniforms were cleaned daily.

### **Specific issues related to family responsibilities**

Issues related to family responsibilities figured significantly in the rulings during 2001 on indirect discrimination.

Three recommendations considered whether refusing a full-time employee's request to jobshare or to work part-time can constitute indirect discrimination based on gender or marital status under the 1977 Act. (The claimants argued that there is much heavier impact on female

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<sup>54</sup>*70 Named Female Employees v Superquinn* DEC-E2001-028.

employees because women in practice were significantly more likely to assume responsibility for childcare and to request family-friendly working arrangements of this sort.) These rulings are discussed in more detail in section 4 <sup>55</sup>.

A recruitment case considered whether it may be discriminatory for an employer to ask detailed questions about a prospective employee's childcare arrangements and willingness to work atypical hours, if the same questions are put to male and female candidates. This recommendation is also discussed in more detail in section 4 <sup>56</sup>.

## Justification

*Sheils O'Donnell*, a case under the 1977 Act, held that in the circumstances of that case it was justified for interviewers to question candidates for a job as home-school community liaison officer, about their availability to work atypical hours "considering family commitments". <sup>57</sup> The Equality Officer found that the liaison scheme involved the appointee in evening meetings and home visits to families, some of them during evenings or weekends to facilitate working parents. She considered it arguable that such questions, even if posed irrespective of the candidate's sex, might tend to disadvantage female candidates disproportionately. However, she concluded that in the circumstances of this particular case, the questions were objectively justified. A requirement of flexibility to work outside normal hours was in her view an objective requirement unrelated to the candidate's gender, which met a genuine need, was suitable to attain its objectives, and was necessary to achieve them. She referred to the Court of Justice's decisions in *Seymour-Smith* and *Bilka Kaufhaus*.

Similarly, in *Hughes v Minister for Justice Equality and Law Reform*, the Equality Officer accepted that speed in data entry tests was a reasonably and objectively justified requirement for assignment to data entry duties in a busy section, and in *70 named Female Employees v Superquinn* the Equality Officer accepted that providing free uniform cleaning only to employees dealing with fresh foods was objectively justified where the respondent was obliged under food hygiene regulations to ensure all such staff had daily clean uniforms.

## Comparators

The early decisions under the Equal Status Act made it clear that a comparator would be needed in assessing discrimination under the Act. In *Conroy v Carney*, the Equality Officer stated that "The question to be answered.. is whether the complainant was refused service in a situation where a non-Traveller in similar relevant circumstances would have been served. In order to prove that less favourable treatment was involved, some form of comparator is required."<sup>58</sup>

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<sup>55</sup>*Burke v National University of Ireland Galway* DEC-E2001-012, *Weir v St Patricks Hospital*, DEC-E2001-011, and *Walsh v Tesco* DEC-E2001-042. (these decisions were under appeal on 01.04.02).

<sup>56</sup>*Sheils O'Donnell v St Baithin's National School*, DEC-E2001-008 (under appeal on 01.04.02)

<sup>57</sup>Direct discrimination did not arise in this case as identical questions were found to have been put to both sexes.

<sup>58</sup>See similarly *Donovan v Gort Community Council* DEC-S2001-006.

The provisions of the 1998 and 2000 Acts that discrimination occurs where one person is treated less favourably than another “would be treated” were considered in a number of decisions as permitting the use of a hypothetical comparator in non-pay cases<sup>59</sup>.

The same question arose in relation to the 1977 Employment Equality Act, which does not specifically provide for the use of a hypothetical comparator. The Equality Officer in *Barry*<sup>60</sup> referred to the decision of another Equality Officer in *McDonald v Clonmel Healthcare*<sup>61</sup>, and to the broad terms of article 2.1 of the Equal Treatment Directive, in holding that the 1977 Employment Equality Act allowed the use of a hypothetical comparator of the opposite sex. *Barry* concerned questions put to a female candidate about her ability to reconcile childcare and working obligations, but there were no male candidates who could provide an actual comparator for the purpose of establishing whether the questioning was discriminatory. The Equality Officer concluded that a hypothetical male comparator would not have been similarly questioned, and that the question was therefore discriminatory.

## Intention to discriminate is not required

In *Collins v Bartra*,<sup>62</sup> the Equality Officer referred to the terms of the Equal Status Act, and also considered the persuasive effect of a leading Irish textbook on employment equality law and of the decision of the UK House of Lords in a case on gender discrimination in access to facilities<sup>63</sup>, in holding that intention to discriminate was not a necessary condition to liability.

## Different forms of discrimination

The concepts of discrimination by association and by imputation provided under the Equal Status Act were considered and applied in several cases. Discrimination by association was found in *Ward v Quigley*<sup>64</sup>. Discrimination by imputation was considered in *O’Brien v Killarney Ryan*<sup>65</sup>. In that case the complainant stated that he personally had never considered himself a Traveller. He lived in private housing accommodation, had never been nomadic, and had brought up his children as part of the settled community. He stated however that some people did regard him as a Traveller as his parents were nomadic Travellers. The Equality Officer found that the complainant was a Traveller by imputation, but did not find discrimination against him.

## The burden of proof: employment equality cases

The classic approach in employment equality law concerning the need to establish a prima facie case, and the possibility of a shift in the burden of proof, was applied and explained in a number of cases.

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<sup>59</sup>*Conroy v Carney’s Bar* DEC-S2001-002, *McDonagh v Tesco* DEC-S2001-016; *Coffey & others v Blasket Pub* DEC-S2001-010 (under appeal on 1<sup>st</sup> April 2002).

<sup>60</sup>*Barry v Board of Management, Virgin Mary Schools* DEC-E2001-031

<sup>61</sup>*McDonald v Clonmel Healthcare* DEC-E2000-12

<sup>62</sup>*Collins & others v Bartra House Hotel*, DEC-S2001-015

<sup>63</sup>*James v Eastleigh Borough Council*, 1990 2 All ER 607

<sup>64</sup>See also *Paddy Collins v Kyle’s Pub* DEC-S2001-019 (association found but not discrimination).

<sup>65</sup>*O’Brien v Killarney Ryan Hotel*, DEC-S2001-008

Many employment equality rulings cited *Dublin Corporation v Gibney's*<sup>66</sup> definition of a *prima facie* case as “evidence which in the absence of any credible contradictory evidence by the employer would lead any reasonable person to conclude that discrimination has probably occurred”<sup>67</sup>. A number of rulings found against the claimant on the basis that the necessary *prima facie* case had not been established<sup>68</sup>.

A number of rulings also referred to the decision of the Northern Ireland Court of Appeal in *Wallace*,<sup>69</sup> and the Labour Court's determinations in *Gleeson*<sup>70</sup> and *Mitchell*<sup>71</sup>, to the effect that once a *prima facie* case of discrimination has been established, the burden of proof then shifts to the respondent, who must then rebut the presumption of discrimination by proving that he did not discriminate.<sup>72</sup> The Supreme Court's decision in *Nathan v Bailey Gibson*<sup>73</sup> on the shift in the onus of proof to the employer in indirect discrimination cases was cited in *Martinez v Network Catering*.

Rulings also referred to the Burden of Proof Directive<sup>74</sup> as setting out the principles established by the European Court of Justice's caselaw on gender equality in employment, to the effect that the burden of proof must shift to the respondent when *prima facie* evidence of discrimination was established. Rulings in the latter part of 2001 also began to refer to the Burden of Proof Regulations<sup>75</sup>, which transposed the Directive into Irish law with effect from 18 July 2001.<sup>76</sup>

In *Kennedy v Thurles Golf Club*, the Equality Officer considered the burden of proof in equal pay cases and referred to the European Court of Justice's statement in the “Swedish Ombudsman Case”<sup>77</sup> that workers would be deprived of the means of securing compliance with the principle of equal pay before national courts, if evidence establishing a *prima facie* case of discrimination did not have the effect of imposing on the employer the onus of proving that the difference is not in fact discriminatory.

Rulings during 2001 extended the same approach to the new grounds covered by the 1998 Act, including race<sup>78</sup>, disability<sup>79</sup>, membership of the Traveller community,<sup>80</sup> and (obiter) sexual orientation<sup>81</sup>.

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<sup>66</sup>*Dublin Corporation v Gibney* EE5/1986

<sup>67</sup>See for example *Kennedy v Thurles Golf Club* DEC-E2001-019, *Rook v Tesco* DEC-E2001-037, *Murphy v Tesco* DEC-E2001-036, *Weldon v Primera* DEC-E2001-007 and *Sheils O'Donnell v St Baithin's National School* DEC-E2001-008 (both under appeal on 01.04.02), *66 Female Workers v Tesco* DEC-E2001-024. The same approach is also used in *Rodmell v TCD* DEC-E2001-016

<sup>68</sup>See for example *Rook v Tesco* (above), *Weldon v Primera* (above), *Murphy v Tesco* DEC-E2001-036

<sup>69</sup>*Wallace v South Eastern Education and Library Board*, Northern Ireland Court of Appeal, 1980 IRLR 193

<sup>70</sup>*Gleeson v Rotunda Hospital*, Labour Court, DEE 003

<sup>71</sup>*Mitchell v Southern Health Board*, Labour Court, DEE 011

<sup>72</sup>See for example *Rook* (above), *O'Hanlon v EBS* DEC-E2001-022, *Kennedy v Thurles Golf Club* DEC-E2001-020, *70 Named Female Employees v Superquinn* DEC-E2001-028, *66 Female Workers v Tesco* DEC-E2001-024. Also *Sheils O'Donnell*, (above), *Riney v Co Donegal VEC* DEC-E2001-030, and *McCarthy v Dublin Corporation* DEC-E2001-015 (all under appeal on 01.04.02).

<sup>73</sup>*Nathan v Bailey Gibson*, 1998 2 IR 162

<sup>74</sup>Council Directive no 97/80/EC of 15 December 1997

<sup>75</sup>S.I. no 337 of 2001.

<sup>76</sup>See for example *Rook v Tesco* DEC-E2001-037, *O'Hanlon v EBS* DEC-E2001-022, *70 Named Female Employees v Superquinn* (above), *Geasley v Watermans Printers Ltd*, DEC-E2001-027.

<sup>77</sup>*Jamstallhdetsombudsmannen v Orebrolans*, Case no C-236/98 30 March 2000

<sup>78</sup>*Martinez v Network Catering*, DEC-E2001-004

<sup>79</sup>*Gorry v Manpower* DEC-E2001-017, *Martinez v Network Catering*, DEC-E2001-004

<sup>80</sup>*Nevin v Plaza Hotel*, DEC-E2001-033. (under appeal to the Labour Court on 1st April 2002.)

<sup>81</sup>*Martinez*, above: (it appeared later in the decision that the claimant withdrew her claim in respect of this ground.)

## The burden of proof: Equal Status cases

The caselaw under the Equal Status Act has applied the same approach regarding the need to establish a *prima facie* case, and the possibility of a shift in the burden of proof, as has been applied in employment equality cases.

In an early Equal Status case, the Equality Officer stated that *"In discrimination cases, the burden of proof rests with the complainant. It is up to him to present a prima facie case of discrimination, and if he can do this the burden of proof then shifts to the respondent to prove that discrimination did not occur."*<sup>82</sup> In deciding what was meant by a *prima facie* case he referred to sources from employment equality law which he considered persuasive: *Dublin Corporation v Gibney* EE5/1986, the EC Burden of Proof Directive (Council Directive 97/80/EC of 15 December 1997), and the Labour Court's determinations in *Gleeson v Rotunda Hospital*, DEE003 and *Mitchell v Southern Health Board*, DEE 01/2001.<sup>83</sup>

He then sought to decide whether the complainant *"has produced sufficient hard evidence which, in the absence of convincing contradictory evidence, would lead a reasonable person to believe that [the respondent] discriminated against [the complainant] on the basis of his membership of the Traveller community. If he has succeeded in producing sufficient hard evidence then the burden of proof shifts to [the respondent] to show that she did not act in a discriminatory manner. In the absence of sufficient hard evidence any inferences of discrimination which might in themselves contribute to a prima facie case have to be considered"*<sup>84</sup>. However, if *[the complainant] fails to produce sufficient hard evidence or inferences of discrimination to establish a prima facie case, the burden does not shift to [the respondent].."* In this particular case there was extensive conflict of evidence, and he noted that in such a case *"the lack of independent witnesses is not helpful to the complainant's attempts to establish a prima facie case."*

In *Paddy Collins v Kyle's Pub*, the Equality Officer clarified that in his view the appropriate comparator must be someone in the same circumstances. *"In other words, the complainant has to show [in that particular case] that a non-Traveller drinking in the company of someone who was barred would have received more favourable treatment than the treatment which he received."*<sup>85</sup>

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<sup>82</sup>*McDonagh v Quinn* DEC-S2001-007. See similarly *Coffey & others v Blasket Pub* DEC-S2001-010, *Joyce v Temple Gate Hotel* DEC-S2001-012 (both under appeal to the Circuit Court on 1st April 2002), *Scanlon and Ryan v Russell Court Hotel*, DEC-S2001-013, *Forestal v Hearn's Hotel* DEC-S2001-018

<sup>83</sup>See similarly the approach taken in *Joyce v Delaney's Pub* DEC-S2001-021 (under appeal on 1st April 2002), and *McDonagh v Castle Inn* DEC-S2001-022; in *Conroy v Costello's Bar*, DEC-S2001-014 and *Collins & others v Bartra House Hotel*, DEC-S2001-015 (both of which also referred to *Wallace v South Eastern Education and Library Board*, Northern Ireland Court of Appeal, 1980 IRLR 193); in *Wall v Green Isle Hotel* DEC-S2001-017 and *Paddy Collins v Kyle's Pub* DEC-S2001-019, which both accorded persuasive value to *Mitchell* (above) and the Burden of Proof Directive (above); and in *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008. See further *Dooley v Grand Hotel* DEC-S2002-016.

<sup>84</sup>He referred here to *Mongan v Angler's Rest* DEC-S2001-004 and to *Gleeson v Rotunda Hospital* (above) as persuasive sources. See similarly *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008.

<sup>85</sup>*Paddy Collins v Kyle's Pub* DEC-S2001-019; see similarly *Wall v Green Isle Hotel* DEC-S2001-017

In *Wall v Green Isle Hotel*, the Equality Officer stated that:

*“the elements critical to the establishment of a prima facie Equal Status case are:*

- *that the claimants are covered by one of the discriminatory grounds outlined in the Equal Status Act*
- *that specific instances of treatment occurred, and*
- *that this involved the claimants being treated differently and less favourably than a non-Traveller was treated, or would be treated, in similar circumstances.”*<sup>86</sup>

In *Joyce v Delaney’s Pub*, the Equality Officer further explained the effect of a shift in the burden of proof: *“If and when those elements are established, the burden of proof shifts, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. In such cases the claimant does not need to prove that there is a link between the difference and the membership of the ground: instead, the respondent has to prove that there is not.”*<sup>87</sup>

## Inferences

In *Collins v Bartra House Hotel* and in *Kennedy v Thurles Golf Club*<sup>88</sup>, the Equality Officers referred to the statement of the Northern Ireland Court of Appeal in *Wallace*<sup>89</sup> that direct evidence of discrimination would not always be available to complainants and that consequently the court *“is more often left to infer discrimination from the circumstances. If this could not be done, the object of the legislation would be largely defeated...”* in support of their decision to draw an inference of discrimination from the facts of the case. The same point was also made in *Paddy Collins v Kyle’s Pub* DEC-S2001-019; where the Equality Officer also adopted the approach taken by the Labour Court in an employment equality case, *Gleeson*, in considering any inferences of discrimination arising from the circumstances of the case as part of the *prima facie* case established by the complainant.<sup>90</sup>

## Harassment

There were no substantive decisions during 2001 on harassment or sexual harassment under the 1998 and 2000 Acts<sup>91</sup>. However, there were decisions in cases brought under the 1977 Employment Equality Act<sup>92</sup>.

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<sup>86</sup>A similar test was used in *Joyce v Delaney’s Pub* DEC-S2001-021 (under appeal on 1st April 2002), *McDonagh v Castle Inn* DEC-S2001-022, and *Forrestal v Hearn’s Hotel*, DEC-S2001-018

<sup>87</sup>See similarly *McDonagh v Castle Inn* DEC-S2001-022

<sup>88</sup>*Collins v Bartra House Hotel*, DEC-S2001-015, *Kennedy v Thurles Golf Club*, DEC-E2001-019

<sup>89</sup>*Wallace v South Eastern Education and Library Board*, Northern Ireland Court of Appeal, 1980 IRLR 193

<sup>90</sup>*Gleeson v Rotunda Hospital*, DEE 003

<sup>91</sup>*A Complainant v a Company* DEC-E2001-023 was decided against the claimant on procedural grounds.

<sup>92</sup>In addition to those mentioned see also *Hughes v Minister for Justice Equality and Law Reform* DEC-E2001-013 (no evidence to support allegation of penalisation at work after referring a claim).

In *A Named Female Employee v a Named Company*<sup>93</sup>, the Equality Officer expressed doubt as to whether harassment had in fact taken place on the evidence, but also followed the approach taken by the High Court in *BC v A Health Board*, and by the Labour Court in *A Company v a Worker*, in holding that the employer could not be liable because the alleged harasser was not in a position of authority over the claimant, although he did have a disciplinary role regarding her conduct at work.

*Two Female Claimants and the Equality Authority v A Boys' Secondary School*<sup>94</sup> was a claim of sexual harassment of female teachers by male secondary school pupils. The incidents included attaching lewd notes to a teacher's back in class, whistling and calling the teachers sexually offensive names in corridors, pushing two boys up against a female teacher, and sexually offensive remarks made in class. The Equality Officer was in no doubt that this amounted to "unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work," and could therefore constitute discrimination under the 1977 Act. He also considered that it was reasonable to impose vicarious liability on a school in respect of acts by pupils. School students were "*persons over whom the school, in the words of the principal, acts in loco parentis, and over whom the school has authority while they are engaged in school activities, whether on the school premises or elsewhere. The acts complained of are acts of gross misbehaviour...which if uncorrected, would in all likelihood continue... The board of management is clearly responsible for the discipline and working environment at the school and is therefore in a position to exercise control over such behaviour.*"<sup>95</sup> He agreed that the school had responsibilities to both students and staff, but observed that "*in responding to disciplinary matters, a school must balance these responsibilities and endeavour to correct misbehaviour so that a pupil learns that certain behaviour is neither socially nor legally acceptable in society.*" However, he concluded that on balance there was no general practice of discrimination against female employees and that the school had taken all reasonably practicable steps to address the complaint, including suspending two pupils, arranging for two others to leave the school, amending the disciplinary code to specifically prohibit sexual harassment and drawing up a policy document on sexual harassment. He did hold that the teachers had been penalised by the school for bringing their complaints, and awarded them both compensation for the victimisation.

This recommendation was overturned on appeal by the Labour Court, which imposed direct liability on the school in respect of the pupils, found that there was sufficient evidence of a general practice of discrimination, and held that the steps taken by the school were not sufficient<sup>96</sup>.

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<sup>93</sup>*A Named Female Employee v a Named Company* DEC-E2001-003

<sup>94</sup>*Two Female Claimants and the Equality Authority v A Boys' Secondary School* DEC- E2001-005, reported at 2001 ELR 159.

<sup>95</sup>The Equality Officer also referred in this context to the Labour Court determination in *A Worker v a Company* EEO 3/91.

<sup>96</sup>*A Boys' Secondary School v Two Female Teachers*, DEE 02/1

## Victimisation

Victimisation arises under both Acts when a person is penalised or adversely treated for having, in good faith, sought redress against discrimination. The decisions during 2001 show that Equality Officers have taken a serious view of victimisation and have reflected this in their awards.

In *McCarthy*, for example, the claimant had succeeded in an earlier claim against her employer of discriminatory treatment, both before an Equality Officer and on appeal. The Equality Officer found that she was subsequently ignored and marginalised by her manager over three years. The employer published in its in-house magazine a report that it, rather than the claimant, had won her case, and then refused to publish any correction. The claimant was also threatened with disciplinary measures following an internal investigation which the Equality Officer judged to have been unfair and inconsistent with natural justice. Commenting that *"the victimisation of a person for in good faith having taken a claim under the equality legislation is very serious, as it could have the impact of undermining the effectiveness of the legislation"*, the Equality Officer awarded her compensation totaling £40,000 / €50,790.<sup>97</sup>

In a case under the 77 Act, where the Equality Officer did not find discrimination, he nevertheless was satisfied that actions of the employer were *"done only to expose and embarrass the claimants in the eyes of their colleagues... and to add to their trauma on the day [of the hearing of their complaint]."* He also accepted the second named claimant's evidence that the school principal had publicly criticised her performance a number of times before her colleagues and her students, and placed in doubt the continuation of her post, after she referred her claim. The two claimants were awarded compensation of £7,000 / €8,888 and £12,000 / €15,236 respectively.<sup>98</sup>

The only victimisation decision under the Equal Status Act during 2001 concerned a Traveller customer who notified a possible complaint under the Act to a pub which refused to serve him<sup>99</sup>. The publican wrote to the complainant stating that following his outrageous allegation of discrimination, he would no longer be welcome on the premises. The Equality Officer found that the claim had been made in good faith and upheld it, awarding £2,000 / €2,539 compensation in respect of the discrimination and £1,500 / €1,905 in respect of the victimisation. She also directed the pub to put in place a clear and transparent code of practice on behaviour expected from customers and redress which might be applicable.

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<sup>97</sup>*McCarthy v Dublin Corporation* DEC-E2001-015 (under appeal on 01.02.04). See similarly *Kennedy v Thurles Golf Club* DEC-E2001-019.

<sup>98</sup>On appeal the Labour Court upheld the finding of victimisation, and also found discrimination, increasing the awards to a composite of €30,000.

<sup>99</sup>*Griffin v Mary B*, DEC-S2001-023 (under appeal to the Circuit Court on 1st April 2002).

# 4. Issues specific to the Equal Status Act

## The scope of the Act

The Equal Status Act prohibits discrimination (with some exceptions) in the disposal of goods to the public, the provision of services or of accommodation to the public, in certain disposals of property and in education. “Services” are defined broadly under section 2 of the Act.

The decisions in 2001 related to claims of discrimination in a wide range of areas, including service in hotels and pubs, admission to nightclubs, treatment in a supermarket, access to sporting events organised by a local community centre, policing functions and the provision of car insurance. Some claims were upheld in all of these areas except in relation to policing functions and the provision of car insurance. The only substantive decision<sup>100</sup> on policing functions held that the issue raised was outside the scope of the Act. The only decision regarding car insurance, *Green v Quinn Direct Insurance*, found that the Equality Officer did not have jurisdiction on the facts of that case, as the contract in question was made before the coming into force of the Act.

## What are “services” under the Act?

*Donovan v Garda Donnellan*<sup>101</sup> arose from an incident when four horses were allowed to stray onto the public road. The Garda (police officer) investigated the incident and prosecuted the complainant, a Traveller, who owned one of the horses. He argued that this was discriminatory because the police officer had not prosecuted the owners of the other horses, who were not Travellers. The Gardai argued that prosecuting functions were outside the scope of the legislation although they also contended that the decision to prosecute the complainant and not the other owners was validly based on other reasons, and was not discriminatory. The Equality Officer considered the definition of “services” in section 2 of the Act and decided that it did include services provided by the State to the public: “...the services which are covered by it are services which are available to the public or a section of it. A number of examples of such services are mentioned in the Act but it does not purport to be an exhaustive list. While State services are not

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<sup>100</sup>In *A Complainant v a Garda Station*, DEC-S2001-025, a complaint about the availability of bibles in police stations was dismissed under s. 22 of the Act as relating to a trivial matter. This case is discussed in section 2 under the religion ground.

<sup>101</sup>*Donovan v Garda Donnellan*, DEC-S2001-011

*specifically mentioned as being covered, they are not specifically excluded either, and I believe it is clear that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc."*

He held that certain policing functions could amount to services provided by the State to the public, mentioning as examples a Garda witnessing a passport application, giving directions to a person on the street or taking details of a complaint. A refusal by a Garda to provide such a service based on any of the grounds protected by the Act could be investigated by the Director of Equality Investigations. However, *"the investigation and prosecution of crime are not services which are available to the public, or a section of it, within the meaning of service defined [in section 2]. It is my belief that these are State functions which are carried out by Gardai (and the Director of Public Prosecutions) on behalf of, and for the benefit of, the public and society as a whole. They are clearly not services to which the public has access in the way that other services clearly are, such as access to facilities for banking, leisure and travel."*

He referred in support of this view to statements made by the Minister presenting the Equal Status Bill to the Oireachtas, and to the judgement of the UK Court of Appeal in a somewhat similar case<sup>102</sup> arising in the UK under the Race Relations Act.

## **Type of activities constituting discrimination**

The activities found to constitute discrimination under the Act were diverse. They included requiring a Traveller woman to cease her shopping and leave a supermarket<sup>103</sup>, refusing to accept a Traveller as a member of a team in a local soccer competition<sup>104</sup>, telling a wheelchair user that wheelchairs were not allowed into a nightclub<sup>105</sup>, refusing to serve four Travellers tea in a hotel<sup>106</sup>, and refusing two young adults admission to a nightclub<sup>107</sup>.

In the supermarket case, a Traveller woman holding two litres of milk was approached by staff who insisted she leave the supermarket, and would not allow her to pay for the milk. The staff thought she had been involved in a shoplifting incident there some years previously. The complainant strenuously denied this, insisting that she intended to pay for the goods. The facts as found by the Equality Officer were that she was a regular twice-weekly customer of that supermarket, neither the supermarket nor the Gardai had been able to find any record of the alleged previous incident, and the staff concerned could not recall any details of the alleged previous incident, in which they were not directly involved. The Equality Officer considered that

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<sup>102</sup>*Farah v Commissioner of Police of the Metropolis*, 1997 2 WLR 824.

<sup>103</sup>*McDonagh v Tesco* DEC-S2001-016

<sup>104</sup>*Donovan v Gort Community Council* DEC-S2001-006

<sup>105</sup>*Forrestal v Hearn's Hotel*, DEC-S2001-018

<sup>106</sup>*Joyce v Temple Gate Hotel* DEC-S2001-012 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>107</sup>*Scanlon and Ryan v Russell Court Hotel*, DEC-S2001-013

*"In the absence of hard evidence, I believe it is reasonable to conclude that, on the balance of probabilities, no previous incident of shoplifting involving Ms McDonagh occurred in Tesco's store."* Moreover, he noted that the store practice and policy in cases of suspected shoplifting was to initially monitor the customer and only approach them when they tried to leave without paying. Yet the complainant had been asked to leave immediately, on an apparently unfounded suspicion and without being monitored as to whether she intended to pay for the goods. *"Having considered all the evidence... I simply cannot accept that a non-Traveller, in similar circumstances, would have been treated in the same manner as the complainant was treated... If a non-Traveller had been involved, I believe that the staff, with no clear evidence to hand and relying only on memory, would have given the customer the benefit of the doubt, and would have simply monitored that individual's movements through the store... The only conclusion I can arrive at with regard to Ms McDonagh's treatment and her eviction from the store, is that it was based on a bias against members of the Traveller community amounting to discrimination under the Equal Status Act."* He awarded the complainant €1,905 compensation, and also directed the supermarket to provide her with free shopping vouchers to the value of €1,270.

A large number of cases related to refusals to serve members of the Traveller community in pubs, hotels and restaurants. A number of decisions found that it was discriminatory under the Equal Status Act to refuse or restrict service in such circumstances, based on membership of the Traveller community. Types of refusal or restriction found included a general ban on admitting any Travellers<sup>108</sup>, asking Travellers to leave the pub after they had been served one drink<sup>109</sup>, refusing to serve or admit individual Travellers where non-Travellers would have been admitted or served<sup>110</sup>, and asking Travellers to leave because the number of Travellers on the premises was thought excessive<sup>111</sup>. Conversely, a number of other decisions found that no *prima facie* case of discrimination had been established<sup>112</sup>, or that the difference in treatment was based on criteria, such as convictions for violent crime, which were applied to Travellers and non-Travellers alike<sup>113</sup>.

In the first decision under the Equal Status Act, *Ward v Quigley*, the Equality Officer noted parallels with Australian anti-discrimination caselaw concerning refusals to serve alcohol to members of the Aboriginal community. He quoted a decision of the Australian Human Rights and Equal Opportunities Commission, where a hotel refused to serve three Aborigines because other Aborigines had caused damage in the hotel previously, to the effect that the refusal *"involved the common error of blaming all those falling into a group for the misdeeds of others"*<sup>114</sup>, although he also emphasised relevant differences between the Irish and Australian laws.

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<sup>108</sup>*Connors v Molly Heffernan's Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002).

<sup>109</sup>*Ward v Quigley* DEC-S2001-001

<sup>110</sup>*Joyce v Delaney's Pub* DEC-S2001-021, *Griffin v Mary B*, DEC-S2001-023 (both under appeal to the Circuit Court on 1st April 2002).

<sup>111</sup>*McDonagh v Castle Inn* DEC-S2001-022, *Griffin v Mary B* (above).

<sup>112</sup>see for example *Mongan v Angler's Rest* DEC-S2001-004, *McDonagh v Quinn* DEC-S2001-007, *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008

<sup>113</sup>These are discussed below in relation to section 15(1).

<sup>114</sup>*Mungaloon and Others v Stenrom Pty Ltd*, HREOCA 14-1990

## Section 15(1) Defence: Risks of violence and disorderly conduct

In *Wall v Green Isle Hotel*<sup>115</sup>, two Traveller couples had a meal together at the hotel and subsequently ordered drinks at the hotel bar, but were asked to leave before they had finished them. The Equality Officer found that three of the complainants had been involved in a previous incident at the hotel when they refused to pay for drinks and spoke abusively to staff. She found that the hotel's refusal was based on that incident and was in accordance with the general hotel policy regarding disorderly conduct. Accordingly, there was no difference of treatment and no *prima facie* case of discrimination. (There was, accordingly, no need to consider the section 15(1) defence.)

A large number of other cases referred to the defence provided in section 15(1) of the Equal Status Act. The relevant part of the section provides that:

*"...nothing in this Act preventing discrimination shall be construed as requiring a person to dispose of goods... or to provide services... to another person ("the customer") in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds, that [to do so] ...would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought..."*

A number of decisions held that the respondent must show that in refusing or restricting service to a person, they reasonably believed that the individual refused was likely to be a cause of trouble. It was not sufficient merely to show that the person refused was a Traveller and that other Travellers had previously caused trouble<sup>116</sup>.

In *McDonagh v Castle Inn*, the Equality Officer considered whether the respondent could invoke the section 15(1) defence to support his "quota" system of not allowing more than five Travellers on his premises. The respondent claimed that it originated in a violent incident in his pub some twelve years earlier, involving unidentified Travellers. The quota applied whether the Traveller was known to the respondent or not, and there was no suggestion that the complainants had ever been involved in any violent or disorderly conduct. The Equality Officer remarked that:

*"... Publicans are entitled to some degree of sympathy over the dangerous situation they sometimes face when their premises are subjected to violent incidents. The situation in relation*

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<sup>115</sup>*Wall v Green Isle Hotel*, DEC-S2001-017

<sup>116</sup>*Connors v Molly Heffernan's Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002), *McDonagh v Castle Inn* DEC-S2001-022

to smaller pubs, where the publican and family members may be the only staff members on the premises at the time, is particularly difficult, and it is understandable that [the respondents] might have been badly shaken by their experience. However... it is entirely inappropriate and unjustified for a publican to tar all members of the Traveller community, however peaceable and responsible, with the same brush, by refusing service to Travellers whom they do not know, and restricting service even to Travellers whom they do know, irrespective of any real risk of disorder.”<sup>117</sup>

In circumstances where the complainant had regularly frequented the premises and had never caused trouble in the past, it would be difficult to establish a reasonable belief that they were a substantial risk, unless there was actual disorderly or violent conduct<sup>118</sup>. In *Coffey v Blasket Pub*<sup>119</sup>, the Equality Officer found on the evidence presented that the complainants were “by all accounts, good, law-abiding citizens” and that “no evidence was produced, nor was it even suggested by the respondents, that any of the six had ever been remotely involved in any unsavoury incident in the past.” He did not accept that they had been verbally abusive when refused admission, and noted that in any event this conduct would have occurred after the decision to refuse admission, which he considered was made for discriminatory reasons.

In *Griffin v Mary B*<sup>120</sup> the Equality Officer referred to the wording of section 15(1) and stated that “To invoke this section, the respondent must show that there was a substantial risk of criminal or disorderly conduct or behaviour if the complainant was served. This is quite a heavy test, and I am of the view that the respondent has not established that it was reasonable for him to hold that view”<sup>121</sup>. In that case she found that the complainant was a regular customer for a number of months, that there was no question of him causing any trouble at any stage, and that the respondent had decided to bar him because, in his view, the complainant “associated” with another group of Travellers who, according to the respondent, had misbehaved on a previous occasion. The complainant denied that he associated with that group, and it appeared that the respondent did not bar non-Travellers merely for associating with groups who had been disorderly. Similarly, in *Moorehouse v Ayleswood Ltd*,<sup>122</sup> the Equality Officer noted that the complainant had been a regular for some nine months with no evidence of any criminal or disorderly behaviour from him, and that the respondent’s decision to bar him was based on the bar manager being told by another barman that he was a troublemaker. Weighing the barman’s direct experience over nine months against an unsubstantiated comment made to him, a reasonable person would not have concluded that there was a substantial risk of criminal or

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<sup>117</sup>*McDonagh v Castle Inn*, DEC-S2001-022

<sup>118</sup>*Ward v Quigley* DEC-S2001-001, *Moorehouse v Ayleswood Ltd* DEC-S2001-009, *Conroy v Costello’s Bar*, DEC-S2001-014

<sup>119</sup>*Coffey v Blasket Pub* DEC-S2001-010 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>120</sup>*Griffin v Mary B Public House*, DEC-S2001-023 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>121</sup>See similarly *Conroy v Costello’s Bar* (above), *Moorehouse v Ayleswood Ltd* DEC-S2001-009.

<sup>122</sup>*Moorehouse v Ayleswood Ltd* DEC-S2001-009

disorderly conduct in continuing to serve the complainant. He noted that the barman's normal practice would have been to substantiate such a comment, and that he did not do so in this case.

Nor was it sufficient to show that other members of the person's family had previously caused trouble, unless it was reasonable to believe that the person refused was substantially likely to be a cause of trouble. In one case<sup>123</sup>, a publican was found to have restricted service to two customers because he recognised one, a Traveller, as a brother of a person who had allegedly engaged in threatening and disorderly conduct. The Equality Officer found that section 15(1) did not apply in such circumstances, as there was no evidence to suggest that either complainant had ever engaged in violent or disorderly conduct. He noted that there was no evidence that their presence might produce a substantial risk of trouble from anyone else.

Similarly in *Donovan v Gort Community Council*<sup>124</sup>, the local community centre refused to accept a team entered for its soccer competition until the complainant and another Traveller member were removed from the team. The respondent claimed that the refusal was based on the complainant's behaviour. The Equality Officer found that the complainant had been involved in one minor incident of misbehaviour, but had subsequently been admitted to a soccer competition in the centre without objection. It was only the following year that he was refused, and he had not been involved in any incident at the centre in between. The complainant had used threatening and abusive language to a local woman on a date shortly before he was refused for the soccer competition, in respect of which he was subsequently convicted. However, the Equality Officer also found that a non-Traveller who had been involved in the same incident, and had received a heavier penalty from the courts when convicted, had been admitted to the soccer competition without objection. He concluded that this incident was not the reason for refusal, and that the real reason was some intervening incidents of aggressive language or misbehaviour by other members of the complainant's family at the centre, in which the complainant was not involved. His investigation of the management records showed a "*tendency. not to treat the members of the extended Donovan family individually, and to treat them less favourably than members of the settled [non-Traveller] community.*" He decided that the complainant had been treated less favourably than a non-Traveller would have been in similar circumstances, although he took some doubts over the complainant's credibility into account in awarding compensation. He also ordered the community centre to put in place clear procedures for a transparent appeal system for people refused membership or use of facilities.

In a number of other cases, however, the Equality Officers did find the section 15(1) defence applicable, and held that there was accordingly no discrimination. In *Martin Collins v Kyle's Pub*<sup>125</sup>,

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<sup>123</sup>*Ward v Quigley* DEC-S2001-001

<sup>124</sup>*Donovan v Gort Community Council*, DEC-S2001-006

<sup>125</sup>*Martin Collins v Kyle's Pub*, DEC-S2001-005

a publican had refused to serve a Traveller customer. It was agreed that the customer in question had been convicted and fined, some 13 years previously, for his involvement in a violent incident in or near the pub. The complainant argued that a lifetime ban was disproportionate. The Equality Officer noted that the complainant had not provided any evidence that a non-Traveller with a similar record would be treated differently. She accepted the respondent's evidence that his policy was to bar for life anyone involved in violent behaviour, irrespective of their background, and that this did not constitute discrimination against the complainant. A different Equality Officer heard a subsequent claim of discrimination<sup>126</sup> by another Traveller, Mr Paddy Collins, who had been with Mr Martin Collins on that occasion and had been asked to leave. He found that Mr Paddy Collins was involved in a scheme to obtain drink for Mr Martin Collins knowing that the latter was barred, and accepted the publican's evidence that it was his normal policy to bar anyone who knowingly tried to buy drinks in his pub for another person whom he had barred. He was satisfied accordingly that this was not discriminatory.

Similarly, in *O'Brien v Killarney Ryan*<sup>127</sup>, the Equality Officer held that the reason why the complainant was refused service was that he had become verbally aggressive after having to wait for service on a busy night. The complainant's behaviour had been unjustified and he had not established a case of discrimination. In assessing the complainant's behaviour, the Equality Officer considered the evidence of the respondent's witnesses and written incident reports.

Where allegations are made by a respondent of conduct amounting to a criminal offence, and this is denied by the complainant, Equality Officers may insist on some independent corroborating evidence such as a contemporary report to Gardai. In *Moorehouse v Ayleswood Ltd*<sup>128</sup>, the Equality Officer stated that "*If it can be proven that someone assaulted a member of the pub's staff or a patron, either in a pub or in its vicinity, then I would not expect a publican to continue serving such a person. I think it is important to note that if publicans allege complainants have carried out violent assaults which constitute criminal offences, and the complainants deny it, as in this case, that the allegations have to be corroborated and it is a matter for the publican who is alleging the conduct as a defence to prove the necessary evidence.*" Similarly in *O'Brien v Killarney Ryan*, the Equality Officer indicated that he was not happy to take account of an uncorroborated allegation of a serious threat by the complainant which would have amounted to a criminal offence, and which was denied by the complainant, in the absence of contemporary notification to the Gardai or other independent corroboration.

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<sup>126</sup>*Paddy Collins v Kyle's Pub* DEC-S2001-019

<sup>127</sup>*O'Brien v Killarney Ryan* DEC-S2001-008

<sup>128</sup>*Moorehouse v Ayleswood Ltd* DEC-S2001-009

## Section 15(2) Defence: Action in good faith to comply with the Licensing Acts

Section 15(2) of the Equal Status Act provides that “Action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the provisions of the Licensing Acts, 1833 to 1999, shall not constitute discrimination”.

This defence was considered in *Moorehouse v Ayleswood*, where the Equality Officer stated that it imposed a less severe test for the respondent than the section 15(1) defence since it did not require a “substantial” degree of risk.<sup>129</sup> The Equality Officer noted that the licensing laws oblige publicans to run orderly houses, and recognised their obligations under health and safety laws and under their contracts of insurance to avoid liability. He then considered whether this allowed the respondent to refuse service to the complainant, a Traveller, because the barman had been told he was a “troublemaker”, although he had caused no trouble in the nine months he had frequented their premises. He noted that the pub’s normal practice was to substantiate why a customer had been barred elsewhere before deciding to bar them from their own premises and considered it significant that they did not do so in the complainant’s case. In the absence of any clear evidence why normal procedure was not followed in the case of the complainant, he concluded that he had been treated less favourably than a non-Traveller would have been treated and that the respondent did not appear to have acted “in good faith” as required by section 15(2).

Similarly in *Maughan v the GlimmerMan*<sup>130</sup>, the Equality Officer did not accept that the respondent could rely on the section 15(2) defence in refusing to serve the complainant. He found that the respondent had no previous knowledge of the complainant, who came in with his wife and young son and was not drunk or disorderly. “ I am ..satisfied that a reasonable person would not believe there was a risk of drunkenness, violent, quarrelsome or riotous behaviour in serving the complainant...” (it was an endorsable offence for a publican to permit such behaviour under section 13 of the Licensing Act 1872.) He found no basis for the respondent to suppose that serving the complainant would give rise to any breaches of the Licensing Acts. In these circumstances he did not believe that service had been refused in good faith under section 15(2). He considered, however, that a publican could be entitled to refuse service under section 15(2) if the customer was drunk, or if they or an accompanying child was disorderly. This did not, however, legitimise a *blanket* ban on serving any customer accompanied by a child aged under 18, as the presence of a child was not in itself contrary to the Licensing Acts: indeed, the Licensing Acts appeared to specifically permit the presence of children in pubs, provided they were with a parent or guardian.

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<sup>129</sup>DEC-S2001-009; see similarly *Conroy v Costello’s Bar*, DEC-S2001-014 and *Griffin v Mary B*, DEC-S2001-023 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002).

<sup>130</sup>*Maughan v The GlimmerMan* DEC-S2001-020

The nature of “good faith” in the section 15(2) defence was considered in *Conroy v Costello*, where the Equality Officer commented that “In order to take an action in good faith it has to be free from any discriminatory motivation, and in this case, I am of the view that the fact that the complainant was a member of the Traveller community had a major influence on the respondent’s decision not to serve him.”<sup>131</sup>

Publicans’ obligations not to serve alcohol to minors were considered in two decisions. In *Maughan v the GlimmerMan*, the respondent referred to its obligations under sections 34 and 35 of the Intoxicating Liquor Act 1988, to ensure that those aged under 18 years did not consume alcohol on its premises. The Equality Officer acknowledged “that publicans were obliged by the Licensing Acts not to serve alcohol to people under 18 years old, and that they are entitled to put procedures in place to ensure that under 18 year olds are not served alcohol.” He considered that if a publican saw a minor consuming alcohol on their premises when accompanied by a parent, the publican could refuse to serve the parent. In *Coffey and others v Blasket Public House*<sup>132</sup>, the Equality Officer considered publicans’ obligations under the Licensing Acts not to permit persons under 18 to consume alcohol. The pub in this case argued that it had refused admission to the complainants because they did not have age cards as evidence they were over 18. The Equality Officer noted that “If the Vintners’ Age Card is, in fact, the only valid defence a publican, who serves drink in error to an underage person, has under the Licensing Acts, then it might be perfectly reasonable under section 15(2) for a publican to insist on the presentation of these age cards, provided that this policy is applied equally to all customers. It would not be reasonable, on the other hand, for a pub to insist on Travellers producing age cards, where no such condition was imposed on non-Travellers in similar circumstances, with the intention of making it more difficult for Travellers to gain access.” On the facts of this particular case he concluded that very few age cards had been issued in the area at that stage, that it was unlikely the respondent normally asked for them in practice, and that in any event a discriminatory decision to refuse admission had occurred before any request for age cards was made.

In *Wall v Green Isle Hotel*, the Equality Officer considered further the treatment of a fourth complainant, who was not involved in the previous incident<sup>133</sup>. She found that there was no evidence that he personally posed any threat to the proper running of the hotel bar. The hotel’s normal policy in this situation was to ask people involved in previous incidents to leave but allow any companions who had not been involved in previous incidents to stay. Here, the fourth complainant was not told he could stay, although when he asked to see the manager he was eventually invited to remain. The hotel said that this was an error made in good faith under section 15(2). The Equality Officer accepted that the hotel had acted in good faith to fulfil its

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<sup>131</sup>*Conroy v Costello*, DEC-S2001-014; see similarly *Griffin v Mary B*, DEC-S2001-023 (under appeal to the Circuit Court on 1st April 2002).

<sup>132</sup>*Coffey and others v Blasket Public House* DEC-S2001-010 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>133</sup>*Wall v Green Isle Hotel* DEC-S2001-017; see above under the section 15(1) defence.

obligations under the Licensing Acts, given the seriousness of the previous incident and the fact that it had occurred only five days previously. She found that there had been no discrimination against the fourth complainant, although she observed that the refusal of service had been carried out in a discourteous manner and recommended<sup>134</sup> the hotel to draw up a code of practice on the conduct of refusals.

## Giving false reasons for refusing service

In *O'Brien v Killarney Ryan*<sup>135</sup>, the Equality Officer accepted that the hotel's real reason for refusing service was a fear of violent or disorderly conduct by the complainant. The reason given to the complainant was that service was reserved to residents, although other non-residents were being served at the time. The Equality Officer commented that the hotel "*must realise that the use of reasons which are obviously false to refuse service can only serve to inflame a situation further...[and] increase [the complainant's] conviction that the real reason was a discriminatory one*", considering that such an approach was "*ill-advised and somewhat provocative*," although he made no finding of discrimination.

## Existence of discriminatory policies

A number of respondents argued, particularly in relation to pubs, that they had no policy of discriminating against Travellers<sup>136</sup>.

In a number of cases, evidence was adduced that respondents had discriminated against other Travellers in the past and complainants argued that this was evidence of prejudice. The Equality Officers indicated that they could not take account of such evidence where the past discrimination pre-dated the Act, as such discrimination was not, at that date, unlawful<sup>137</sup>. In *Collins v Bartra*, the Equality Officer stated that hearsay evidence alone was not sufficient to convince her that the respondent operated a discriminatory policy against Travellers.

The absence of any evidence that a respondent operated a discriminatory policy against Travellers, and evidence that other Travellers were served normally, was considered in several cases to weigh against the complainant, where the respondent produced evidence of non-discriminatory factors grounding their decision not to serve the complainant<sup>138</sup>, or where the case turned on a conflict of evidence between the parties which was not reduced by independent evidence<sup>139</sup>. In *McDonagh v Coach House*, for example, the Equality Officer noted that it was

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<sup>134</sup>The Equality Officer explained that as she had not found discrimination, she was making no binding order.

<sup>135</sup>*O'Brien v Killarney Ryan* DEC-S2001-008

<sup>136</sup>*Ward v Quigley* DEC-S2001-001, *Conroy v Carney's Bar* DEC-S2001-002, *McDonagh v Quinn*, DEC-S2001-007.

<sup>137</sup>*Conroy v Carney*, (above), *McDonagh v Coach House* (above)

<sup>138</sup>*Martin Collins v Kyle's Pub* DEC-S2001-005

<sup>139</sup>*McDonagh v Coach House* DEC-S2001-007

agreed that the complainant had been served on the premises previously, and that a number of Travellers drank there regularly, including on the night the complainant was allegedly refused. *"I find these facts are not helpful to the complainant's case. This is because they do not support the suggestion that the respondent has a generally discriminatory policy against Travellers."*<sup>140</sup>

The fact that other Travellers were normally served was a factor in reducing the level of compensation in their cases. In *Moorehouse v Ayleswood*<sup>141</sup>, the Equality Officer stated that *"In determining the level of appropriate redress I have also taken into account that the respondent does not appear to have a universal policy of discrimination against members of the Traveller community. The complainant was served there for nine months with no problems, and both sides accepted that other Travellers are regular customers there also."*

In some cases, however, it was found that the pub operated a general policy of not serving Travellers. In *Connors v Molly Heffernan's*<sup>142</sup>, there had been a serious fight in a pub, involving both Travellers and non-Travellers, in which the pub manager had been stabbed. The Equality Officer found that subsequent to this incident, the owner of the pub had instructed his staff that "all Travellers were barred". The complainants, a married couple, were subsequently told that they would no longer be admitted for this reason. The Equality Officer found that there was no evidence to support the respondent's allegation that they might have been involved in any way in the fight, and no evidence that they had been involved in trouble on any previous occasion. On the contrary, the manager who had been stabbed had given evidence in favour of the complainants that they were not directly or indirectly involved in the fight, and were innocent people who had afterwards been refused access simply because they were Travellers. The Equality Officer commented that *"the discrimination suffered by [the complainants] should not be tolerated and is unacceptable in a civilised society"*. He awarded them each £2,200 / €2793 and ordered the respondent to communicate the decision to his staff, and to put up notices at the pub confirming his commitment to treating people equally in accordance with the Act.

Similarly in *Coffey and others v Blasket Pub*<sup>143</sup>, the respondent gave evidence that no Travellers under 30 frequented the pub. The Equality Officer commented that *"considering that the Blasket provides entertainment aimed at younger customers and that Tralee has a large population of young Travellers, it seems difficult to believe that younger Travellers would, by choice, decide not to frequent a pub where musical entertainment was freely available to the public."* In the light of the other evidence, he concluded that the pub operated discriminatory policies and that young Travellers could not in fact gain admission.

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<sup>140</sup>Similarly in *O'Brien v Killarney Ryan* DEC-S2001-008 and in *Paddy Collins v Kyle's Pub* DEC-S2001-019, the fact that the claimant had been served without difficulty on previous occasions was seen as *"clearly undermining his contention that the Hotel operated an anti-Traveller policy"* (O'Brien).

<sup>141</sup>*Moorehouse v Ayleswood* DEC-S2001-009

<sup>142</sup>*Connors v Molly Heffernan's* DEC-S2001-003 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>143</sup>*Coffey and others v Blasket Pub* DEC-S2001-010 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

In *Joyce v Liz Delaney's Pub*<sup>144</sup>, the complainants were refused access to the respondent pub on three occasions on the basis that access was for “regulars only”. They claimed that this was a cloak for an anti-Traveller admission policy. The respondents denied operating a discriminatory policy, and argued that a number of Travellers were regulars, while the complainants argued that a small number of “token” Travellers were admitted merely to conceal the general operation of an anti-Traveller policy. There was no suggestion that the complainants, two of whom had previously frequented the pub, had been involved in violent incidents. The respondent said the complainants were threatening and abusive when first refused, but the complainants denied this and the respondent could not produce security video footage which should have been available to support his contention. The Equality Officer found that on the balance of probabilities, the complainants were refused simply because they were recognised as Travellers and that the “regulars only” stance was merely an excuse.

The most striking case concerning a discriminatory policy was *McDonagh v Castle Inn*<sup>145</sup>. In that case the publican gave evidence that he habitually operated a quota system under which he would only serve an absolute maximum of five Travellers at any one time. He based this on a violent incident which, he said, occurred in his pub some twelve years previously, involving unidentified Travellers. The quota applied to all Travellers including those known to him. There was no such quota for non-Travellers, and there was no suggestion that the complainants had ever been involved in any violent or disorderly conduct. The Equality Officer remarked that:

*“... Publicans are entitled to some degree of sympathy over the dangerous situation they sometimes face when their premises are subjected to violent incidents. The situation in relation to smaller pubs, where the publican and family members may be the only staff members on the premises at the time, is particularly difficult, and it is understandable that [the respondents] might have been badly shaken by their experience. However... it is entirely inappropriate and unjustified for a publican to tar all members of the Traveller community, however peaceable and responsible, with the same brush, by refusing service to Travellers whom they do not know, and restricting service even to Travellers whom they do know, irrespective of any real risk of disorder.”* He noted further that *“it is quite clear from [the respondent’s] evidence that he has little time or respect for Travellers, and indeed, it would seem that he would very much prefer if they did not frequent his pub at all.”* He found discrimination, awarded compensation, and ordered the respondent to immediately review his practices to ensure compliance with the Equal Status Act in respect of everyone seeking service in his pub.

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<sup>144</sup>*Joyce v Liz Delaney's Pub* DEC-S2001-021 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002)

<sup>145</sup>*McDonagh v Castle Inn* DEC-S2001-022

# 5. Issues specific to the employment equality Acts

## Jurisdiction

In *Eng*<sup>146</sup>, the Equality Officer considered whether a doctor occupying an unpaid (“supernumerary”) internship in a hospital was an employee or a vocational trainee for the purposes of the 1998 Act. (She informed the parties that she had taken advice from Counsel on this point, and of the nature of that advice. Both parties were offered the opportunity to make submissions on the advice received, but neither wished to do so.) The Equality Officer considered the nature of the relationship between the parties in the light of Irish and European Community law, and concluded that the complainant was an employee, but was not a vocational trainee, for the purposes of the 1998 Act.

In *Damery v Italian Embassy*<sup>147</sup> and *O’Shea v Italian Embassy*, the Equality Officer considered the judgement of the Supreme Court in *Government of Canada v Employment Appeals Tribunal and Brian Bourke*<sup>148</sup>. He held that in accordance with the Supreme Court judgement, he had no jurisdiction to investigate two claims of nationality-based discrimination in pay and working conditions, brought by Irish employees of another country’s embassy in Ireland, because of the operation of the doctrine of sovereign immunity.

## Exercise of profession or trade

*Nelson v Boxing Union of Ireland*<sup>149</sup> was an unusual case, in coming under section 5 of the 1977 Act, which prohibits discrimination by bodies controlling entry to a profession or the carrying on of a profession. The claimant was a licensed professional boxer in the UK, and the respondent was the body responsible for regulating professional boxing in this jurisdiction. She contacted the respondent informally about the requirements for her to compete in a professional bout in this country. The Equality Officer found that she had effectively been told that she would not be allowed to box professionally in this jurisdiction, as the European Boxing Union had not yet issued guidelines of the safety aspects of female boxing, and that no formal application from her would be considered. She was medically fit to box according to the stringent tests imposed for female

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<sup>146</sup>*Eng v St James’ Hospital*, DEC-E2001-041 (This decision was under appeal to the Labour Court on 1st April 2002).

<sup>147</sup>*Damery v Italian Embassy* DEC-E2001-039 and *O’Shea v Italian Embassy* DEC-E2001-040, (*Damery* was under appeal to the Labour Court on 1st April 2002).

<sup>148</sup>*Government of Canada v EAT and Brian Bourke* 1992 ILRM 325

<sup>149</sup>*Nelson v Boxing Union of Ireland* DEC-E2001-018

professional boxers in the UK, and the Equality Officer accepted that a male in similar circumstances would have been given the opportunity to apply. He considered that as the claim was one of discrimination directly based on sex, the difference in treatment could only be legally permissible if covered by a specific exemption under either European Community Law or national legislation. In this connection he referred to the Court of Justice's decision in *Ministere Public v Stoeckel*<sup>150</sup> that any differences of treatment between women and men based on a protective intention must be strictly proportionate and based on strictly objective evidence, not on assumptions or stereotypes. He also considered a UK decision, *Couch v British Boxing Board of Control*,<sup>151</sup> which had found that an earlier refusal by the comparable UK authority to allow female professional boxing on medical grounds, was not objective and was discriminatory. He concluded that the medical concerns raised by the respondent were not convincing, amounting to "gender-based stereotypes and assumptions," and that the respondent had discriminated unlawfully against the claimant.

## Equal remuneration cases

There were eleven rulings during 2001 dealing with claims for equal remuneration: four under the Anti-Discrimination (Pay) Act 1974 and the remainder under the 1998 Act.

The range of work done by those claiming equal remuneration was wide, they included a junior hospital doctor, a divisional marketing manager, administrative officials, a barperson, a traffic warden, department store buyers, clerical workers at a telephone company, a cleaner in a department store, an embassy driver, a graphic designer and a storekeeper at a technical institute.

Three cases found in favour of the claimant: *Kennedy*<sup>152</sup>, on the gender ground under the 1974 Act, *McKenna*,<sup>153</sup> on the gender ground, under the 1998 Act and European Community law, and *Eng*<sup>154</sup>, on the nationality ground under the 1998 Act. In two further cases, it was held that the Equality Officer had no jurisdiction to investigate<sup>155</sup>. All the other cases were decided in favour of the respondent.

Like work was agreed in one case (*Eng*) and did not arise in another (*McKenna*, where the complainant was contesting a decision to reduce her level of remuneration due to her absence through pregnancy-related illness).

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<sup>150</sup>*Ministère Public v Stoeckel*, ECJ, Case no C-345/89

<sup>151</sup>*Couch v British Boxing Board of Control*, UK Industrial Tribunal Case no 2304231/97.

<sup>152</sup>*Kennedy v Thurlis Golf Club* DEC-E2001-020

<sup>153</sup>This case is discussed in more detail in chapter 2 under the gender ground

<sup>154</sup>This case is discussed in more detail in chapter 2 under the race ground (It was under appeal to the Labour Court on 1st April 2002).

<sup>155</sup>*Damery v Italian Embassy* DEC-E2001-039 and *O'Shea v Italian Embassy* DEC-E2001-040, (*Damery* was under appeal to the Labour Court on 1st April 2002)

Work inspections were carried out in the other cases. In most of these, the Equality Officer found that the claimant did not perform “like work” with the comparators, as their work was not the same or interchangeable, similar with only minor or infrequent differences, or of equal value, as required by section 3 of the 1974 Act and section 7 of the 1998 Act. The exceptions were *Kennedy*, where the Equality Officer awarded equal pay, and *Hanley and Kelly v Eircom*<sup>156</sup> where the Equality Officer went on to consider grounds other than sex.

In *Kennedy*, the Equality Officer also considered the differences between sections 3(a), 3(b) and 3(c) of the 1974 Act in the light of earlier caselaw<sup>157</sup> and concluded that the three sections were exclusive, providing for claims of like work to be made in different work situations, and that jobs found to amount to “work of equal value” under section 3(c) could be radically dissimilar. She found that in this case the claimant’s and comparator’s jobs were interchangeable, or similar with only minor or infrequent differences. The Equality Officer also considered the claimant’s argument, following *Murphy v Telecom*<sup>158</sup> that her work was of greater value than the comparator’s, in that she did the same job to a higher standard. She rejected this argument, considering that *Murphy v Telecom* had been based on an analysis of the jobs performed by the parties rather than on the relative performance of the parties in their jobs. She also referred to the comments of the European Court of Justice in *Brunnhofner*<sup>159</sup> that subjective ability might justify personal pay increases after the employee had started work, but could not justify fixing differential rates for what was essentially like work, before there was an opportunity to assess personal performance.

In three cases the Equality Officer considered arguments that the difference of pay was based on grounds other than sex (or other than nationality). In *Hanley and Kelly v Eircom*<sup>160</sup>, it was accepted that the need to obtain consent from one union to the terms of a grade restructuring agreement amounted to grounds other than sex. This consent could only be obtained by including access for that union’s members to a special pay rate for a defined period. (The Equality Officer also found that the claimants could not satisfy the statistical tests necessary under European Community law to establish indirect discrimination.) In *Eng*<sup>161</sup>, the Equality Officer rejected the respondent’s argument that it was entitled or obliged under European Community law on free movement for EEA nationals, or by national work permit rules, to pay a Malaysian junior hospital doctor no basic salary, when Irish and EEA nationals were paid a basic salary for what was agreed to be like work.

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<sup>156</sup>*Hanley and Kelly v Eircom* DEC-E2001-006

<sup>157</sup>*Dowdall O’Mahoney & Co v ITGWU*, DEP 6/1987: *O’Leary v Minister for Transport*, Supreme Court, 1998 ELR 113.

<sup>158</sup>*Murphy v an Bord Telecom*, 1988 ECR 673

<sup>159</sup>*Brunnhofner v Bank der Oesterreichischen Postsparkasse AG*, ECJ, Case no C-381/99.

<sup>160</sup>*Hanley and Kelly v Eircom* DEC-E2001-006

<sup>161</sup>*Eng v St James’s Hospital* DEC-E2001-041(This decision was under appeal to the Labour Court on 1st April 2002).

And in *Kennedy*<sup>162</sup>, the Equality Officer considered the argument that the pay differential reflected the later hour shift worked by the comparator. She found a lack of transparency in the calculation of any antisocial hours element, and referred to the *Swedish Ombudsman case*<sup>163</sup>, which held that an inconvenient hours supplement should not be taken into account in calculating basic salary for the purposes of an equal remuneration case. She held that “*I think the object of equal pay legislation would be defeated where employers placed a male on night work and a female on day work, where both are employed to do the same job, and paid the male more on the basis that he worked the night shift, without distinguishing the element of pay relating to the day shift and night shift. I consider that the more correct approach would be to distinguish basic salary which would apply, irrespective of gender, to day or night work and any additional payment for night work.*” She noted that this would also be consistent with the Employment Regulation Order applicable to workers in the catering and drinks trade. She rejected the argument that the shift difference amounted to grounds other than sex, adding that “*In circumstances where the employer applies a non-transparent pay practice which can have the potential to undermine the effectiveness of equal pay legislation, I consider that an order for equal pay is the appropriate remedy*”.

## What is remuneration under the 1998 Act?

*Perry v Garda Commissioner*<sup>164</sup> questioned the terms of a Voluntary Early Retirement package introduced for the public sector in 1987, as discriminatory on the age ground. The scheme included four elements: a pension, a lump sum, a redundancy payment and a severance gratuity. These were available in different combinations, depending on the age of the person taking early retirement. The complainant, who was 64 at date of early retirement, discovered that a colleague aged 59 with an identical service record was entitled to a severance gratuity nearly £11,000 / €13967 larger than her own.

The Equality Officer noted that the definition of remuneration in the 1998 Act specifically excludes pension rights, but otherwise defines the term broadly. She held that the other aspects of the scheme were covered by the Act. (This case is discussed in more detail in chapter 2 under “age discrimination”.)

## The dividing line between pay and treatment issues

The *McKenna* decision considered European Community caselaw to the effect that a range of different benefits paid to employees in respect of their employment constituted pay within the meaning of Article 141 and the Equal Pay Directive, and that if this was the case they could not

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<sup>162</sup>*Kennedy v Thurlis Golf Club* DEC-E2001-020

<sup>163</sup>*Jamsteldhetsombudsmannen v Orebrolans*, European Court of Justice Case C-236/98

<sup>164</sup>*Perry v Garda Commissioner* DEC-E2001-029

be covered also by the Equal Treatment Directive<sup>165</sup>. It concluded that a claim to be paid full pay during a period of pregnancy-related illness must be considered under the Equal Pay Directive rather than the Equal Treatment Directive.

In *Hanley and Kelly v Eircom*<sup>166</sup>, the Equality Officer held that a claim about conditions of employment, such as loss of promotional opportunities, was outside the scope of the Anti-Discrimination (Pay) Act 1974. It should have been the subject of a separate referral under the 1977 Act. She noted that the claimants had been informed that this would be needed but had not done so. The distinction had a practical consequence as the 1977 Act was subject to a time limit for claims, and an extension of time would have had to be sought as the claimants had not raised the point within time under that Act.

## Access to employment and promotion

A number of cases continue to raise issues of discrimination in interviews and recruitment.<sup>167</sup> In *Riney v Donegal VEC*,<sup>168</sup> the Equality Officer accepted that the female claimant was clearly better qualified for the job than the successful male appointee, that the interview marking failed to reflect her higher qualifications and experience, and that this was due to gender-based discrimination. He adopted a decision of the Northern Ireland Court of Appeal<sup>169</sup> as persuasive in this context, and also followed the Labour Court's determination in *Gleeson*<sup>170</sup> in holding that the relevant comparator was the successful male applicant, and the fact that two other female candidates had been marked ahead of the claimant in certain sections of the selection process did not disprove gender discrimination. He also questioned the selector's improvisation of a tie-breaker rule (length of service) to decide between the claimant and the appointee, noting that their length of service was almost identical, was much longer than that required elsewhere in the selection process, and that this was a criterion which the male candidates were statistically much more likely to satisfy than the female candidates. He considered that this condition was inessential and discriminatory.

The Equality Officer also considered arguments by the claimant that the overall culture of the organisation (Donegal VECs) was heavily gender biased, based on statistics showing that males were proportionately much more present in senior positions than females. He was not satisfied that the statistics presented gave rise to an inference of discrimination, as they did not indicate whether similar imbalances arose in those eligible for promotion or applying for senior positions. He also referred to the Labour Court's clarification in *Mitchell*<sup>171</sup> that gender imbalance in

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<sup>165</sup>*McKenna v North Western Health Board*, DEC-E2001-025 (This decision was under appeal to the Labour Court on 1<sup>st</sup> April 2002). She referred for example to *Gillespie v Northern Health and Social Services Board*, ECJ, Case no C-342/93, and *Kruger v Kreiskrankenhaus Ebersberg*, ECJ, Case no C-281/97.

<sup>166</sup>*Hanley and Kelly v Eircom* DEC-E2001-006

<sup>167</sup>See detailed discussion on this theme in ODEI's Annual Review 2000.

<sup>168</sup>*Riney v Donegal VEC*, DEC-E2001-030 (under appeal on 01.04.02)

<sup>169</sup>*Wallace v South Eastern Education and Library Board*, Northern Ireland Court of Appeal, 1980 IRLR 193

<sup>170</sup>*Gleeson v Rotunda Hospital* DEE003

<sup>171</sup>*Mitchell v Southern Health Board*, DEE011

interview boards did not in itself give rise to an inference of discrimination. However, he held that where imbalances of this sort existed, they gave rise to an additional onus on the employer to ensure gender balance on interview boards, and he recommended that the employer should ensure as far as reasonably practicable in future competitions that the gender balance of the interview boards matched that of the pool of candidates.

Discriminatory comments or questions arose in three cases. *Rodmell*<sup>172</sup> concerned an interview by a university for a maintenance electrician. The complainant was the only female applicant and a member of the interview panel collected her from the waiting area with the words "I'm looking for a lady electrician." The Equality Officer found that the selection board had in practice selected the best qualified applicant, but that the comment in the circumstances was likely to affect the complainant's performance at interview and was discriminatory. He awarded compensation of £1500 (€1905) for distress and humiliation.

*Barry*<sup>173</sup> concerned a post as Director of an education project working with primary children from difficult backgrounds. All the applicants were female. The Equality Officer found that the interview board had in fact selected the best person for the job. However, he also found that the complainant, who had four children, was asked how she would cope with looking after her four children and also working outside the home. No such question had been asked of the (single, female) appointee and he concluded that such a question was intrinsically more likely to be posed to married candidates. He also considered that a hypothetical male candidate with four children would not have been asked the same question. Accordingly, he held that the question was discriminatory under the 1977 Act, both on the marital status ground and on the sex ground. He awarded £1,000 / €1270 compensation and recommended that the respondent review its interview practices to ensure that discriminatory questioning did not occur in future.

*Sheils O'Donnell*<sup>174</sup> concerned the more complex question whether it may be discriminatory for an employer to ask detailed questions about a prospective employee's willingness to work atypical hours considering family commitments, if the same questions are put to both male and female candidates.

The Equality Officer considered it arguable that referring to family commitments in this way might tend to disadvantage female candidates disproportionately. Following the High Court's approach in *Conlan*<sup>175</sup>, she tested first for objective justification, referring also to the European Court of Justice's dicta on justification in *Seymour-Smith* and *Bilka Kaufhaus*<sup>176</sup>. She concluded

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<sup>172</sup>*Rodmell v Trinity College* DEC-E2001-016

<sup>173</sup>*Barry v Board of Management, Virgin Mary Schools* DEC-E2001-031

<sup>174</sup>*Sheils O'Donnell v St Baithin's National School* DEC-E2001-008

<sup>175</sup>*Conlan v University of Limerick* 1999 2 ILRM 131.

<sup>176</sup>Cases no. C-167/97 and C-170/84

that in the circumstances of this particular case, the questions were objectively justified. The interviews were for a job as home-school community liaison officer, under a scheme oriented to including meetings and home visits to families, some of them during evenings or weekends to facilitate working parents. A requirement of flexibility to work outside normal hours was in her view an objective requirement unrelated to the candidate's gender, and met the tests prescribed by the European Court: this condition met a genuine need, was suitable to attain its objectives, and was necessary to achieve them.

In *O'Hanlon v EBS*,<sup>177</sup> it was again pointed out that it was an undesirable practice for interview panel members to destroy their notes and that "*such a practice could well form part of an evidential chain on which a claim of discrimination could be made out.*"

## Access to jobsharing or part-time working

An important issue in the 2001 caselaw was whether an employee who requested a move to jobsharing, part-time work, or to more flexible working hours, in order to help in reconciling work and family commitments, could argue that an employer's refusal amounted to indirect discrimination on the sex or marital status grounds under the 1977 Act. In three cases, the claimants argued that since in practical terms women rather than men tended to assume the responsibility for childcare, refusing family-friendly working conditions would impact much more heavily on women than on men and amounted to indirect discrimination on grounds of sex.

This question was considered in three decisions<sup>178</sup>. In *Weir*<sup>179</sup>, a full-time nurse supervisor in a psychiatric hospital applied to jobshare following the birth of her child. The hospital's policy was that jobsharing was not available to supervisory grades, and she was refused. In *Burke*<sup>180</sup>, a full-time university librarian applied for jobsharing due to family reasons. No formal jobsharing scheme operated for her grade: the practice was to consider applications, some of which were granted. The applicant's own post was considered unsuitable for jobsharing: she was offered an alternative post on a jobsharing basis but it did not suit the claimant's needs. In *Walsh v Tesco*,<sup>181</sup> the claimant applied to work shorter hours on her return from maternity leave. The practice was to consider such requests: the claimant's request was not granted on her return, although she did transfer to shorter hours by agreement some months later.

In all three cases, the Equality Officers reviewed a range of Irish and European Community law sources<sup>182</sup> and concluded that there was no legal right under Irish or Community law for a full-

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<sup>177</sup>*O'Hanlon v EBS* DEC-E2001-022

<sup>178</sup>Two of these were appealed by the claimants, and one by the respondent.

<sup>179</sup>*Weir v St Patrick's Hospital* DEC-E2001-011

<sup>180</sup>*Burke v NUI Galway*, DEC-E2001-012 (under appeal on 1st April 2002).

<sup>181</sup>*Walsh v Tesco* DEC-E2001-042

<sup>182</sup>particularly Labour Court Determinations DEE014 *Tesco Ireland v a Worker* and DEE985 *Minister for Justice Equality and Law Reform v Hand*; Council Recommendation on Child Care of 31 March 1992 (92/241/EC), section 3 of the 1977 Act, *Nathan v Bailey Gibson*, Supreme Court, 1998 2 IR 162, and the Equal Treatment Directive (Council Directive 76/207/EC).

time employee to transfer to job-sharing or to part-time work. They also noted the provisions of section 13 of the 1977 Act, to the effect that an employer is not obliged to employ a person who will not accept the conditions under which the duties attached to that position are performed. In *Walsh*, the Equality Officer stated that it was “clearly within the competence of an employer to determine that full-time work is a necessary condition of employment.” However, in all three cases the Equality Officers emphasised that an employer was obliged to decide on an application for flexible working conditions in a non-discriminatory manner<sup>183</sup>.

In *Walsh v Tesco*, the Equality Officer concluded that the employer’s initial refusal of shorter working hours was not indirectly discriminatory, noting there was no policy of refusing such applications and that other female employees had been facilitated in similar circumstances. She specifically distinguished this situation from the *Weir* case, where the employer had a policy of not permitting jobsharing in particular grades. In *Burke*, the Equality Officer accepted the employer’s insistence on full-time working for the claimant’s existing post as necessary and objectively justified, and considered that it had made reasonable efforts to facilitate the claimant with a post of equal grade in another area of work and that there had accordingly been no discrimination. In *Weir*, however, the Equality Officer emphasised the existence of a policy not to permit jobsharing in certain grades.<sup>184</sup> She was satisfied that the respondent had given no serious consideration to the claimant’s request.

In *Weir*, the Equality Officer accordingly proceeded to consider whether a policy not to allow jobsharing in supervisory grades was indirectly discriminatory, applying the tests laid down by the High Court in *Conlan v University of Limerick*<sup>185</sup>. She concluded that a policy of not considering applications for jobsharing “*adversely impacts on females rather than on males, both within the respondent and generally.*” She based this conclusion on the evidence at hearing that all forty jobsharers in the respondent hospital were female, and on the agreed evidence in *Hill v Stapleton*<sup>186</sup> that the vast majority of jobsharing staff within the civil service were female. She was not satisfied, on the evidence before her, that the respondent had objectively justified its policy, noting that while the respondent argued jobsharing in supervisory nursing posts would prejudice essential customer care, the evidence at hearing suggested that jobsharing at this level in other hospitals had not caused difficulties for care standards. She directed the respondent to objectively justify its decision, after considering the suitability of each supervisory nursing post. She also indicated that the respondent should have checked whether any staff member at the claimant’s grade was interested in jobsharing a post with her.

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<sup>183</sup>Cases cited in support of this view included DEE985 *Minister for Justice Equality and Law Reform v Hand*

<sup>184</sup>She distinguished the case from the Labour Court’s determination in *Hand* because of the existence of the policy not to permit jobsharing in certain grades (in *Hand*, she noted that all grades were entitled to apply for jobsharing.)

<sup>185</sup>*Conlan v University of Limerick* 1999 2 ILRM 131

<sup>186</sup>*Hill and Stapleton v Revenue Commissioners*, European Court of Justice C-243/95

The Equality Officer in *Weir* emphasised that “*This does not mean that all applications for jobsharing from staff at supervisory grades should be facilitated. Rather, management reserve the right to decide on the suitability of posts for jobsharing and, in accordance with Nathan v Bailey Gibson, management would have to be able to objectively justify its decision when it deems a post unsuitable for job-sharing.*”<sup>187</sup>

## Grouped claims and class actions

The issue arose again in 2001 of what constitutes a class action, and to what extent class actions may be brought.<sup>188</sup>

*66 Female Employees v Tesco*<sup>189</sup> arose from the introduction of a new post of responsibility as chargehand. In the store in question, the post was not advertised internally and a male employee was appointed. The union referred claims of discrimination on behalf of sixty-six female employees at more junior levels in the store. The respondent objected that the claims amounted to a class action. The Equality Officer considered the High Court’s decision in *Verbatim*.<sup>190</sup> In her view that judgement indicated that class actions were not possible under the 1974 Act, and she considered from the wording of the 1977 Act that claims must also be pursued individually under that Act. However, she did not consider that this prevented a group of claimants from pursuing a group of similar individual claims, or from being individually named on a single claim form submitted by their representative union. Similarly in *70 named female employees v Superquinn*<sup>191</sup>, the Equality Officer noted that the respondent had provided no direct evidence of its contention that the case amounted to a class action. He concluded that in *Verbatim* the High Court had not placed in question the practice of unions referring groups of individual claims on behalf of their members, and that this was not the same as a class action.

In *66 Female Employees v Tesco*, however, the Equality Officer found that “*underlying the class action issue is a more fundamental issue, in relation to the burden of proof being satisfied that the claimants, on the balance of probability, would have applied for the post.*” She emphasised that this case was exceptional, in that the claimants’ submission stated that not all of them would have applied for the position if advertised, and that she had been unable, despite a number of requests, to obtain any clarifying oral or written evidence from the claimants’ representative as to which of the claimants would have done so. In these circumstances the claimants had not succeeded in establishing a *prima facie* case that any of them had been personally affected by the respondent’s action, and the claim could not succeed.<sup>192</sup>

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<sup>187</sup>*Nathan v Bailey Gibson, SC*, 1998 2 IR 162

<sup>188</sup>See Legal Review, ODEI Annual Report 2000.

<sup>189</sup>*66 Female Employees v Tesco* DEC-E2001-024

<sup>190</sup>*Verbatim Ltd v Duffy and others*, HC (Kinlen J) 1994 ELR 159

<sup>191</sup>*70 Named Female Employees v Superquinn* DEC-E2001-028

<sup>192</sup>See similarly *15 Named Female Employees v Tesco*, DEC-E2001-035, where the Equality Officer found that there was no case for her to investigate, and that it was unnecessary to consider an argument about class actions. The case concerned an alleged incident in which female, but not male, staff were asked to clean toilets as an addition to their normal duties. The Equality Officer rejected the claims because the respondent disputed that all the claimants could have been involved in the incident, and the claimants’ representative was unable to identify which of the fifteen claimants had been involved. (Under appeal on 01.04.02).

The exceptional circumstances noted in *66 female employees v Tesco* were not repeated in *70 named female employees v Superquinn*, but the respondent objected that all claimants should have signed the complaint form. The Equality Officer noted that it was not normal practice, where claims were referred by professional representatives such as solicitors or trade unions, to require written proof that they represented their clients, and that a requirement of individual signatures in such a case did not seem appropriate. *"However, where a dispute arises as to who is covered by a group of claims involving a number of claimants, there is, in my view, a particular obligation on complainant representatives that they be able to show a specific mandate for any individual challenged."* Here, the respondent objected to the names of a small number of claimants, as not having been employed in the section in question at the relevant time, but the parties indicated that they could agree a revised list of names, and the Equality Officer found that in these circumstances the claim was acceptable.

In *66 female employees v Tesco*, the Equality Officer also noted that section 20 of the 1977 Act provided alternative avenues for challenging alleged discrimination in overall company policies, as distinct from where it was directed against an identifiable individual.

# 6. Procedural issues

## The obligation to follow fair procedures

In an Equal Status Act case, the respondent objected that the Equality Officer, in accordance with the normal practice of ODEI, was not requiring parties or witnesses to swear to the truth of their evidence. The Equality Officer's decision referred to the Supreme Court's decision in *Kiely v Minister for Social Welfare*<sup>193</sup> where Henchy J. stated that:

*"Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the normal rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or a fair result."*

The Equality Officer added that *"I am satisfied that the oral hearing was conducted in accordance with the principles of natural and constitutional justice. I am also satisfied that the absence of sworn evidence did not prejudice either party or imperil a fair result in any way."*<sup>194</sup> Accordingly, he overruled the objection.

## Date of discrimination:

*Green v Quinn Direct* concerned a claim of discrimination in the fixing of car insurance premiums. The Equality Officer held that she did not have jurisdiction to deal with the case, as the discrimination occurred before the entry into force of the Equal Status Act.<sup>195</sup> The facts were that the complainant concluded a contract for a year's car insurance with the respondent in July 2000, some months before the entry into force of the Act in October 2000. He argued that the contract contained a term that amounted to discrimination on the age ground, and that the discrimination must be considered as ongoing throughout the duration of the contract. The Equality Officer noted that the Equal Status Act did not have retrospective effect, and referred to *Aer Lingus Teo v the Labour Court*<sup>196</sup> as authority for the view that a contractual provision which was discriminatory but lawful at the date of its conclusion should not be invalidated retrospectively. She also considered the provisions of section 21 of the Act and pointed out that

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<sup>193</sup>*Kiely v Minister for Social Welfare* 1977 IR 276

<sup>194</sup>*Maughan v Glimmer Man Pub*, DEC-S2001-020

<sup>195</sup>*Green v Quinn Direct* DEC-S2001-024. This decision was under appeal to the Circuit Court on 01.04.02.

<sup>196</sup>*Aer Lingus Teo v the Labour Court* 1990 ELR 113 and 125

the 2000 Act, unlike the Employment Equality Act 1998, did not contain any provision invalidating any contract concluded before its entry into force which contained a discriminatory term. Finally she accorded persuasive value to a decision of the English EAT which distinguished between a once-off act with continuing consequences, and an act extending over a period<sup>197</sup>. She concluded that “*When the contract was agreed and entered into, any alleged discrimination occurred at that time and did not extend over the period of the contract.*”

*Donovan v Garda Donnellan* concerned a Garda decision to prosecute one person, but not another, involved in allowing horses to wander on the public road. The horses had strayed before the Act came into force, but the application for the summons was made after the Act came into force. The Equality Officer was prepared, on a preliminary basis, to examine on what date the decision to prosecute was made, and whether it involved discrimination.<sup>198</sup>

## Jurisdiction

In *Damery v Italian Embassy* and *O’Shea v Italian Embassy*<sup>199</sup>, the Equality Officer considered the judgement of the Supreme Court in *Government of Canada v Employment Appeals Tribunal and Brian Bourke*<sup>200</sup>. He held that in accordance with the Supreme Court judgement, he had no jurisdiction to investigate two claims of nationality-based discrimination in pay and working conditions, brought by Irish employees of another country’s embassy in Ireland, because of the operation of the doctrine of sovereign immunity.

## The statutory power to draw inferences

The Equal Status Act provides at section 26 a power to draw “such inferences, if any, as seem appropriate” where a respondent refuses to reply to a statutory request for information made by the complainant, or supplies false or misleading information. Equality Officers exercised this power in a number of cases. In *Connors v Molly Heffernan*, the Equality Officer decided that “*the inference which I think it is appropriate to draw, in the light of all the evidence presented, is that the reason for the refusal of service to both complainants was based on their membership of the Traveller community.*” Conversely, *McDonagh v Coach House* found that no *prima facie* case of discrimination had been established, even taking into account any inferences which could be drawn under section 26<sup>201</sup>.

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<sup>197</sup>*Amies v Inner London Education Authority*, 1977 ICR 308.

<sup>198</sup>*Donovan v Garda Donnellan*, DEC-S2001-011 However, he found that the issue was outside the material scope of the Act.

<sup>199</sup>*Damery v Italian Embassy* and *O’Shea v Italian Embassy* DEC-E2001-40

<sup>200</sup>1992 ILRM 325

<sup>201</sup>See for example *Connors v Molly Heffernan’s Pub*, DEC-S2001-002, *Scanlon and Ryan v Russell Court Hotel* DEC-S2001-013, *McDonagh v The Coach House Pub* DEC-S2001-007

## Time limits

The statutory time limit of six months for referring complaints of discrimination under the 1998 Act was considered in *A Complainant v a Company*. In this case, the complainant alleged a series of discriminatory incidents, with the last occurring on 28<sup>th</sup> October. Her claim was received on 28<sup>th</sup> April. The question arose whether the six month time limit provided by section 77(5) of the 1998 Act began on the date of the last incident, or the following day: and accordingly, whether or not the claim had been referred in time. The Equality Officer adopted the approach of the High Court in *McGuinness v Armstrong Patents*, holding that in accordance with section 11(h) of the Interpretation Act 1937, the date of the last incident alleged must be included in the six month period. Accordingly, the last date for referring a complaint in this case was the 27<sup>th</sup> April, and the complaint was out of time<sup>202</sup>.

## Claims in different fora

Conversely, an argument that complaints of discriminatory treatment during employment could not be referred to the Director where a complaint of constructive discriminatory dismissal had been referred to the Labour Court on the same facts, was rejected<sup>203</sup>. This point was examined in detail in *O’Hanlon v EBS*, where the Equality Officer noted that there was no statutory provision preventing such a situation, although the 1998 Act did provide in detail against parallel claims in a number of other situations. He also considered that such an interpretation might conflict with the requirements of European Community law. He held that the terms of the Act leaned more to the interpretation that a claim of discriminatory treatment during employment was distinct and different from a claim of constructive dismissal, noting a Labour Court’s determination to the same effect.<sup>204</sup>

## The “Polymark” principle<sup>205</sup>

In *Eng*<sup>206</sup>, the Equality Officer considered whether a supernumerary intern was an employee for the purposes of the Employment Equality Act 1998. She informed the parties that she had taken advice from Counsel on this point, and of the nature of that advice. Both parties were offered the opportunity to make submissions on the advice received, but neither wished to do so. The Equality Officer considered the nature of the relationship between the parties in the light of the advice received and of Irish and European Community law, and concluded that the complainant was an employee, but was not a vocational trainee, for the purposes of the 1998 Act.

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<sup>202</sup>*A Complainant v a Company*, DEC-E2001-023; *McGuinness v Armstrong Patents*, High Court, 1990 1 IR 289

<sup>203</sup>*O’Hanlon v EBS* DEC-E2001-022, also *A Complainant v a Company* DEC-E2001-023.

<sup>204</sup>*A Worker v New Era Packaging*, EE 00/11

<sup>205</sup>*State (Polymark) v Labour Court*, High Court, 1987 ILRM 357.

<sup>206</sup>*Eng v St James’s Hospital* DEC-E2001-041 (under appeal to Labour Court on 1st April 2002).

## Retrospection

It was held in two cases that the 1998 Act and 2000 Acts respectively did not have retrospective effect. In a preliminary decision, an Equality Officer considered the correct approach to complaints referred after the entry into force of the 1998 Act which related to conduct occurring both before and after that date<sup>207</sup>. *Green v Quinn Direct*<sup>208</sup> noted that the Equal Status Act did not have retrospective effect.

## Effect of failure to sign form

In *O'Brien v Killarney Ryan Hotel*,<sup>209</sup> the Equality Officer held that the complainant's failure to sign a notification form in the correct place, or at all, did not invalidate it. Section 21(2) of the Equal Status Act requires a complainant to notify the respondent in writing of their possible complaint, satisfying certain statutory requirements, before the complaint may be referred validly to the Director of Equality Investigations. In this case the complainant had signed the form, but not in the designated place. The Equality Officer observed that the Act did not specify any requirement for the notification to be signed and the notification form used was not prescribed by statute, so that non-compliance with its layout would not invalidate the notification.

In *70 named Female Employees v Superquinn*<sup>210</sup>, the question arose whether it was necessary for each claimant to have signed the complaint form. The Equality Officer noted that it was not normal practice, where claims were referred by professional representatives such as solicitors or trade unions, to require written proof that they represented their clients, and that a requirement of individual signatures in such a case did not seem appropriate.

## Extension of time to refer cases

During 2001, the Director decided seven applications under the new Acts for extending the normal time limits to refer or notify a complaint. She emphasised in all these cases that her jurisdiction to extend time under both Acts depended on the complainant satisfying her that "*exceptional circumstances prevented*" them complying with the normal time limit. She added:

"The phrase "*exceptional circumstances prevented*" sets a higher test than would be set by phrases such as "*with reasonable cause*" or "*in exceptional circumstances*". This is not a new phrase, being very similar to the test under the Unfair Dismissals legislation for referral of a claim to the EAT. It puts a significant onus on a prospective claimant to ensure that the procedure is completed on time, or to satisfy the double test that **exceptional** circumstances existed and that these **prevented** such completion."<sup>211</sup>

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<sup>207</sup>*O'Malley v Golden Vale* DEC-E2001-002, see preliminary decision on this point in Appendix D.

<sup>208</sup>*Green v Quinn Direct*, DEC-S2001-024. (This decision was under appeal to the Circuit Court on 1st April 2002.)

<sup>209</sup>*O'Brien v Killarney Ryan Hotel* DEC-S2001-008

<sup>210</sup>*70 Named Female Employees v Superquinn* DEC-E2001-028

<sup>211</sup>DIR-S2001-004

The Director refused all three applications under s. 77(6) of the 1998 Act for an extension of time to refer a claim, on the basis that the complainant had not satisfied the “exceptional circumstances prevented” test as required by the Act.

In the first case, the complainant’s reason was that he *did not know the discrimination was unlawful* and had been told by the respondent that the difference of treatment was required by law. The Director held that it was a matter for complainants to inform themselves of the legal position and that the complainant could have sought advice from a number of accessible bodies<sup>212</sup>.

In a second case, the complainant’s reason was that the incident was still subject to *internal investigation*. The Director held that it was not unusual for internal investigations to exceed six months, and that the complaint could have been referred to ODEI, as was customary, with a request that it be put on hold until the internal process was completed<sup>213</sup>.

In the third case, the complainant’s reasons were that he had *difficulties in securing legal representation*. The Director noted that legal representation before ODEI was not required, that only a small proportion of complainants were legally represented, and that advice could have been sought from the Equality Authority, a citizens’ advice centre or other competent source.<sup>214</sup>

The Director also decided four applications under s. 21(3) of the Equal Status Act to extend time for fulfilling the statutory notification requirement under the Act. (This provision requires that before referring a complaint, a complainant must first notify the respondent in writing of the nature of their grievance, mentioning their intention to refer a complaint to the Director if not satisfied by the respondent’s reply, within two months of the last incident of discrimination. The provision allows the Director to extend time up to a maximum of four months from the last date of discrimination, if satisfied that exceptional circumstances prevented timely compliance and that it would be just and equitable to do so.)

The Director refused all four applications. In three cases, she held that the complainant had not shown that “*exceptional circumstances prevented*” them from complying with the conditions, as required by section 21(3). The reasons put forward by complainants for their delay included being unfamiliar with the technicalities of the notification requirement and being unable to obtain legal

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<sup>212</sup>DIR-E2001-001

<sup>213</sup>DIR-E2001-002

<sup>214</sup>DIR-E2001-003

representation. In relation to lack of knowledge of the technical requirements, the Director noted that although the Act had only just entered into force at the time of the incident, the complainant had the Equality Authority's contact details. The complainant also had a complaint form from ODEI which fully set out the requirement to notify within the two month period, and she noted that advice was also freely available from a range of accessible bodies<sup>215</sup>. In relation to legal representation, the Director noted that legal representation was not required before ODEI and that free advice on the Equal Status Act was available from a range of accessible organisations. *"Neither the Act nor the decided caselaw on the requirements of natural justice appear to envisage extensions in this situation."* The Director referred to the High Court's decision in *Corcoran v Minister for Social Welfare* where Murphy J. stated that *"No precedent or authority has been produced for the general proposition that a lay tribunal exercising a quasi-judicial function must afford to the parties appearing before it an opportunity to procure legal advice and to be represented by lawyers."*<sup>216</sup> She held that an inability to obtain legal advice did not therefore amount to exceptional circumstances preventing a complaint's referral.<sup>217</sup>

In the other case, she held that as the complainant had not satisfied the statutory notification requirements within the maximum four months allowed by the Act, she had no jurisdiction to extend time further. The Director noted that she had no jurisdiction under the Act to waive the statutory notification requirements.<sup>218</sup>

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<sup>215</sup>DIR-S2001-004

<sup>216</sup>*Corcoran v Minister for Social Welfare*, Murphy J., High Court, 1991 2 IR 175.

<sup>217</sup>DIR-S2001-003

<sup>218</sup>DIR-S2001-002

# 7. Outcomes

ODEI decided sixty-seven cases of discrimination during 2001, covering both employment equality and the Equal Status Act, and involving 223 individual claims<sup>219</sup>. A large number of other claims were resolved in other ways (withdrawn, settled, mediated or found to be inadmissible)<sup>220</sup>. Of the 67 cases decided, slightly more claims were decided in favour of respondents, with 29 cases being decided in favour of the complainants and 38 cases in favour of the respondents.

About two-thirds of employment discrimination cases were decided in favour of respondents during 2001, (28 as against 14 decided in favour of claimants.)<sup>221</sup> Conversely, about two-thirds of equal status decisions were in favour of the complainant (15 as against 9 decided in favour of the respondent.) The fact that the Equal Status Act had only recently come into force, and the possibility that many service providers may not have yet adapted their practice to the Act's requirements, may explain this differential. Many of the cases decided during 2001 related to incidents happening within the initial first months after the Act's entry into force.

## Remedies and compensation in employment cases

Remedies in employment cases fell into three main categories: equal pay, compensation for distress resulting from discrimination, and other more wide-ranging recommendations (under the 1977 Act) or orders (under the 1998 Act) for action to be taken.

### Equal pay

Equal pay was awarded in three cases<sup>222</sup>, one under the 1974 and two under the 1998 Acts. (Under the Acts, the order made is for equal remuneration with the comparator from the date of ruling, plus arrears of equal remuneration for the period in employment up to a maximum of three years.) In *Eng*, a race discrimination case, a hospital was ordered to pay a Malaysian national occupying an unpaid intern post the same basic pay, overtime rates and living-out

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<sup>219</sup>Sometimes a number of claims referred to ODEI by individuals raise identical points of law and fact, and are therefore the subject of a single case and decision (eg *66 Female Workers v Tesco Ireland*, DEC-E2001-024.) This may occur, for example, where twenty female clerical employees of the same employer claim equal pay with the same five male comparators in another pay grade, or where three Travellers are together refused service in a pub on the same occasion. For this reason the number of decisions issued does not correspond with the number of claims involved. This review accordingly distinguishes between *claims* and *cases* where relevant.

<sup>220</sup>During 2001, a further 96 claims under the Equal Status Act were closed (principally out of time, withdrawn, mediated agreement, or inadmissible). See ODEI Annual Report 2001.

<sup>221</sup>But note that in 2000, the balance in employment cases was evenly distributed (22 rulings in favour of claimants and 22 in favour of respondents.)

<sup>222</sup>*Kennedy v Thurles Golf Club* DEC-E2001-020; *Eng v St James Hospital*, DEC-E2001-041 and *McKenna v NorthWestern Health Board* DEC-E2001-025 (both under appeal as of 1<sup>st</sup> April 2002).

allowance as an Irish national doing like work. In *McKenna*, a gender discrimination case, a health board was ordered to restore an employee to full pay in respect of absence due to pregnancy-related illness occurring before the birth of her child, and to amend its sick pay scheme to comply with European Community gender equality law in this regard. (Both the latter cases are presently under appeal.)

### **Compensation (employment cases)**

Compensation was awarded in 13 cases to a total of 14 individuals, and totalled £184,000 (€233,631). The amount of the awards was proportionate to the salary of the claimant, in accordance with section 23(1) of the 1977 Act and section 82(4) of the 1998 Act, and also varied with the circumstances of the case and the nature of the discrimination found.

There were two very large awards to individuals (of £85,000/€107,930, and £40,000/€50,790, respectively)<sup>223</sup>. Overall, the average award to an individual was £13,143 / €16,688. Excluding the two large awards, the normal range of awards to an individual was between £12,000 / €15,237 and £1,000 / €1,270, and averaged a much lower figure of £4,917 / €6,243. In one case<sup>224</sup> there was also an order for backdated appointment to a disputed post, which would involve payment of salary in respect of the interim period and thus further financial compensation.

### **Orders for a specific course of action (employment cases)**

Under section 82(1)(e) of the 1998 Act, the deciding Equality Officer can also make an order that specified person take a specified course of action. (Under section 22(b) of the 1977 Act the Equality Officer could only make a non-binding recommendation.) This power was extensively used in 2001<sup>225</sup>, with decisions including the following orders or recommendations to respondents in cases where discrimination had been found:

- To examine all posts at the claimant's grade and objectively justify why none was suitable for job-sharing: to objectively justify a policy that job-sharing was not available to supervisory posts<sup>226</sup>
- To prepare an equality policy consistent with the 1998 Act<sup>227</sup>
- To circulate an equality policy to all staff<sup>228</sup>
- To train and inform all staff in equality issues under the 1998 Act<sup>229</sup>

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<sup>223</sup>DEC-E2001-001 *O'Malley v Golden Vale*; DEC-E2001-015, *McCarthy v Dublin Corporation* (under appeal on 01.04.02)

<sup>224</sup>*Riney v Co Donegal VEC* DEC-E2001-030 (under appeal on 01.04.02)

<sup>225</sup>The first decision to order a specific course of action under the Equal Status Act (*Connors v Molly Heffernan's Pub*, DEC-S2001-003; under appeal on 1st April 2002) referred to the first decision doing so under the 1998 Act (*Equality Authority v Ryanair*, DEC-E2000-14).

<sup>226</sup>*Weir v St Patricks Hospital*, DEC-E2001-011 (under appeal on 1<sup>st</sup> April 2002)

<sup>227</sup>*Kennedy v Thurles Golf Club* DEC-E2001-020; *McCarthy v Dublin Corporation* DEC-E2001-015 and *Nevin v Plaza Hotel*, DEC-E2001-033 (both under appeal to the Labour Court on 1<sup>st</sup> April 2002).

<sup>228</sup>*McCarthy v Dublin Corporation* DEC-E2001-015 (under appeal, see above)

<sup>229</sup>*Nevin v Plaza Hotel* DEC-E2001-033 (under appeal, see above)

- To amend a sick pay scheme to accord with the requirements of European Community gender equality law<sup>230</sup>
- To discontinue any disciplinary action based on an internal inquiry found to be biased and unfair, and ensure that an employee was not penalised or victimised in any respect in future for making a complaint<sup>231</sup>
- To publish within six months procedures allowing female boxers to apply to box professionally within the Irish jurisdiction<sup>232</sup>
- To revise selection procedures to ensure transparency and fairness<sup>233</sup>
- To take measures to ensure appropriate gender balance on selection boards<sup>234</sup>
- To appoint a claimant to a disputed post with effect from the date of the disputed competition<sup>235</sup>
- To retain all interview records in future for a minimum period in order to ensure their availability for inspection where a complaint was made<sup>236</sup>.

## Remedies and compensation in Equal Status cases

Under section 27(1) of the Equal Status Act, two forms of redress may be provided: awards of compensation, and other more wide-ranging orders under the 2000 Act for action to be taken.

### Compensation (Equal Status cases)

Compensation was awarded in 16 cases, to a total of 35 individuals, and totalled £34,900 (€ 44,314). Under section 27(2) of the Act, the maximum amount of compensation which can be awarded in an individual case is presently £5,000 (€ 6,349). The average amount of compensation per individual was thus just under £1,000 (€1270). The largest awards made were for £2,200 (€2793) and (in a case where both discrimination and victimisation were found) £3,500 (€ 4,444), while the smallest were for £300 (€381). The compensation was generally stated to relate to distress, humiliation, stress or loss of amenity. In a number of cases Equality Officers stated that the amount of the award was related to the incidents in question occurring in the few weeks immediately after the coming into force of the Equal Status Act, and that for this reason “*despite its clear legal duty to comply fully with the provisions of the Equal Status Act 2000, ...the respondent did not properly assess and realise the full range of new obligations placed on it by the Act.*”<sup>237</sup> Other issues mentioned as relevant in assessing compensation

<sup>230</sup>*McKenna v NorthWestern Health Board* DEC-E2001-025 (under appeal as of 1<sup>st</sup> April 2002)

<sup>231</sup>*McCarthy v Dublin Corporation* DEC-E2001-015 (under appeal, see above)

<sup>232</sup>*Nelson v Boxing Union of Ireland* DEC-E2001-018

<sup>233</sup>*Kennedy v Thurles Golf Club* DEC-E2001-019

<sup>234</sup>*Kennedy v Thurles Golf Club* DEC-E2001-019, *Riney v Co Donegal VEC* (see above). In the latter case the Equality Officer recommended (under the 1977 Act) that the gender balance of the interview board should match as far as reasonably practicable the gender mix of candidates.

<sup>235</sup>*Riney v Co Donegal VEC* DEC-E2001-030 (under appeal, see above)

<sup>236</sup>*Barry v Virgin Mary Schools* DEC-E2001-031

<sup>237</sup>*Donovan v Gort Community Council* DEC-S2001-006, *Connors v Molly Heffernan’s Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002), *McDonagh v Castle Inn* DEC-S2001-022, *Maughan v the GlimmerMan*, *Moorehouse v Ayleswood Ltd* DEC-S2001-009, *Conroy v Costello’s Bar*, DEC-S2001-014.

included the credibility of the complainant<sup>238</sup>, the complainant's own conduct<sup>239</sup>, the attitude of the respondent<sup>240</sup>, and whether the respondent was shown to have a general policy of discriminating<sup>241</sup>. The awards also varied according to circumstances of the case and the seriousness of the discrimination found: in one case where a total of £4,400 / €5,586 was awarded to two complainants, the Equality Officer commented that the discrimination experienced by the complainants "*should not be tolerated and is unacceptable in a civilised society.*"<sup>242</sup>

## Orders for a specific course of action (Equal Status cases)

Under section 27(1) of the Equal Status Act, the deciding Equality Officer can also make an order that specified person take a specified course of action. This power was used in 2001, with decisions including the following orders to respondents in cases where discrimination had been found.

- To bring the provisions of the Equal Status Act to the attention of all staff<sup>243</sup>
- To immediately review practices to ensure compliance with the Equal Status Act in respect of everyone seeking service<sup>244</sup>
- To put in place a clear and transparent code of practice, applicable to all customers, setting out the standard of behaviour expected from customers and the measures which would be applied where customers did not observe it<sup>245</sup>
- To put in place an appeal system for people refused access to, or membership of, a community centre<sup>246</sup>
- To keep staff clearly informed of the identities of customers who had been barred, in order to avoid uncertainties<sup>247</sup>
- To train their staff in the provisions of the Equal Status Act<sup>248</sup>
- To review staff training to ensure that staff were aware of the need to base security decisions on reasonable evidence, to guard against undue reliance on assumptions, and to apply consistent rules irrespective of customer background<sup>249</sup>

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<sup>238</sup> *Conroy v Costello's Bar*, DEC-S2001-014, *Donovan v Gort* (above)

<sup>239</sup> *Moorehouse v Ayleswood Ltd* (above) *Coffey & others v Blasket Pub* DEC-S2001-010 (under appeal on 1<sup>st</sup> April 2002).

<sup>240</sup> *McDonagh v Castle Inn* DEC-S2001-022

<sup>241</sup> *Moorehouse v Ayleswood Ltd* DEC-S2001-009, *Forrestal v Hearn's Hotel*, DEC-S2001-018

<sup>242</sup> *Connors v Molly Heffernan's Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002).

<sup>243</sup> *Connors v Molly Heffernan's Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002)

<sup>244</sup> *McDonagh v Castle Inn* DEC-S2001-022

<sup>245</sup> *Griffin v Mary B*, DEC-S2001-023 (under appeal to the Circuit Court on 1<sup>st</sup> April 2002).

<sup>246</sup> *Donovan v Gort Community Council* DEC-S2001-006

<sup>247</sup> *Ward v Quigley* DEC-S2001-001, *Conroy v Carney's Bar* DEC-S2001-002, *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008

<sup>248</sup> *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008

<sup>249</sup> *McDonagh v Tesco* DEC-S2001-016

- To put up a sign indicating that the business is committed to treating people equally in accordance with the Equal Status Act<sup>250</sup>
- To take down any signs suggesting that parents would not be served when accompanied by their children<sup>251</sup>
- To provide the complainant with free shopping in the form of credit notes or vouchers to the value of £1,000 (€1270)<sup>252</sup>

In addition, Equality Officers made non-binding recommendations in a number of cases where discrimination had not been found or where the action to be taken was outside the immediate control of the respondent. The main recommendation made<sup>253</sup> was:

- That publicans generally should seriously consider drawing up a universal code of practice, emphasising their commitment to non-discriminatory practices and setting out clearly the rules which they apply to all customers, and the type of behaviour likely to lead to a customer being barred. The code should also make it clear that these rules would be applied to all customers irrespective of their background<sup>254</sup>.

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<sup>250</sup>*Maughan v Glimmer Man Pub*, DEC-S2001-020, *Connors v Molly Heffernan's Pub*, DEC-S2001-003 (under appeal on 1<sup>st</sup> April 2002)

<sup>251</sup>*Maughan v Glimmer Man Pub*, DEC-S2001-020

<sup>252</sup>*McDonagh v Tesco* DEC-S2001-016

<sup>253</sup>See also *Wall v Green Isle Hotel*, DEC-S2001-017

<sup>254</sup>*Conroy v Carney's Bar* DEC-S2001-002, *O'Brien v Killarney Ryan Hotel*, DEC-S2001-008, *Coffey & others v Blasket Pub* DEC-S2001-010 and *Joyce v Delaney's Pub* DEC-S2001-021(both under appeal on 1<sup>st</sup> April 2002), *Scanlon v Russell Court* DEC-S2001-013, *McDonagh v Castle Inn* DEC-S2001-022.

# 8. Appeals <sup>255</sup>

## Overall outcomes on appeal

At the date of writing (1<sup>st</sup> April 2002), the Circuit Court had not yet heard any appeals against Decisions issued by ODEI under the Equal Status Act. Nor had the Labour Court as yet decided any appeals from a Decision issued by ODEI under the Employment Equality Act, 1998, although several such appeals were pending.

The information below provides, instead, lists of all rulings issued during 2001 which ODEI knows to have been appealed. It does not purport to be definitive.

Details are also given of appeals decided by the Labour Court during 2001, in respect of rulings by ODEI in 2001 or in previous years. **Overall, in 2001 the Labour Court upheld 7 Equality Officer rulings without change, upheld another 4 with modifications, and overturned 2 rulings**<sup>256</sup>.

ODEI/the equality tribunal would like to express its thanks to the staff of the Labour Court, and the staff of the Circuit Court offices, for their help in compiling details of appeals for this Review.

## Equal Status appeals

As of 15<sup>th</sup> April 2002, ODEI had been notified of appeals to the Circuit Court against the following Decisions issued under the Equal Status Act during 2001.

### Appeals by the respondent

DEC-S2001-003 *Connors and anr v Molly Heffernan's Pub*

DEC-S2001-010 *Coffey and ors v Blasket Public House*

DEC-S2001-012 *Joyce and ors v Temple Gate Hotel*

DEC-S2001-021 *Joyce and ors v Liz Delaney's Pub*

DEC-S2001-023 *Griffin v Mary B Pub*

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<sup>255</sup>The information given in this section is that notified to ODEI as of 1<sup>st</sup> April 2002, except regarding Equal Status appeals which are correct as of 15<sup>th</sup> April 2002.

<sup>256</sup>The Labour Court issued four separate determinations in appeals against a single recommendation DEC-E2001-005.

## **Appeals by the complainant**

DEC-S2001-024 *Green v Quinn Direct Insurance*

The rate of appeals lodged was 6 out of 25 decisions, or 24%, substantially lower than the corresponding rate for employment equality cases (15 out of 42, or 36%).

As of 15<sup>th</sup> April 2002, no appeal under the Equal Status Act had yet been heard by the Circuit Court. It was expected that the first appeals might be heard during the summer of 2002.

## **8.3 Pending appeals against 2001 employment equality rulings**

Appeals to the Labour Court under the employment equality Acts fall into three categories: appeals by the employer against the ruling, appeals by the employee against the ruling, and (under the 1974 and 1977 Acts) appeals by the employee seeking implementation of the redress awarded by the Equality Officer, where the employer has not complied with the ruling. (The last category arises from the non-binding nature of recommendations made by Equality Officers under those Acts.)

ODEI has been notified of pending appeals to the Labour Court, against the following rulings issued in 2001 under the Employment Equality Act 1998 or previous employment equality legislation. (It should however be noted that a proportion of such appeals are withdrawn or settled prior to hearing.<sup>257</sup> )

### **By the employee:**

DEC-E2001-014 *O'Dowd v National Museum of Ireland*

DEC-E2001-007 *Weldon v Primera Soft Furnishings*

DEC-E2001-008 *Sheils O'Donnell v Board of Management St Blaithin's National School*

DEC-E2001-012 *Burke v NUI Galway*

DEC-E2001-026 *McKernan v University College Dublin*

DEC-E2001-035 *Fifteen Female Employees v Tesco Ireland*

DEC-E2001-042 *Walsh v Tesco*

DEC-E2001-038 *McEvoy v Dublin Institute of Technology*

DEC-E2001-039 *Damery v Italian Embassy*

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<sup>257</sup> Appeals to the Labour Court were withdrawn or settled prior to 1<sup>st</sup> April 2002 in a further six cases decided during 2001.

### **By the employer:**

- DEC-E2001-015 *McCarthy v Dublin Corporation*  
DEC-E2001-025 *McKenna v NorthWestern Health Board*  
DEC-E2001-030 *Riney v Co Donegal Vocational Educational Committee*  
DEC-E2001-034 *Kehoe v Convertec*  
DEC-E2001-033 *Nevin v Plaza Hotel*  
DEC-E2001-041 *Eng v St James' Hospital*

### **By the employee, for implementation only:**

- DEC-E2001-030 *Riney v Co Donegal Vocational Educational Committee*  
DEC-E2001-020 *Kennedy v Thurles Golf Club*

## **Results of employment equality appeals decided during 2001**

Between 1<sup>st</sup> January 2001 and 1<sup>st</sup> April 2002, the Labour Court issued the following determinations in appeals against previous recommendations of Equality Officers. Overall, the Labour Court upheld 7 Equality Officer recommendations without change, upheld another 4 with modifications, and overturned 2 rulings<sup>258</sup>.

#### *DEP01/1 Fás v a Worker*

Appeal against Equality Officer Recommendation No. EP10/2000  
Appeal disallowed: recommendation of Equality Officer upheld.

#### *DEP01/2 Tesco Ireland v Mandate*

Appeal against Equality Officer Recommendation No. EP4/99  
Appeal disallowed: recommendation of Equality Officer upheld.

#### *DEP01/3 Roches Stores v Mandate*

Appeal against Equality Officer Recommendation No. EP16/99  
Appeal upheld: recommendation of Equality Officer overturned: red circling and objective justification

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<sup>258</sup>The Labour Court issued four separate determinations in appeals against a single recommendation DEC-E2001-005.

*DEE01/1 Southern Health Board v Teresa Mitchell*

Appeal against Equality Officer Recommendation No. EE16/98

Equality Officer's dismissal of claim on procedural grounds overruled, dismissal of claim on substantive grounds upheld

*DEE01/2 Dublin Institute of Technology v Davis*

Appeal against Equality Officer Recommendation No. EE05/2000

Equality Officer's findings on one issue of fact upheld, on second issue of fact overturned, substantive finding and amount of award confirmed

*DEE01/3 Minister for Education v Breslin*

Appeal against Equality Officer Recommendation No. EE14/2000

Appeal disallowed, Equality Officer's recommendation upheld

*DEE01/4 Tesco Ireland v a Worker*

Appeal against Equality Officer Recommendation No. EE07/99

Appeal disallowed, recommendation of Equality Officer upheld

*DEE01/5 Minister for Justice, Equality and Law Reform v Clarke and others*

Appeal against Equality Officer Recommendation No. EE20/2000

Equality Officer's use of statistical material disallowed, finding on the substantive issues upheld.

*DEE01/6 Dept of Arts, Heritage and the Gaeltacht v SIPTU*

Appeal against Equality Officer Recommendation No. DEC-E2000-003

Equality Officer's recommendation adjusted: claimant to be placed second rather than fifth on the disputed panel. Equality Officer's finding of discrimination upheld.

*DEE01/7 St James' Hospital v a Worker*

Appeal against Equality Officer Recommendation No. DEC-E2000-009

Equality Officer's recommendation affirmed, both on the substantive issue, and in regard to compensation. Appeal for implementation of other redress no longer applicable.

*DEE01/8 A Company v a Worker*

Appeal against Equality Officer Recommendation No. EE47/99

Equality Officer's recommendation on the substantive issue upheld. Award of compensation by Equality Officer increased from £4,000 to £15,000.

*DEP02/1 University College Cork v SIPTU*

Appeal against Equality Officer Recommendation No. EP09/1999 and appeal for implementation. Equality Officer's recommendation upheld.

*DEE02/1 A Boys' Secondary School v Two Female Teachers*

Appeal by the employer against Equality Officer recommendation No. DEC-E2001-005. Finding of Equality Officer as to victimisation confirmed. Finding of Equality Officer that there was no discrimination overturned: held that claimant's complaint of discrimination was well founded, and total compensation increased from £19,000 to €30,000.

*DEE02/2 A Boys' Secondary School v Two Female Teachers*

Appeal by the claimants for implementation of Equality Officer recommendation No. DEC-E2001-005. Held that implementation was unnecessary, as the Court reheard the case on appeal, and awarded higher compensation. (Refers to DEE02/1)

*DEE02/3 A Boys' Secondary School v a Female Teacher of Religion*

Appeal by one claimant against Equality Officer recommendation No. DEC-E2001-005. Finding of Equality Officer confirmed as to victimisation, overturned as to discrimination: compensation to this claimant increased from £12,000 to €20,000. (Refers to DEE02/1)

*DEE02/4 A Boys Secondary School v The Equality Authority*

Appeal by the Equality Authority against Equality Officer's recommendation No. DEC-E2001-005. Finding of Equality Officer that there was no policy of discrimination in operation, overturned: held that the Authority's complaint was well founded: no redress awarded. (Refers to DEE02/1)

# Appendix I:

## List of all rulings issued during 2001

### Employment Equality Rulings

- DEC-E2001-001 O'Malley v Golden Vale Ltd (1977 Act)
- DEC-E2001-002 O'Malley v Golden Vale Ltd (1974 and 1998 Acts)
- DEC-E2001-003 A Named Female Employee v A Named Company (1977 Act)
- DEC-E2001-004 Martinez v Network Catering (1977 and 1998 Acts)
- DEC-E2001-005 2 Female Claimants & Equality Authority v a Boys' Secondary School (1977 Act)
- DEC-E2001-006 Hanley and Kelly v Eircom (1974 and 1977 Acts)
- DEC-E2001-007 Weldon v Primera Soft Furnishings (1977 Act)
- DEC-E2001-008 Sheils O'Donnell v St Baithin's National School & Others (1977 Act)
- DEC-E2001-009 8 Named Female Employees v Anthony Ryan & Sons (1974 Act)
- DEC-E2001-010 Rattigan v Boots Chemists (1977 Act)
- DEC-E2001-011 Weir v St Patrick's Hospital (1977 Act)
- DEC-E2001-012 Burke v National University of Ireland, Galway (1977 Act)
- DEC-E2001-013 Hughes v Minister for Justice Equality & Law Reform (1977 Act)
- DEC-E2001-014 O'Dowd v National Museum of Ireland & Others (1977 Act)
- DEC-E2001-015 McCarthy v Dublin Corporation (1977 and 1998 Acts)
- DEC-E2001-016 Rodmell v Trinity College (1998 Act)
- DEC-E2001-017 Gorry v Manpower (1998 Act)
- DEC-E2001-018 Nelson v The Boxing Union of Ireland (1977 Act)
- DEC-E2001-019 Kennedy v Thurles Golf Club (1977 and 1998 Acts)
- DEC-E2001-020 Kennedy v Thurles Golf Club (1974 Act)
- DEC-E2001-021 O'Sullivan v Roches Stores, Cork (1974 Act)
- DEC-E2001-022 O'Hanlon v Educational Building Society (1998 Act)
- DEC-E2001-023 A Complainant v A Company (1998 Act)

DEC-E2001-024 MANDATE (on behalf of 66 Female Workers) v Tesco Ireland (1977 Act)  
DEC-E2001-025 McKenna v The North Western Health Board (1998 Act)  
DEC-E2001-026 McKernan v UCD (1977 Act)  
DEC-E2001-027 Geasley v Watermans Printers Ltd (1998 Act)  
DEC-E2001-028 70 Named Female Employees v Superquinn (1977 Act)  
DEC-E2001-029 Perry v The Garda Commissioner (1998 Act)  
DEC-E2001-030 Riney v Co. Donegal VEC (1977 Act)  
DEC-E2001-031 Barry v Board of Management (Aisling Project) Virgin Mary Schools (1977 Act)  
DEC-E2001-032 Partridge v DBA Publications (1998 Act)  
DEC-E2001-033 Nevin v The Plaza Hotel (1998 Act)  
DEC-E2001-034 Kehoe v Convertec Ltd (1998 Act)  
DEC-E2001-035 15 Named Tesco Employees v Tesco Ireland Ltd (1977 Act)  
DEC-E2001-036 Murphy v Tesco Ireland Ltd (1998 Act)  
DEC-E2001-037 Rook v Tesco Ireland Ltd (1998 Act)  
DEC-E2001-038 McEvoy v Dublin Institute of Technology (1998 Act)  
DEC-E2001-039 Damery v The Italian Embassy (1998 Act)  
DEC-E2001-040 O'Shea v The Italian Embassy (1998 Act)  
DEC-E2001-041 Eng v St James's Hospital (1998 Act)  
DEC-E2001-042 Walsh v Tesco Ireland Ltd (1977 Act)

## **Equal Status Decisions**

DEC-S2001-001 Michael Ward & Another v The Boathouse Pub  
DEC-S2001-002 Tom Conroy v Carney's Bar  
DEC-S2001-003 Michael Connors & another v Molly Heffernan's Public House  
DEC-S2001-004 Kathleen Mongan v The Angler's Rest  
DEC-S2001-005 Martin Collins v Kyle's Pub  
DEC-S2001-006 John Donovan v Gort Community Council Ltd  
DEC-S2001-007 William McDonagh v The Coach House  
DEC-S2001-008 Patrick O'Brien v Killarney Ryan Hotel

DEC-S2001-009 Michael Moorehouse v Ayleswood Ltd (Clancy's Public House)  
DEC-S2001-010 Robert Coffey & Others v The Blasket Public House  
DEC-S2001-011 Paddy Donovan v Garda Olive Donnellan  
DEC-S2001-012 Bridget Ann Joyce & Others v The Temple Gate Hotel  
DEC-S2001-013 Greg Scanlon & Another v The Russell Court Hotel  
DEC-S2001-014 Tom Conroy v Costello's Bar  
DEC-S2001-015 Martina Collins & Others v Bartra House Hotel  
DEC-S2001-016 Ann McDonagh v Tesco Ireland Ltd (Waterford)  
DEC-S2001-017 Margaret Wall & Others v Green Isle Hotel  
DEC-S2001-018 P.J. Forrestal v Hearn's Hotel  
DEC-S2001-019 Paddy Collins v Kyle's Pub  
DEC-S2001-020 John Maughan v The Glimmer Man Ltd  
DEC-S2001-021 Bernard Joyce & Others v Liz Delaney's Pub  
DEC-S2001-022 Michael McDonagh v Castle Inn, Birr  
DEC-S2001-023 Dan Griffin v Mary B Public House  
DEC-S2001-024 David Green v Quinn Direct Insurance  
DEC-S2001-025 An Individual v a Garda Station (dismissal of Complaint)

# Appendix 2:

## Summaries for all 2001 Employment Equality rulings

### DEC-E2001-001

*O' Malley v Golden Vale Limited*

#### **Background**

The claimant alleged that she was discriminated against by the respondent in terms of Section 2(a) and Section 2(d) of the Employment Equality Act, 1977 when it offered her a position which had previously reported to her and which would require her to report to a male colleague who had previously been of equal standing to her in the organisation. The claimant alleged that the male colleague was less qualified and had less experience for the position than she did. The respondent denied the allegation of discrimination on the basis of the claimant's sex and also her claim of victimisation. The claimant attempted to resolve the matter through normal grievance channels in the respondent organisation. In the course of her attempts to resolve the matter the respondent became aware that she was pregnant and soon after learning of her pregnancy her employment was terminated.

#### **Conclusions**

The Equality Officer found in favour of the claimant. In its defence the respondent held that the reason for the offer of the alternative position to the claimant was because of her poor performance. The Equality Officer noted that the respondent had failed to undertake any performance appraisal on the claimant. The respondent made the claimant's position permanent after her six months probationary period even though it alleged that her performance was poor. The respondent paid the claimant a performance bonus in excess of £5,000. The Equality Officer found that the evidence did not support the respondent's contention that the claimant's performance was poor. The Equality Officer also found that the respondent had penalised the claimant for having attempted to oppose by lawful means an act which was unlawful in terms of Section 2(d) of the Employment Equality Act, 1977.

## **Recommendation**

The Equality Officer recommended that the respondent pay the claimant a total sum of £85,000 to cover loss of earnings and stress suffered as a result of the discrimination.

*The claimant was represented by O'Mara Geraghty McCourt, Solicitors, on behalf of the Equality Authority, formerly the Employment Equality Agency. The respondent was represented by Maurice Power, Solicitors.*

## **DEC-E2001-002**

### ***O'Malley v Golden Vale Limited***

## **Background**

The claimant contends that she is entitled to the same rate of remuneration as that paid by the respondent to the named male comparator in terms of Section 3(b) and 3(c) of the Anti-Discrimination (Pay) Act, 1974. The respondent rejected the claim and argued that the claimant does not perform 'like work' with the named male comparator in accordance with the provisions of the Act and it also stated that there were grounds other than sex for the difference in the pay of the claimant and the named male comparator.

## **Conclusions**

The Equality Officer undertook work inspections of the work of the claimant and the named male comparator. On foot of these work inspections the Equality Officer found that the claimant did not perform similar work as the named male comparator in terms of Section 3(b) of the 1974 Pay Act. The Equality Officer undertook an analysis of the work of the claimant and the named male comparator in terms of skill, physical effort, mental effort, responsibility and working conditions. The Equality Officer found that the claimant and the named male comparator did not perform like work on the basis of these criteria in terms of Section 3(c) of the 1974 Pay Act. As the Equality Officer found that the claimant and the named male comparator did not perform like work in terms of Section 3 of the Act the Equality Officer did not need to examine the issue of grounds other than sex in terms of Section 2(3) of the Anti-Discrimination (Pay) Act, 1974.

In a preliminary decision in annex, the Equality Officer considered whether to apply the 1974 Act or the 1998 Act, given that the events in issue occurred before the repeal of the 1974 Act but the complaint was referred after that repeal. She considered legal arguments from both parties, the Interpretation Act 1937, and section 47 of the Equal Status Act. The Equality Officer held that the 1998 Act did not have retrospective effect and that the claim should be investigated under the 1974 Act and not under the 1998 Act.

*The claimant was represented by O'Mara Geraghty McCourt, Solicitors, on behalf of the Equality Authority, formerly the Employment Equality Agency. The respondent was represented by Maurice Power, Solicitors.*

## **DEC-E2001-003**

### ***A Named Female Employee v A Named Company***

#### **Background**

The Union, on behalf of the claimant, alleged that she was discriminated against by the Company in terms of Section 2(a) of the Employment Equality Act, 1977 when she was placed in a stressful and uncomfortable working environment resulting from ongoing sexual harassment from a work colleague. The Company rejected the claim.

#### **Conclusions**

The Equality Officer noted the conflict in the evidence of both parties. The Equality Officer found, on the balance of probabilities, that the Company's version of events was more credible than the Union's version of events. The Equality Officer noted that the Company had undertaken an investigation of the complaint and had found that the allegations had not been substantiated. The Equality Officer referred to the High Court decision in the case of Health Board v BC and the Labour Court and, in accordance with that judgement, held that the Company was not vicariously liable in this case.

#### **Recommendation**

The Equality Officer concluded that the Company did not directly discriminate against the named female claimant contrary to the provisions of the Employment Equality Act, 1977.

*The claimant was represented by MANDATE. The respondent was represented by I.B.E.C.*

## DEC-E2001-004

### *Martinez v Network Catering*

#### **Background**

The complainant was employed by Network Catering as a Chef from 21 April 1999 to 30 November 1999. The complainant alleged that during her employment she was discriminated against in relation to her conditions of employment on the grounds of gender, disability and race. The respondent denied the complainant's allegations.

#### **Conclusions**

The Equality Officer found in relation to the claim of discrimination on the gender ground under the Employment Equality Act, 1977 and the Employment Equality Act, 1998 that the complainant had not established a *prima facie* case that the respondent discriminated against her. The Equality Officer found that under the Employment Equality Act, 1998, she did not have jurisdiction to investigate the allegation of discrimination on the disability ground as the complainant's medical appointments in relation to her back injury, in respect of which she alleged discriminatory treatment, related to a time before the operation of the Act. The Equality Officer found that the complainant had not established a *prima facie* case of discrimination on the ground of race under the Employment Equality Act, 1998, in respect of acts alleged to have occurred after 18 October 1999.

#### **Decision**

The respondent did not discriminate against the complainant contrary to the provisions of the Employment Equality Act, 1977 and the Employment Equality Act, 1998.

## DEC-E2001-005

### *Two Named Female Teachers and the Equality Authority v A Boys Secondary School*

*NOTE: This recommendation was partly overruled on appeal by The Labour Court*

#### **Background**

The dispute concerns a claim by two female teachers at a boys' secondary school that they were subjected to both verbal and physical harassment of a sexual nature by pupils at the school during the course of their teaching work. The claimants also alleged that they were penalised by school management when they proceeded to take their complaints up formally with the Labour

Court. The Equality Authority separately referred a complaint to the Labour Court under Section 20 of the 1977 Act alleging discriminatory treatment of female teaching staff in general at the school by virtue of the school management's alleged failure to provide a working environment which was free from sexual harassment. The Union and the Authority cited several instances where pupils at the school had engaged in sexually abusive behaviour towards the claimants and argued that although disciplinary action had been taken in several instances, the school had failed to put in place any system of education or prevention. The Union also claimed that one of the claimants was victimised on several occasions by the school after she referred a complaint to the Labour Court and complained that on the day before the Equality Officer's hearing the Principal posted a notice in the staff room encouraging all staff to attend the hearing despite the confidential nature of the proceedings. The school argued firstly that it was not vicariously liable for the actions of pupils as they were not employees of the school and secondly that it had dealt appropriately with complaints of sexual harassment citing instances where offending pupils had been transferred out of the school or suspended. The school also outlined broader policy measures which it was taking to address sexually abusive behaviour by pupils. The school contradicted the allegations of victimisation and said that the posting of the notice arose from a misunderstanding on the Principal's part.

## **Conclusions**

The Equality Officer found that the school was liable for the actions of pupils where they sexually harass teachers. The Equality Officer was however satisfied that the school had taken all reasonable steps to deal with the problem of sexual harassment in the classroom and found that the claim of discrimination in relation to sexual harassment was not sustained. In relation to the allegation of victimisation, the Equality Officer was satisfied that victimisation had taken place and accordingly found against the school.

## **Recommendation**

The Equality Officer found that the school did not discriminate against the claimants or female teachers in general on grounds of their gender, but that the school did penalise the claimants for having referred complaints to the Labour Court. He made individual compensatory awards to the claimants of £7,000 and £12,000.

## **DEC-E2001-006**

***Hanley and Kelly v Eircom (formerly Telecom Éireann)***

## **Background**

The Union, on behalf of the claimants, alleged that they were entitled to the same rate of remuneration as that paid to two named male comparators in terms of section 3 of the Anti-

Discrimination (Pay) Act, 1974. The claimants were employed as Clerical Officers while the named male comparators were employed as Telephone Officers. Following restructuring both these grades had been amalgamated into the one grade of Telecom Officer I. The respondent did not contest or concede 'like work' within the meaning of section 3 of the Act. However it did argue that there were 'grounds other than sex' for the difference in pay between the claimants and the named male comparators.

## **Conclusions**

The Equality Officer found that the claimants performed 'like work' with the two named male comparators in accordance with section 3 of the Anti-Discrimination (Pay) Act, 1974. In examining the arguments made on 'grounds other than sex' under section 2(3) of the 1974 Pay Act the Equality Officer found that a case of direct discrimination did not arise. The Equality Officer addressed the question of indirect discrimination in detail and found that, while more females than males had been adversely affected by the payment of a higher rate of pay to former Telephone Officers, the imbalance was not sufficient to ground a prima-facie case of indirect discrimination. In reaching this conclusion the Equality Officer had regard to the various judgements of the European Court of Justice. As a *prima facie* case had not been established the Equality Officer held that the respondent was not required to show objective justifiable grounds for the difference in pay. The Equality Officer noted other arguments made by the Union in relation to holidays and promotional opportunities and held that these issues related to conditions of employment which were covered by the Employment Equality Act, 1977 and not the Anti-Discrimination (Pay) Act, 1974 which specifically relates to pay.

## **Recommendation**

The Equality Officer found that the respondent did not discriminate against the claimants.

*The claimant was represented by the CPSU. The respondent was represented by Arthur Cox, Solicitors*

## **DEC-E2001-007**

***Weldon v Prima Soft Furnishings Ltd***

## **Background**

The claimant asserted that she was discriminated against on the grounds of gender by the company when she was not offered the position of manager, was demoted and was subjected to less favourable working conditions - including being laid off - due to the fact she was

pregnant. The respondent denied the allegations, saying that the claimant had refused the manager post on several occasions. The company claimed that employees were put on a three-day week as opposed to being laid off.

## **Conclusion**

The Equality Officer noted that there were many conflicts of evidence in this case. On investigation, she could not find that there was any causal link between the claimant's notification of her pregnancy and the respondent's decision to appoint a manager, as alleged by the claimant. The claimant's evidence regarding other matters - including the allegation that she was laid off - was found to be either contradictory or, on balance, to support the respondent's case. Because of this, the claimant had not established that there was *prima facie* evidence of discrimination against her.

## **Recommendation**

The Equality Officer found that Primera Soft Furnishings Ltd did not discriminate against Ms Weldon in terms of section 2 (a) of the Employment Equality Act, 1977 and contrary to section 3 of that Act.

*The claimant was represented by the Equality Authority. The respondent was represented by Peter Morris & Co, Solicitors.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC-E2001-008**

***Sheils O'Donnell v The Board of Management of St. Baithin's National School, the Board of Management of St Aengus National School and the Department of Education and Science***

## **Background**

The claimant was interviewed for the post of Home School Community Liaison Co-ordinator to be shared between both schools. She stated that during the interview, she was asked how she felt about the post in the light of the requirement for flexible working hours and was further asked whether considering family commitments she would accept the conditions of the post. The claimant was not successful at interview and a male was appointed. The claimant stated that she was the best qualified and most experienced person for the post and that she was directly or in the alternative indirectly discriminated against on the grounds of gender and marital status. The

first and second named respondents denied the allegation of discrimination and the third named respondent stated that the initiation of proceedings under the Act was a matter for the attention of the Board of Management, as employer.

## **Conclusions**

In relation to the question of the employer for the purposes of the proceedings, the Equality Officer found that the Boards of Management of the schools were the claimant's prospective joint employer and not the Department of Education and Science. The Equality Officer found that the claim of discrimination on the marital status ground did not come within the provisions of the Employment Equality Act, 1977 and could not therefore be investigated. In relation to the claim of direct discrimination on the gender ground, the Equality Officer found that the Boards of Management rebutted the claim of discrimination and on the balance of probabilities she found that the Boards of Management did not discriminate against the claimant. The Equality Officer was satisfied that in relation to the claim of indirect discrimination on the gender ground, the requirement to be flexible was an objectively justifiable factor which had no relation to the claimant's gender. She found that the Boards of Management of the schools did not indirectly discriminate against the claimant.

## **Recommendation**

The Equality Officer recommended that there be complete transparency in all appointments in the future which should include, *inter alia*, a job specification, clearly defined assessment criteria, marking of candidates by reference to the criteria and the retention of all interview notes and that the Boards of Management liaise with the Equality Authority in relation to the drafting of an Equal Opportunities Policy.

*The claimant was represented by the INTO. The respondent was not represented.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC-E2001-009**

### ***8 Named female employees v Anthony Ryan & Sons***

## **Background**

The eight female claimants are buyers at Anthony Ryan & Sons department store in Galway and the Union claimed that they were entitled under the provisions of the Anti-Discrimination (Pay) Act, 1974 to the same security allowance as that paid to the male comparators who are also

buyers at the shop. The section of the shop where the male comparators work is in an adjacent building and is referred to as 'the Man's Shop' whereas the claimants work in the 'main shop'.

## **Conclusions**

The Equality Officer, having carried out a work inspection at the shop, concluded that the claimants were not engaged on like work with that of the male comparators. The male comparators were required to remain on in the Man's Shop for up to fifteen minutes after closing time for the purposes of ensuring that that part of the premises was vacated, all electrical systems switched off, doors locked and security shutters in place. The comparable security duties in the main shop where the claimants work are carried out by management. The Equality Officer was satisfied that the comparators carry an additional burden of responsibility in relation to the security of the Man's Shop. The Equality Officer also noted that a male buyer who has not been assigned locking up duties is not paid the security allowance.

## **Recommendation**

The Equality Officer found that the claimants are not entitled to the same rate of pay as the male comparators and that the respondent did not discriminate against the Claimants contrary to the 1974 Act.

*The claimant was represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E2001-010**

### ***Rattigan v Boots the Chemist***

## **Background**

The claimant was employed in a Boots store in Dublin. During the period May, 1998 to February, 1999 she was absent from work on a number of occasions due to illness of a gynaecological nature. The claimant alleged that the company's response to these absences, in that it invoked its internal sick leave scheme and disciplinary code, constituted discrimination of her on grounds of sex contrary to the Act because her absences were intimately connected with the fact that she was female.

The respondent rejected the claimant's allegations and stated that she had been treated no differently to any other member of staff, male or female, with the same frequency of absence due to illness and that it had merely applied established company policy on the matter. It added that the fact that a medical condition is unique to women does not mean that absences due to such a condition cannot be treated in the same way as absences due to illness which affects both men and women.

## **Conclusions**

The Equality Officer found that the ECJ jurisprudence on the treatment of a female employee by her employer as a result of absence due to illness is not discrimination on grounds of sex, provided the illness is not connected with pregnancy or confinement and a male employee is treated the same in similar circumstances, was applicable to the case. He also found that the ECJ jurisprudence restricted special protection against dismissal and disciplinary measures to circumstances connected with pregnancy, maternity and childbirth and that to extend it beyond those parameters would undermine that protection. He found therefore that the respondent had not discriminated against the claimant contrary to the Act. He did however, have some concern about the procedures operated by the respondent in connection with its sick leave scheme and disciplinary code and recommended that it undertake a review of those procedures.

## **Recommendation**

The Equality Officer found that the respondent did not discriminate against the claimant contrary to the Act.

*The claimant was represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E2001-011**

### ***Weir v St. Patrick's Hospital***

## **Background**

The claimant alleged that she was directly and indirectly discriminated against by the respondent in terms of Sections 2(a), 2(b) and 2(c) of the Employment Equality Act, 1977 when she her application for job-sharing in her position as Deputy Nursing Officer was not granted. Her application for job-sharing would have been granted if she had been prepared to revert back to the position of Staff Nurse. The original referral of victimisation in terms of Section 2(d) of the Employment Equality Act, 1977 was subsequently withdrawn.

## **Conclusion**

The Equality Officer found that the respondent did not directly discriminate against the claimant in terms of Section 2(a) of the Employment Equality Act, 1977. The Equality Officer found that the claimant had failed to make a valid claim on the basis of her marital status in terms of section 2(b) of the 1977 Act. In terms of indirect discrimination the Equality Officer found that the respondent had failed to objectively justify its policy of not allowing staff at supervisory grades job-share. The Equality Officer held that this did not mean that all applications for job-sharing by

staff at supervisory levels had to be facilitated. Rather the respondent reserves the right to decide on the suitability of each post for job-sharing by objectively justifying a decision when it deemed a post unsuitable for job-sharing. The Equality Officer found that the respondent had failed to undertake this exercise on foot of the claimant's request for job-sharing. Consequently the Equality Officer found that the respondent indirectly discriminated against the claimant by having a discriminatory policy in place. The Equality Officer found that the claimant had no absolute right to job-share but the respondent had a responsibility to objectively justify its decision that no posts at the claimant's grade were suitable for job-sharing. An inability to do this would mean that no reason would exist for refusing the claimant's application for job-sharing.

### **Recommendation**

The Equality Officer found that the respondent indirectly discriminated against the claimant by having a discriminatory policy in place which adversely affected more females than males. The Equality Officer recommended that the respondent objectively justify its policy of not permitting staff at supervisory levels avail of job-sharing. The Equality Officer also recommended that the respondent examine each post at the claimant's grade and objectively justify its reason for stating that it is unsuitable for job-sharing. The Equality Officer recommended that the respondent pay the claimant the amount of £4,000 by way of compensation for the stress suffered as a result of the indirect discrimination.

*The claimant was represented by the PNA. The respondent was represented by I.B.E.C.*

## **DEC-E2001-012**

### ***Burke v National University of Ireland, Galway***

#### **Background**

Ms Burke, who is married, alleged that she was discriminated against both directly and indirectly on grounds of her gender and marital status by National University of Ireland, Galway contrary to the 1977 Act when her request to job-share in her position as Assistant Librarian within the library service of the College was refused.

#### **Conclusions**

The Equality Officer found that the College had valid operational reasons, unconnected with Ms Burke's gender or marital status, for refusing her request to job-share in the library. The Equality Officer was also satisfied that the College had made reasonable efforts to facilitate the claimant's job-share request in another area of the College. The Equality Officer noted that four Library

Assistants who were female and married were facilitated by the College in their job-share requests.

### **Recommendation**

The Equality Officer found that National University of Ireland, Galway did not discriminate against Ms Burke contrary to the 1977 Act.

*The claimant was represented by SIPTU. The respondent was represented by IBEC.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC-E2001-013**

### ***Hughes v Minister for Justice, Equality and Law Reform***

#### **Background**

The dispute concerns a claim by Mr Hughes who is employed at the Metropolitan District Court that his employer, the Minister for Justice, Equality and Law Reform, discriminated against him contrary to the Employment Equality Act, 1977. The complaint concerns access to the full range of Clerical Officer duties for a former member of the Paperkeeper grade who was re-graded to Clerical Officer.

Mr Hughes' former grade of Paperkeeper was assimilated into a broadened Clerical Officer grade under the terms of a civil service restructuring agreement which was implemented in 1997. The Paperkeeper grade, along with the Clerical Assistant grade, was abolished and the duties subsumed into the duties of the new Clerical Officer grade. Following his re-grading the claimant continued to carry out the duties associated with his former grade however he wished to progress to work previously associated with the Clerical Officer grade and to data entry work in particular, work which the claimant alleged was being carried out by female Clerical Officers to the exclusion of former Paperkeepers who were all male. The claimant also complained about access to training and the standard of his office accommodation. The respondent argued that there was a considerable backlog of data entry work in the office and that Mr Hughes did not possess the necessary keyboard skills to enable his assignment to data entry work. The respondent also stated that a female Clerical Officer referred to in Mr Hughes complaint was experienced at data entry.

## **Conclusions**

The Equality Officer was satisfied that the non-assignment of Mr Hughes to data entry work was unconnected with his gender and that a certain level of proficiency on keyboards was a justifiable requirement in a busy data entry environment. The Equality Officer was also satisfied that there was nothing in the evidence to support the allegation that Mr Hughes was being discriminated against because of his gender in relation to access to training or the allocation of office accommodation.

## **Recommendation**

The Equality Officer found that the Minister for Justice, Equality and Law Reform did not discriminate against Mr Hughes contrary to the 1977 Act.

*The claimant was represented by Darach Connolly, Solicitor. The respondent was represented by BCM Hanby Wallace, Solicitors.*

## **DEC-E2001-014**

***O'Dowd v National Museum of Ireland and Department of Arts, Heritage, Gaeltacht and the Islands.***

## **Background**

The dispute concerns a claim by Dr O'Dowd who is employed at the National Museum of Ireland that her employer, the Minister for Arts, Heritage, Gaeltacht and the Islands discriminated against her contrary to the Employment Equality Act, 1977. Dr O'Dowd was one of three candidates in an internal competition run by the Civil Service and Local Appointments Commissioners to fill a new post of Manager / Keeper at the new Folklife Division to be based in Castlebar. The claimant was ranked in second place at interview. The two other candidates were male. Evidence was presented that the Director of the National Museum, who was a member of the interview board, had prior reservations about Dr O'Dowd's suitability for the position. It was the claimant's contention that she was discriminated against because she was a woman and that there is a history of discrimination against women in the filling of senior management positions at the Museum.

## **Conclusions**

While the Equality Officer was satisfied that Dr O'Dowd had demonstrated that she was better qualified for the position than the appointee in terms of qualifications and experience, no

evidence was presented to support the claim that the Director's reservations about her suitability for the position were connected with her gender. The record of the interview board noted that Dr O'Dowd was weaker than the other candidates in relation to management and planning. The Equality Officer was satisfied that on balance, the outcome of the selection process, while it may have been influenced by the Director's reservations about the claimant's suitability for the position, was not influenced by Dr O'Dowd's gender. The Equality Officer was also satisfied that the evidence did not support the claimant's contention that there was a history of bias against female candidates in the filling of senior management positions at the Museum.

### **Recommendation**

The Equality Officer found that the Minister for Arts, Heritage, Gaeltacht and the Islands did not discriminate against Dr O'Dowd contrary to the 1977 Act.

*The claimant was represented by Fawsitt and Company, Solicitors. The respondent was not represented.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC -E2001-015**

### ***Mc Carthy v Dublin Corporation***

#### **Background**

The case concerns a claim by Ms. Mc Carthy that Dublin Corporation penalised her in circumstances amounting to victimisation, contrary to the provisions of the Employment Equality Act, 1977 and the Employment Equality Act, 1998, for having in good faith previously referred a claim under the Employment Equality Act, 1977. The respondent denied the allegation of discrimination.

#### **Conclusions**

The Equality Officer found that the complainant had established a *prima facie* case of victimisation over a three and a half year period which the respondent had failed to rebut. In particular, the Equality Officer found that the complainant was victimised by:

(i) her manager's refusal to speak to her during the period from 24 September 1997 until his departure from the respondent's employment in October 2000,

(ii) the inaccurate reporting of the Labour Court Determination in relation to the previous equality claim at a management meeting, the minutes of which were published internally and by the refusal to correct the minutes to accurately reflect the position;

(iii) the manner in which an investigation into bullying and harassment allegations against her was carried out by two employees of the respondent.

The Equality Officer found the respondent vicariously liable for the actions of its employees as the employees were acting within the scope of their employment

### **Decision**

The Equality Officer recommended that the respondent: pay to the complainant £20,000 as compensation for the distress suffered as a result of the discrimination occurring before 18 October 1999; she ordered that the respondent pay to the complainant £20,000 as compensation for the distress suffered as a result of the discrimination occurring after 18 October 1999; not proceed to administer a warning, verbal or written on foot of the internal investigation which was not conducted in a fair manner in accordance with the principles of natural justice; ensure that every effort is made to assist the complainant with any transfer request that she might make; in future, do not penalise the complainant in circumstances amounting to victimisation and treat the complainant in exactly the same manner as any other employee who has not referred an equality claim(s).

She further ordered that the respondent update immediately its 'Equal Opportunity Policy and Positive Action Programme' to take account of the provisions of the Employment Equality Act, 1998 and make available to every staff member a copy of its revised Equal Opportunity Policy.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by the Equality Authority. The respondent was represented by Terence O'Keefe, Law Agent.*

## **DEC-E2001-016**

***Rodmell v University of Dublin, Trinity College***

### **Dispute**

This dispute concerns a claim by Ms Rodmell that the University of Dublin, Trinity College discriminated against her on the gender ground, in denying her access to employment, contrary

to Section 6(2)(a) and Section 8(1)(a) of the Employment Equality Act, 1998. The claim revolves around the claimant's application for a position with the College and her attendance at an interview on 12 November 1999.

## **Background**

In August 1999, Trinity College advertised in the daily newspapers for suitably qualified craftpersons for a number of positions including that of Electrician in the Buildings Office of Trinity College. Ms Rodmell was the only female of the 37 original applicants and of the 18 invited for interview. Ms Rodmell claims that she was discriminated against on the grounds of gender on the basis that, prior to the interview, she was addressed as a "lady electrician" by a member of the Interview Board.

The respondent denies that the reference to "lady electrician" was discriminatory and states that the term was used simply to identify the candidate from among a crowd of people. The company state that the reason Ms Rodmell did not get the position was because of her lack of technical knowledge in areas specific to the post.

## **Conclusions**

The Equality Officer found that the University of Dublin, Trinity College did discriminate against Ms Rodmell in terms of Section 6(2)(a) and Section 8(1)(a) of the Employment Equality Act, 1998. He found that the fact that a member of the Interview Board clearly identified the complainant by her sex, prior to the interview commencing, was sufficient to constitute discrimination under the Employment Equality Act 1998. With regard to the filling of the vacancy concerned, the Equality Officer found that Interview Board acted in a non-discriminatory fashion in selecting the most suitable candidates for the job and that the formal interview process was conducted in a fair and equitable manner.

## **Decision**

The Equality Officer ordered that the University of Dublin, Trinity College pay Ms Rodmell the sum of £1500 in compensation for the distress and humiliation suffered by her as a result of the discriminatory treatment afforded to her, on the grounds of her gender, immediately prior to the interview.

*The claimant was represented by the Equality Authority. The respondent was represented by IBEC.*

## DEC-E2001-017

### *Gorry v Manpower*

#### **Background**

An advertisement was placed in the Evening Herald by the respondent employment agency, seeking applications from persons for the position of Switchboard Operator in Eircom. The complainant was invited to forward his *Curriculum Vitae*. The complainant stated on his Curriculum Vitae that he had a slight visual impairment since birth. The complainant was not called for interview and he alleged that he was directly and indirectly discriminated against in his application for the post on the ground of his disability. The respondent denied the complainant's allegation of discrimination.

#### **Conclusions**

The Equality Officer was satisfied that that the complainant established a *prima facie* case of direct discrimination on the basis of his qualifications, previous experience as a Switchboard Operator for Eircom and that it was not submitted that there was an issue going to the complainant's previous performance. The respondent sought to rebut the allegation on the basis of the existence of an Eircom policy of not re-employing ex-employees. The Equality Officer noted that the respondent processed the complainant's application for employment in 1999 notwithstanding the fact that his *Curriculum Vitae* at that time also referred to his health. The Equality Officer established that an Eircom policy of not re-employing persons who had previously worked for Eircom and left under a voluntary leaving scheme existed and was misapplied to the complainant. The Equality Officer found that the misapplication of the Eircom policy was the reason that the complainant's application was not processed and that the respondent did not directly discriminate against the complainant on the disability ground. The Equality Officer found that the complainant had failed to establish a *prima facie* case of indirect discrimination on the disability ground.

#### **Decision**

The Equality Officer found that the respondent rebutted the complainant's allegation of direct discrimination on the disability ground. She found on the balance of probability, the respondent did not directly discriminate against the complainant. She also found that the complainant failed to establish a *prima facie* case of indirect discrimination.

*The complainant was represented by Brabazon and Company, Solicitors. The respondent was represented by Mc Cann Fitzgerald, Solicitors.*

## DEC-E2001-018

### *Nelson v The Boxing Union of Ireland*

#### **Background**

The claimant was licensed to box in a professional capacity by the British Boxing Board of Control in February, 1999. Following preliminary enquiries about the possibility of boxing in the jurisdiction of the Boxing Union of Ireland and on the basis of comments made by the President of that organisation, the claimant formed the view that it would be futile for her to apply for permission to box professionally in the jurisdiction governed by the respondent because she was female.

The respondent rejected the claimant's allegations and stated that she had been treated no differently to any male professional boxer seeking to box in its jurisdiction. It added that once it received an appropriate request or application for permission to box and the claimant complied with the standard medical and technical requirements applied by the respondent, permission to box in its jurisdiction would be granted. However, it added that it was its policy not to entertain any application from a female boxer seeking permission to box in its jurisdiction until the European Boxing Union had reached agreement on the issue, particularly the matter of medical supervision. The respondent argued that this was a reasonable and responsible approach to take. The European Boxing Union adopted guidelines on female professional boxing in June, 1999.

#### **Conclusions**

The Equality Officer found that the comments attributed to the President of the respondent organisation portrayed its policy on the issue of female professional boxing and that it was reasonable for the claimant to form the view that it was futile to pursue the matter because she was a woman. He also found that the position adopted by the respondent organisation was based on "gender-based stereotypes and assumptions" which had been found to be discriminatory by the UK Tribunal in *Couch -v- the British Boxing Board of Control*. In addition, he found that that the policy operated by the respondent was not covered by any of the exemptions permitted under Irish or EU law. He considered the tests in respect of differences in treatment between men and women based on protection, established by the ECJ in *Ministère Public -v- Stoeckel* to be of relevance and found that the policy adopted by the respondent did not comply with these tests. Consequently, he held that the respondent has discriminated against the complainant on grounds of gender contrary to the Employment Equality Act, 1977. However, this discrimination terminated when the claimant became aware that the respondent had adopted procedures for dealing with applications from female professional boxers. He awarded

the claimant £1,500 compensation for the stress and anxiety caused as a result of the discrimination. He also recommended that the respondent publish its procedures on female professional boxing within six months of the date of the Recommendation.

*The claimant was represented by the Equality Authority.*

## **DEC-E2001-019**

### ***Kennedy v Thurles Golf Club***

#### **Background**

In April 1999, the claimant and a male candidate were interviewed for the position of Bar Manager. The interview board consisted of three male members. The claimant was unsuccessful and alleged that she was discriminated against in the selection process on the basis of her gender. The claimant also alleged that she was victimised for contacting the Employment Equality Agency and for referring equality claims. The respondent denied the allegations of discrimination.

#### **Conclusions**

The Equality Officer found that the claimant established a *prima facie* case of discrimination on the basis of her greater bar experience, her performance of managerial functions on occasions, there was no issue of unsatisfactory performance, the all male interview board and the lack of transparency in the selection process. The respondent cited the successful candidate's experience as a Bar Manager, his Certificate in Supervisory Management and that his presentation at interview impressed the interviewers as reasons for his appointment. The Equality Officer found that on the basis of the evidence presented, whilst the successful candidate was better qualified, it was not clear that he held the position of Bar Manager and given the lack of a job specification, assessment criteria, a marking system and notes, it was unclear how it could be objectively stated that one candidate's interview performance was better than the other candidates's performance. The Equality Officer found that a very subjective selection process operated and was not satisfied that the selection process was fair and objective and free from any form of gender bias.

The Equality Officer was satisfied that the respondent had failed to rebut the claim of discrimination. She found on the balance of probability that the claimant was discriminated against in the selection process for promotion to the position of Bar Manager and victimised by the termination of the payment for her day off which she had been in receipt of for a considerable period of time and by the manner in which the attempt to change the staff roster was made. She also found that there was insufficient evidence to conclude that a non biased

selection board operating a non-discriminatory selection process would have concluded that the female candidate was the best person for the job.

## **Recommendation**

She recommended that:

(i) the respondent pay the claimant £5,000 for the distress suffered as a result of the discrimination occurring in relation to the Bar Manager's position, (ii) there be complete transparency in all selection procedures in the future, (iii) there be an appropriate gender balance on interview boards, (iv) the respondent pay the complainant £3,000 as compensation for the distress suffered as a result of the victimisation occurring before 18 October 1999.

She ordered that the respondent (i) pay the complainant £3,000 as compensation for the distress suffered as a result of the victimisation occurring after 18 October 1999 and (ii) liaise with the Equality Authority in relation to the drafting of an Equal Opportunities Policy.

*The claimant was represented by the Equality Authority. The respondent was represented by Butler, Cunningham & Molony, Solicitors.*

## **DEC-E-2001-020**

### ***Kennedy v Thurles Golf Club***

## **Background**

The claimant submitted a claim that she was entitled to the same rate of remuneration as that paid by Thurles Golf Club to a named male comparator from November 1997 to May 1999 in accordance with section 2 of the Anti-Discrimination (Pay) Act, 1974. She claimed that she did like work under section 3(a), 3(b) and 3(c) of the Act with the male comparator prior to his promotion to Bar Manager. The respondent denied that the claimant was engaged in like work with that of the named male comparator and also alleged that there were grounds other than gender for the difference in pay.

## **Conclusions**

The Equality Officer found that the claim was more appropriate under section 3(a) or (b). She found that the claimant and comparator were in every respect fully interchangeable with each other and performed like work within the meaning of section 3(a). In relation to section 3(b), she

found that the difference in relation to the ordering of stock was of small importance in relation to the work as a whole and that like work within the meaning of that section existed. In paying the claimant and the male comparator, the respondent did not distinguish between the earlier and later shifts worked by each of them. The Equality Officer found, in this case, that the time at which the work was carried out did not constitute a ground other than gender for the difference in pay in accordance with section 2(3) of the Act. She found that the respondent discriminated against the claimant contrary to section 2 of the Anti-Discrimination (Pay) Act, 1974 and that she was entitled to the same rate of remuneration as that paid to the comparator during the period in question.

### **Recommendation**

The Equality Officer recommended that the respondent pay the claimant the same rate of remuneration per hour as that paid to the named male comparator during the period in question.

*The claimant was represented by the Equality Authority. The respondent was represented by Butler, Cunningham & Molony, Solicitors.*

## **DEC-E2001-021**

### ***O'Sullivan v Roches Stores Cork***

### **Background**

The female claimant in this case is employed as a cleaner at Roches Stores department store in Cork city. The male comparator is employed as a general worker at the store. The Union claimed that the claimant is engaged on work which is of a similar nature and of equal value to that of the comparator who is paid a higher rate of pay.

### **Conclusions**

The Equality Officer, having carried out a work inspection at the store, concluded that the claimant was not engaged on like work with that of the male comparator. The Equality Officer found that the work of the comparator required greater skill, physical effort and mental effort than that of the claimant. The comparator's duties, which involved general cleaning duties similar to those of the claimant, also involved additional tasks relating to the changing of gas and soft drinks cylinders in the restaurant, replenishing bulk milk cartons and working regularly from a step ladder to clean light fittings and change bulbs.

## **Recommendation**

The Equality Officer found that the claimant was not entitled to the same rate of pay as the male comparators and that the respondent did not discriminate against the claimant contrary to the 1974 Act.

*The claimant was represented by SIPTU. The respondent was represented by IBEC.*

## **DEC-E-2001-022**

### ***O’Hanlon v Educational Building Society***

## **Background**

In January, 1999 the complainant and four male colleagues were interviewed for the vacant position of Marketing Manager at the Educational Building Society (EBS). The complainant was unsuccessful and alleged that she was discriminated against in the selection process on grounds of gender and marital status. She subsequently resigned from the EBS and referred a claim of discriminatory dismissal to the Labour Court in accordance with section 77(2) of the Employment Equality Act, 1998. The respondent stated that the complainant was seeking to rely on the same circumstances to support both claims and submitted that the provisions of the Employment Equality Act, 1998 prevented such a course of action. In addition, it rejected the complainant’s allegations of discrimination.

## **Conclusions**

The Equality Officer rejected the respondent’s arguments in respect of parallel complaints and found that referral of a complaint of discriminatory dismissal under the Act to the Labour Court does create any obstacle to an Equality Officer investigating a complaint of discriminatory treatment referred to the Office of the Director of Equality Investigations under the Act.

The Equality Officer examined the complainant’s allegations that she had a greater level of experience than the appointee; that her third level qualifications were more suitable for the post than those of the appointee and that the selection process was not conducted in a transparent manner. He was not satisfied that the arguments submitted by the complainant in respect of the foregoing established a *prima facie* case of discrimination and rejected the claim.

*The complainant was represented by O’Mara Geraghty Mc Court, Solicitors. The respondent was represented by BCM Hanby Wallace Solicitors.*

## DEC-E-2001-023 (Preliminary Decision)

### *A Complainant v A Company*

#### **Background**

This dispute concerns the preliminary issue of whether a claim by a complainant that she was discriminated against by her employer on the ground of gender, contrary to the provisions of the Employment Equality Act, 1998, is within the time limit of six months specified in section 77 (5) of the Act. The complainant referred a complaint of discrimination on the ground of gender to the Director of Equality Investigations on 28 April 2000. The preliminary question on the time limit arose as a result of written submissions received after the initial referral, wherein both parties agreed that the last specific instance of allegedly discriminatory behaviour occurred on 28 October 1999.

#### **Conclusions**

The Equality Officer concluded that the six month period commencing on 28 October 1999 ended on 27 April 2000.

#### **Decision**

She found that the referral of this case was outside the time specified in section 77 (5) of the Employment Equality Act, 1998.

*The complainant was represented by O'Mara Geraghty McCourt, Solicitors on the instructions of the Equality Authority. The respondent was represented by O'Hanrahan & Co, Solicitors.*

## DEC-E2001-24

### *66 Female Workers v Tesco Ireland*

#### **Background**

In September 1997, the respondent introduced a Chargehand position in the Chilled/Fresh and Frozen Food department of each of its stores. In the Janelle store, the Company did not advertise the position and management appointed a male employee. Mandate on behalf of sixty six female claimants referred a claim of discrimination on the grounds of sex for investigation. The respondent contended that the provisions of the Employment Equality Act, 1977 had not been properly invoked and the claim should be rejected on jurisdictional grounds in so far as it purported to be a class action.

## Conclusions

The Equality Officer considered that the case was exceptional in that the Union lodged a claim on behalf of sixty six claimants and then made a statement that presumably not all of the claimants would have been interested in the position. The respondent raised an issue in relation to whether eight of the claimants were actually employed in the Janelle store at the time that the appointment was made. The Equality Officer did not consider that a number of claimants may not pursue a claim individually. In the case in issue, all sixty six claimants were named on the claim form and she found no evidence that the case was a class action rather than a group of similar individual claims.

In the circumstances, she found that the Union on behalf of the sixty six claimants failed to show that each or any of the sixty six claimants were personally affected by the action of the respondent in not advertising the Chargehand position. The Equality Officer held that a presumption of unlawful discrimination on behalf of the sixty six claimants had not been raised by the action of the respondent in not advertising the post and appointing a male employee.

## Recommendation

The Equality Officer found that the claimants failed to establish a *prima facie* case of direct discrimination in terms of section 2(a) of Employment Equality Act, 1977 and in contravention of the provisions of section 3 of the Act. She found that the claimants, on the basis of their written submissions, failed to establish a *prima facie* case of indirect discrimination contrary to the provisions of section 3 of the Employment Equality Act, 1977.

*The claimants were represented by Mandate.*

## DEC-E2001-025

### *Mc Kenna v The North Western Health Board*

## Background

The complainant was obliged during her pregnancy to take sick leave as a result of a pregnancy related illness and the sick leave extended for almost the full duration of her pregnancy. As a result of the complainant's pregnancy related illness, the respondent reduced her pay to half pay during her pregnancy and again on the expiry of her maternity leave in accordance with its sick leave scheme. The complainant referred a claim that she was discriminated against on the gender ground. The respondent rejected the allegation of discrimination.

## **Conclusions**

The Equality Officer considered that the provisions of the sick leave scheme should have due regard to European Court of Justice jurisprudence in order that there is not less favourable treatment as a result of pregnancy related illness occurring during pregnancy resulting in incapacity for work. She considered that any less favourable treatment in relation to pay whilst pregnant and unfit for work due to pregnancy related illness is contrary to Article 141 (formerly Article 119) and the Equal Pay Directive as it can only affect women. The special protection afforded to pregnancy related illnesses was not given to the complainant and her illness was compared to a sick male or female. The Equality Officer noted that she was bound to interpret the provisions of the Employment Equality Act, 1998 in the light of Community law.

## **Decision**

The Equality Officer found that the respondent discriminated against the complainant contrary to the Equal Treatment Directive when it treated the complainant's pregnancy related illness as normal illness when applying the provisions of the sick leave scheme. She found that the respondent discriminated against the complainant contrary to Article 141 and the Equal Pay Directive when her pay was reduced to half due to a pregnancy related illness occurring during pregnancy which resulted in her being unfit for work. The Equality Officer ordered that the respondent: (i) amend the provisions of its sick leave scheme to have due regard to European Court of Justice jurisprudence, (ii) discount the complainant's pregnancy related illness resulting in incapacity for work for the purposes of the sick leave scheme, (iii) restore the complainant's pay to the amount that would have been payable had her pregnancy related illness not been treated as normal sick leave and pay her the arrears due and (iv) pay the complainant £3,000 for the distress suffered as a result of the discrimination.

*The claimant was represented by IMPACT. The respondent was represented by the HSEA.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC-E2001-026**

***Mc Kernan v UCD***

## **Background**

In April 1999, the post of Professor of Education was advertised internationally and the claimant applied for the position. Twenty eight applications were received which consisted of applications

from twenty males and eight females. The Assessment Board consisted of six internal assessors (five male and one female) and two external assessors (one male and one female). Six candidates, four male and two female were short listed. The claimant was not shortlisted for interview. The claimant alleged that he was discriminated against in the shortlisting process on the basis of his gender and marital status. The respondent denied the allegation of discrimination and stated that the claimant did not meet the selection criteria.

## **Conclusions**

The Equality Officer noted that whilst the selection process was in accordance with agreed procedures, there was a certain lack of transparency. However, she did not consider that the lack of transparency in the selection process, the matter of the claimant's opinion in relation to the superiority and excellence of his record on the criteria specified for the post and the gender balance of the interview board, in themselves established that the shortlisting process was so irrational or unfair as to raise a presumption of unlawful discrimination. In considering the evidence as a whole, the Equality Officer found that the claimant had failed to discharge the evidential burden placed on him and his claim of gender discrimination could not therefore succeed. In relation to the claim of discrimination on the marital status ground, the Equality Officer found that evidence that the respondent, at any stage, sought information from the claimant in relation to his marital status or evidence that the shortlisting committee took the claimant's marital status into account during the shortlisting process had not been presented by the claimant. She found that the claimant had failed to discharge the evidential burden placed on him and his claim of discrimination on the marital status ground could not therefore succeed.

## **Recommendation**

The Equality Officer found that the claimant had failed to establish a *prima facie* case of direct discrimination on the gender and marital status grounds in terms of section 2(a) and 2(b) of Employment Equality Act, 1977 and in contravention of the provisions of section 3 of the Act.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The respondent was represented by Mr. Eugene O'Sullivan Solicitor.*

## **DEC-E2001-027**

***Geasley v Watermans Printers Ltd.***

## **Background**

The complainant commenced working for the respondent in 1998 in a full-time post. In 1995 the

respondent issued protective notice on all its employees due to a fall in business. Shortly afterwards the complainant was re-employed by the respondent on the basis of a 24 hour working week. In January, 1999 the complainant requested and was granted a 13.5 hour working week for family reasons. Between May, 1999 and March, 2000 a number of full-time positions became available in the department where the complainant worked and she alleged that these vacancies were filled by unmarried males. The complainant was not offered a return to full-time employment and contended that she was therefore discriminated against on grounds of gender, marital status and family status. The respondent rejected the allegations.

### **Conclusions**

The Equality Officer found on balance that the respondent's decision not to offer the complainant full-time employment was based on factors unconnected with the complainant's gender, marital status or family status. However, he expressed concern about some elements of the respondent's recruitment practices and urged it to review them immediately.

*The claimant was represented by the GMPU. The respondent was represented by Kieran Mc Carthy + Company, Solicitors.*

## **DEC-E2001-028**

### ***70 Named Female Employees v Superquinn***

#### **Background**

This dispute concerns a claim by MANDATE, on behalf of 70 named female employees of Superquinn, Sutton that they are discriminated against by the respondent in relation to the cleaning of staff uniforms on grounds of sex. The claim was referred in February 1998 under Sections 2(a) and 2(c) of the Employment Equality Act, 1977. In Superquinn Sutton departments are divided into two categories fresh food and non-fresh food, likewise staff uniforms are divided into two main categories, in fresh food departments staff wear white uniforms and non-white uniforms are generally worn at checkouts, shop floor and similar areas. The fresh food/white uniforms are cleaned by the company while employees in other areas are responsible for cleaning their own uniforms.

#### **Conclusions**

The Equality Officer found that the union failed to provide *prima facie* evidence of direct discrimination by the respondent against the claimants on the basis of their sex. The Equality

Officer found that the union did provide *prima facie* evidence of indirect discrimination in relation to the cleaning of uniforms. He also found that the practice complained of was based on factors unconnected with the sex of the employee

### **Recommendation**

The Equality Officer found that the respondent did not discriminate against the claimants in terms of sections 2(a) & 2(c) of Employment Equality Act, 1977 and in contravention of the provisions of section 3 of the Act.

*The claimants were represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E2001-029**

### ***Perry v The Garda Commissioner***

### **Background**

This dispute concerned a claim by Ms Perry, who was employed as a Traffic Warden, that she was discriminated against by the Garda Commissioner on the ground of age, when she was offered a less favourable Voluntary Early Retirement (VER) package than a younger colleague. At the time of the offer, the complainant was aged 64 and her colleague was aged 59, and the calculation of benefits under the VER varied depending on whether the applicant was under or over 60 years of age. The respondent denied that the VER was discriminatory and disputed the legitimacy of the complainant's younger colleague as a valid comparator. It claimed that the rationale of the scheme was to encourage early retirement, and that the calculation of benefits was designed to reflect the fact that a younger employee would forgo more potential future earnings by applying for the VER.

### **Conclusions**

The Equality Officer found that the complainant's younger colleague was a valid comparator for the purposes of the investigation. She found that certain aspects of the VER (pension, lump sum and redundancy payment) were outside her power to investigate because of specific provisions of the Act, but that the severance gratuity element of the scheme constituted remuneration for the purposes of the Act. She considered the application of the scheme to two hypothetical employees with identical service records, one aged 60 years and 1 day and the other aged 59 years and 364 days. In this example, the difference in income forgone by the employees would

be negligible, but the older employee would receive a severance gratuity of £2,000 while the younger employee would have an option of a severance gratuity of £8,000. The Equality Officer found that the disparity was based exclusively on the ages of the employees, and that no clear actuarial or other evidence had been presented by the respondent which would make such discrimination permissible in the terms of section 34 (3) of the Act.

However, she noted that section 34 (6) provided that arrangements for age-related remuneration shall be considered to be in sufficient compliance with the Act if they are brought to an end within a period of three years from 18 October 1999, the date of commencement of the Act.

### **Decision**

The Equality Officer found that the transitional provisions of section 34 (6) meant that the VER must be considered to be in compliance with the Act up to and including 17 October 2002. Based on this, she found that the Garda Commissioner did not discriminate against the complainant on the ground of age.

*The complainant was represented by Gabrielle Wolfe, Solicitors. The respondent was represented by the Chief State Solicitor.*

## **DEC-E2001-030**

### ***Riney v County Donegal Vocational Education Committee***

### **Background**

The claimant, who is employed as a teacher at Milford Vocational School, was one of seven candidates shortlisted for interview in a competition to fill an Assistant Principal post at the School. A male candidate was successful in the competition and the claimant was placed in second place overall. The claimant contended that she was discriminated against in the selection process on the grounds of her gender and that she was the better qualified candidate than the male appointee.

### **Conclusions**

The Equality Officer was satisfied from the evidence that the claimant was discriminated on grounds of her gender in relation to two aspects of the selection process. Firstly, the claimant's superior academic qualifications were not reflected in the marks awarded to her by all of the

members of the selection panel and the Equality Officer was satisfied, on the balance of probabilities, that the reason was that she was a woman. Secondly, when the claimant tied with the male appointee at the end of the selection process the post was awarded to the candidate with the longer service i.e. the male candidate. The Equality Officer found that the use of service as a 'tie-breaker' in this manner favoured male candidates who generally had longer service than the female candidates.

### **Recommendation**

The Equality Officer found that County Donegal VEC did discriminate against Ms Riney on grounds of her gender contrary to Section 2(a) of the 1977 Act and by the imposition of an inessential requirement contrary to Section 2(c) when it failed to appoint her to the position of Assistant Principal at Milford Vocational School. The Equality Officer recommended that Ms Riney be appointed to the position of Assistant Principal with effect from the date of appointment of the male appointee and be paid compensation in the amount of £5,000 for the distress suffered. The Equality Officer also recommended that the VEC make every effort to ensure that selection boards reflect, as far as is reasonably practicable, the gender mix of candidates in future promotional competitions.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The respondent was represented by I.B.E.C.*

## **DEC-E2001-031**

***Barry v Board of Management (Aisling Project), Virgin Mary Schools***

### **Background**

The Aisling Project is a state funded programme involving three schools in the Ballymun area of Dublin. Its purpose is to accommodate 16 primary level children from difficult backgrounds in a 'home setting' after school for a number of hours where they can work on homework and socialise in a supervised environment. The Board of Management, Virgin Mary Schools was given the task of selecting a Director for the Aisling project which it advertised publicly. Ms Barry, who was one of five (all female) applicants called for interview, complained that she was discriminated against because of her gender and marital status when she was asked at interview how she would cope with looking after her family and working full time outside the home. Ms Barry is married with children while the appointee was single.

## **Conclusions**

The Equality Officer was satisfied from the evidence that the claimant was discriminated on grounds of her marital status and gender when she was asked at interview how she would cope with looking after her family and working full time outside the home. While there were no male candidates in the competition, the Equality Officer was satisfied that a male candidate would not have been subjected to a similar line of questioning and that the use of a hypothetical comparator (specifically provided for under the Employment Equality Act, 1998) was, in the light of established case law, valid under the 1977 Act also.

## **Decision**

The Equality Officer found that Board of Management, Virgin Mary Schools did discriminate against Ms Barry on grounds of her gender and marital status contrary to Section 2(a) and 2(b) of the 1977 Act. The Equality Officer recommended that the Respondent pay to the Claimant the sum of £1,000 by way of compensation for the distress caused to her, review its interview practices to ensure that discriminatory questioning does not occur in the future and ensure that interview records are retained for a period of at least one year from the end of any competition and, in the event of a complaint being made under employment equality legislation, pending the conclusion of any investigation of the complaint.

*The claimant was represented by the Equality Authority. The respondent was represented by Mr James O'Higgins, Solicitor*

## **DEC-E2001-032**

### ***Partridge v DBA Publications***

## **Background**

The complainant and comparator worked in the Design Studio at the respondent's office in Dublin. The complainant commenced her employment with the respondent as a "junior designer" in 1996 and progressed to the position of "senior designer" by 1999. The comparator was recruited in September, 1998 as a "senior designer and studio head". The Equality Authority claimed that the complainant was engaged on like work in terms of section 7(a), (b) and (c) of the Act and was therefore entitled under section 19 of the Act to the same rate of remuneration as that paid to the comparator.

## **Conclusions**

The Equality Officer, having carried out a work inspection at the respondent's office, concluded that the complainant was not engaged on like work with the male comparator in terms of any

of the subsections of section 7 of the Act. In terms of sections 7(a) and 7(b) of the Act, the Equality Officer found that the comparator performed a range of management functions which were not performed by the complainant and that these functions were a significant element of his work. In terms of "like work" under section 7(c) of the Act the Equality Officer found that the demands made on the comparator in terms of mental effort, responsibility and working conditions were greater than those made on the complainant and that the demands made on both parties in terms of skill and physical effort were equal.

## **Decision**

The Equality Officer found that the complainant did not perform like work with the named male comparator and was therefore not entitled to the same rate of remuneration as that paid to the comparator.

*The complainant was represented by the Equality Authority. The respondent was represented by Sheils, Solicitors.*

## **DEC-E2001-033**

### ***Nevin v The Plaza Hotel***

## **Background**

The complainant, a member of the Traveller community, said that she had been employed as an Accommodation Assistant by the respondent. At the end of her first day's work, when she asked about her future working roster, she was told by the Supervisor that it had been a trial day and she would be contacted again. Following several unsuccessful attempts by the complainant to speak to the Accommodation Manager, she was eventually told that there was no further work for her. Other people contacted the respondent on her behalf and the Supervisor told one of them that the complainant "did not have the same concept of cleaning as other people but how could she be expected given the way they lived". The respondent denied that the complainant had been offered a job, and stated that a trial day was normal practice. It said the only reason the complainant was not offered further work was because of her unsatisfactory work performance. It also said it had a positive approach to employment of people from a variety of backgrounds, and that the hotel management had been unaware of the complainant's membership of the Traveller community. It denied that the Supervisor made the discriminatory comment.

## **Conclusions**

The Equality Officer stated that a positive employment programme in certain other areas had no

bearing on a complaint of discrimination on the ground of membership of the Traveller community. She found that the trial day was applied in a selective fashion, as opposed to being normal practice. She was satisfied that the complainant's ability to do the work was not adequately assessed by the respondent, and in any case independent evidence was provided that her work was satisfactory. She found that the respondent's actions during the week after the day's employment were inconsistent, but noted that an unreasonable or unfair sequence of events does not necessarily constitute discrimination. However, on the balance of probabilities, she found that the discriminatory comment attributed to the Supervisor was made, and that this constituted unfavourable treatment in the context of the Act and had the effect of making the unfair sequence of events demonstrate discriminatory treatment of the complainant. She was satisfied that the respondent had not provided evidence that it had taken reasonably practicable steps to prevent the discriminatory act, and that it was therefore vicariously liable for the actions of its employees.

## **Decision**

The Equality Officer found that the respondent discriminated against the complainant when it refused her access to employment on the basis of her membership of the Traveller community. She ordered that the respondent pay the complainant a sum of £5,000 in respect of the discrimination. She further ordered that the respondent draw up a code of practice on equality of opportunity for its employees, that all members of staff be instructed in this code, and that the code apply to all employees and prospective employees of the respondent.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by the Equality Authority. The respondent was represented by IBEC.*

## **DEC-E2001-034**

### ***Kehoe v Convertec Limited***

## **Background**

The complainant alleges that he was discriminated against by the respondent on grounds of disability in terms of Sections 6(2)(g) of the Employment Equality Act, 1998 and in contravention of Section 8 of that Act when he failed to meet performance targets. The complainant alleged that the respondent was aware of his disability.

## **Conclusions**

The Equality Officer found that the respondent discriminated against the complainant in terms of Section 6(2)(g) of the Employment Equality Act, 1998. In making this finding the Equality Officer noted that the respondent failed to examine the options available to accommodate the needs of the complainant given his disability. Instead the respondent put pressure on the complainant to meet performance targets and this could have adversely affected his performance. The Equality Officer noted that the complainant was able to carry out the job but was unable to meet a condition of the employment namely to perform at a standard level expected of all employees.

## **Decision**

The Equality Officer found that the respondent discriminated against the complainant by failing to examine the options available to accommodate his needs given his disability. The Equality Officer ordered the respondent to pay the complainant £8,000 in compensation for the stress suffered as a result of the discrimination.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by SIPTU. The respondent was represented by IBEC.*

## **DEC-E 2001-035**

### ***15 Named Female Employees v TESCO Ireland Limited***

## **Background**

The Union, on behalf of twelve named female claimants, alleges that they were directly discriminated against by the respondent in terms of Sections 2(a) of the Employment Equality Act, 1977 when they were asked to clean toilets and male colleagues were not asked to undertake this duty.

## **Conclusions**

The Equality Officer found that the Union failed to make a valid complaint. On the referral form the Union stated that the alleged discrimination occurred on 27 October, 1998. However the Union was unable to say which claimant(s) had carried out the toilet cleaning duties on this date. Without a named claimant the Equality Officer held that the claim was invalid.

## **Recommendation**

The Equality Officer found that the Union had referred an invalid claim as there was no named claimant(s) against whom the respondent was alleged to have discriminated on the date of the discrimination as stated by the Union.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimants were represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E2001-036**

### ***Murphy v Tesco Ireland Limited***

## **Background**

The complainant alleged that he was discriminated against by the respondent in terms of Section 6(2)(a) of the Employment Equality Act, 1998 and contrary to Sections 8(5), 8(7) and 8(8) of that Act for the following reasons:

- (a) In relation to access to employment in the arrangements the respondent made for the purpose of deciding to whom the employment was offered;
- (b) Refusal to offer or afford the complainant the same opportunities or facilities for employment, counselling, training and work experience as that offered or afforded to the current Personnel Manager;
- (c) The respondent refused or deliberately omitted to offer or afford the complainant access to opportunities for promotion in circumstances in which another eligible and qualified employee was offered and afforded such access or the respondent did not offer or afford the complainant access in the same way to those opportunities.

## **Conclusions**

The Equality Officer found that the respondent did not discriminate against the complainant in terms of Section 6(2)(a) of the Employment Equality Act, 1998 as the Union failed to establish a *prima facie* case of discrimination. The respondent had upgraded the position of Staff Officer to that of Personnel Manager and had offered these upgraded positions to current holders of the

Staff Officer positions. Staff Officers were appointed to positions within the store in which they held that position. Any posts which were not taken up by Staff Officers were advertised both internally and externally. Applicants were interviewed and appointments made. Successful internal applicants may have had to move to another store to take up appointment. The complainant held that he was discriminated against because, by allowing Staff Officers to opt for the Personnel Manager position within the store in which they were working, it meant that he could not be appointed as Personnel Manager in the store in which he was working. The complainant failed to make any application for the position of Personnel Manager when it was initially advertised or indeed subsequently when vacancies became available. As the complainant did not apply for the position of Personnel Manager he denied himself both training and promotion opportunities.

### **Decision**

The Equality Officer found that the complainant failed to establish a *prima facie* claim of discrimination

*The complainant was represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E2001-037**

### ***Rooke v Tesco Ireland Limited***

### **Background**

The respondent introduced a new Senior Management role of Personnel Manager in each of its stores. The position was firstly offered to staff in the Staff Manager grade and vacancies arising throughout the company after the offer process were advertised internally and externally. A female was appointed to the position in the Stillorgan store where the complainant works. The complainant did not apply for the position and did not seek training in order to gain promotion to the post.

### **Conclusions**

In relation to the claim of discrimination contrary to section 8(5) of the Act, the Equality Officer found that the complainant did not show that the arrangements made by the respondent for the purpose of deciding to whom the post of Personnel Manager should be offered discriminated against males or show that specific entry requirements applied to male applicants for the post and did not apply to females. The complainant confirmed that he did not apply for the post of Personnel Manager and he never expressed an interest in a Senior Management position.

In relation to the claim of discrimination contrary to section 8(7) of the Act, the complainant clarified that he did not at any stage seek training in order to gain promotion to the Personnel Manager position. The complainant did not adduce evidence which showed that the respondent's training policies are gender biased and confirmed that he did not approach the respondent in relation to counselling, training or work experience which would prepare him for the post of Personnel Manager.

In relation to the claim under section 8(8) of the Act, the respondent submitted that all other members of staff, both male and female, who were not Staff Managers were not offered the new post. The Equality Officer found that the complainant did not adduce any evidence to show that the respondent refused or deliberately omitted to offer or afford him access to opportunities for promotion in circumstances in which the female Staff Manager (now the Personnel Manager) was offered or afforded access to promotional opportunities or that the respondent did not offer or afford him access to promotion in the same way as the female in question.

## **Decision**

The Equality Officer found that the complainant failed to establish a *prima facie* case of discrimination on the gender ground that the respondent discriminated against him contrary to section 8(5), 8(7) and 8(8) of the Employment Equality Act, 1998.

*The complainant was represented by MANDATE. The respondent was represented by IBEC.*

## **DEC-E-2001-038**

### ***McEvoy v Dublin Institute of Technology***

## **Background**

This dispute concerns a claim by Ms McEvoy, employed as a Storekeeper by the Dublin Institute of Technology, that she is entitled to the same rate of remuneration as that paid to a named male comparator, employed by the Institute as a Technician, in accordance with the provisions of section 19 of the Employment Equality Act, 1998, on the basis that she performs like work with him as defined in section 7 (1) (b) and section 7 (1) (c) of the Employment Equality Act, 1998. The respondent denied that similar work, as defined in section 7 (1) (b), or work of equal value, as defined in section 7 (1) (c), existed between the complainant and the comparator.

## **Conclusions**

In relation to the claim under section 7 (1) (b), the Equality Officer found that there were many similarities between the two jobs. However, the comparator had significant extra responsibilities,

as well as extra qualification requirements, which were not mirrored by comparable responsibilities on the part of the complainant. Accordingly, the work performed by the two employees was not of a similar nature in the context of section 7 (1) (b). With regard to the claim under section 7 (1) (c), the Equality Officer found that the physical effort and mental effort required by both employees were similar. However, she found that the skill, responsibility and working conditions of the two jobs were not comparable, and that therefore the work performed by both employees was not of equal value in the context of section 7 (1) (c).

## **Decision**

The Equality Officer found that the Dublin Institute of Technology did not discriminate against the complainant on the basis of her pay in terms of section 19 of the 1998 Act.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by IMPACT. The respondent was represented by IBEC*

## **DEC-E2001-039**

***Damery v The Italian Embassy***

### **Background**

The complainant worked as an Executive Employee at the Italian Embassy in Dublin. Her duties included the preparation of financial records, general administration and liaising with the Ministry in Rome on these matters. In November, 2000 she referred a complaint of discrimination under the Employment Equality Act, 1998, in respect of equal pay and equal treatment on grounds of race. In November, 2000 the respondent advised that it was claiming sovereign immunity in respect of the claim. A preliminary hearing to examine the issue of jurisdiction of this Office to hear the substance of the case was held in April, 2001.

### **Conclusions**

The Equality Officer held that the arguments submitted by the Equality Authority in support of its contention that developments since the Supreme Court's judgement in *The Government of Canada -v- Employment Appeals Tribunal and Brian Burke* effectively rendered the judgement outdated, were unconvincing. Consequently, he held that he was obliged to have regard to the judgement in reaching his decision. He also held, contrary to further argument submitted by the Equality Authority, that the respondent had never waived its right to avail of sovereign immunity in respect of any dealings it had with the complainant with regard to the employment relationship between them.

## **Decision**

The Equality Officer concluded that the Office of the Director of Equality Investigations had no jurisdiction to investigate the complainant's substantive claim of discrimination on grounds of race.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by the Equality Authority. The respondent was represented by Noel O'Gorman & Company, Solicitors.*

## **DEC-E2001-040**

### ***O'Shea v The Italian Embassy***

## **Background**

The complainant worked as an Auxiliary employee at the Italian Embassy in Dublin. His duties included driving the Ambassador's official car. In November, 2000 he referred a complaint of discrimination under the Employment Equality Act, 1998, in respect of equal pay and equal treatment on grounds of race. In November, 2000 the respondent advised that it was claiming sovereign immunity in respect of the claim. A preliminary hearing to examine the issue of the jurisdiction of this Office to hear the substance of the case was held in April, 2001.

## **Conclusions**

The Equality Officer held that the arguments submitted by the Equality Authority in support of its contention that developments since the Supreme Court's judgement in *The Government of Canada -v- Employment Appeals Tribunal and Brian Burke* effectively rendered the judgement outdated, were unconvincing. Consequently, he held that he was obliged to have regard to the judgement in reaching his decision. He also held, contrary to further argument submitted by the Equality Authority, that the respondent had never waived its right to avail of sovereign immunity in respect of any dealings it had with the complainant with regard to the employment relationship between them.

## **Decision**

The Equality Officer concluded that the Office of the Director of Equality Investigations had no jurisdiction to investigate the complainant's substantive claim of discrimination on grounds of race.

*The claimant was represented by the Equality Authority. The respondent was represented by Noel O'Gorman & Company, Solicitors.*

## DEC - E2001-041

### *Eng -v- St. James's Hospital*

#### **Background**

The complainant, a Malaysian national, occupied a Supernumerary Intern post in St. James's Hospital from 10 July 2000 to 31 March 2001. He claimed that he did like work with that of three named Irish comparators for that period. He alleged that he was discriminated against on the race ground (includes nationality) in terms of his remuneration as he did not receive any basic salary whereas his comparators were paid basic salary. The respondent denied the allegation of discrimination and alleged that there were grounds other than race for the difference in pay.

#### **Conclusions**

As a preliminary matter, the Equality Officer considered whether the complainant was in an employment relationship in the absence of basic salary or whether the Internship period could be considered to be vocational training. She concluded that there was an employment relationship and as the respondent did not dispute like work with the comparators, the complainant had established a *prima facie* case of pay discrimination on the race ground. The onus therefore fell to the respondent to rebut the claim by showing that there were grounds other than race for the difference in pay.

The respondent firstly submitted that the work permit rules of the Department of Enterprise, Trade and Employment constituted a ground other than race. The Equality Officer did not consider that it was envisaged that the work permit rules which required that the preference to be given to Irish and EEA nationals to avail of employment opportunities applied to paid posts only and that non-EEA nationals could instead be employed in unpaid posts.

The second ground submitted by the respondent was that non-EEA graduates could be displaced in their exam ranking in accordance with the Treaty of Rome and Council Regulation (EEC) No. 1612/68. The Equality Officer considered that Article 39 EC Treaty (ex Article 48 of the Treaty of Rome) did not oblige employers to discriminate against non-EU nationals. She also considered that the priority afforded to nationals of a Member State as regards access to available employment in another Member State by Council Regulation 1612/68 did not oblige discriminatory treatment of non-EU nationals in circumstances where the respondent was bound by national law not to discriminate. The Equality Officer found that the respondent had failed to rebut the complainant's claim of pay discrimination.

#### **Decision**

The Equality Officer found that the complainant was discriminated against in relation to his pay

on the race ground contrary to section 29(1) of the Employment Equality Act, 1998. She ordered that the respondent pay the complainant for the period in question (i) arrears of salary, (ii) unrostered overtime based on an average of 29 hours each week, (iii) a living out allowance payable per week.

*The respondent was represented by the HSEA.*

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

## **DEC-E2001-042**

***Walsh v Tesco Ireland Ltd***

### **Background**

This dispute concerns a claim by Ms Walsh, employed as a customer services representative, that Tesco Ireland t/a Quinnsnorth discriminated against her on the grounds of sex when her requests for part-time work for family reasons were refused by management. Although the matter was ultimately resolved to the satisfaction of both parties by local agreement, the claimant alleged that the original act of refusal in February 1998 was discriminatory. The respondent denied the allegation of discrimination. It said that the request for part-time work was not immediately granted for operational reasons, and that an employer was only obliged to facilitate a worker if it was possible to do so.

### **Conclusions**

The claimant produced no evidence, and did not claim, that a man would have been granted part-time work for childcare purposes. She said that as only women request part-time work for childcare purposes, only women are affected by a refusal. The Equality Officer did not accept that childcare was inextricably linked to gender, and found that direct discrimination had not occurred. The Equality Officer further found that indirect discrimination had not occurred, and rejected a suggestion that the claimant could maintain a claim of discrimination on the ground of sex on the basis that other women had been given a facility and she had not.

The Equality Officer did not consider to be logical or reasonable an argument by the respondent that the claimant should have resigned if she wished to demonstrate that she could not combine full-time work and childcare. She also felt that both parties had been under a misapprehension regarding obligations concerning permission to work part time, and she noted that an automatic right to part-time work had not been established by legislation or jurisprudence.

## **Decision**

The Equality Officer found that Tesco Ireland Ltd did not discriminate against the claimant in terms of section 2, and contrary to section 3, of the Employment Equality Act, 1977 when it did not grant her request for part-time work immediately after her return from maternity leave.

***This ruling was under appeal to the Labour Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by Mandate. The respondent was represented by IBEC.*

# Appendix 3:

## Summaries for all 2001 Equal Status decisions

### DEC-S2001-001

*Mr John Ward and Mr Michael Ward v Mr Patrick Quigley, The Boathouse Pub, Portumna*

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in pubs - Risk of criminal and disorderly conduct, section 15(1) - Discrimination by association, section 3(1)(b)*

#### **Background**

This dispute concerns complaints by Mr John Ward and Mr Michael Ward that they were discriminated against by Mr Pat Quigley, owner of the Boathouse Pub, Portumna on the grounds that they were members of the Traveller community. The case revolved around an incident in the Boathouse Pub, Portumna on 26 October 2000 when the complainants were only offered one drink by the publican. The complainants maintained that they were discriminated against on the Traveller community ground in terms of sections 3(1)(a), 3(1)(b) and 3(2)(i) of the Equal Status Act 2000 in that they were not provided with a service which is generally available to the public, contrary to Section 5(1) of the Act.

#### **Conclusions of the Equality Officer**

The Equality Officer found that the complainants had established a *prima facie* case. The respondent maintained that he restricted service to the first complainant because he believed that a threat of disorderly conduct existed on the night in question. The Equality Officer found that there was insufficient evidence to substantiate this claim and concluded that the publican's actions constituted discrimination on the grounds of membership of the Traveller community. The second complainant was unknown to the respondent but was also restricted service. The Equality Officer concluded that this action constituted discrimination by association with a member of the Traveller community. The Equality Officer found, however, that there was no evidence that the respondent operated a universal policy of discrimination against Travellers.

## **Decision**

The Equality Officer found that the complainants had been discriminated against on the Traveller community ground in terms of sections 3(1)(a), 3(1)(b) and 3(2)(i) of the Equal Status Act 2000 in that they were not provided with a service which is generally available to the public, contrary to Section 5(1) of the Act. He found in favour of the complainants and ordered that the respondent pay each the sum of £300 for the humiliation and embarrassment suffered by them.

*The respondent was represented by James J. Kearns & Sons, Solicitors*

## **DEC-S2001-002**

### ***Mr Tom Conroy v Mr Luke Carney, Carney's Bar, Ballinrobe***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in pubs - Risk of criminal and disorderly conduct, section 15 .*

## **Background**

This dispute concerns a complaint by Mr Tom Conroy that he was discriminated against by Mr Luke Carney, owner of Carney's Bar, Ballinrobe on the grounds that he was a member of the Traveller Community. The case revolved around an incident in Carney's Bar on 30 October 2000 when the complainant states that he entered the pub and was told by the respondent that he was not being served. The complainant stated that no reason for this decision was conveyed to him on the night. The respondent maintained that Mr Conroy was refused because he had evidence that he was a trouble-maker and not because he was a member of the Traveller community. The complainant maintained that he was discriminated against on the Traveller community ground in terms of sections 3(1)(a) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public, contrary to section 5(1) of the Act. The respondent argued that he was entitled to refuse service to the complainant under section 15 of the Act

## **Conclusions of the Equality Officer**

The Equality Officer found that the complainant had established a *prima facie* case and that the burden of proof had shifted to the respondent. The respondent maintained that he restricted service to the complainant because he believed that a threat of disorderly behaviour existed on

the night in question. The Equality Officer found that there was insufficient evidence to substantiate this claim and concluded that the publican's actions were based on a bias against Travellers and that his actions constituted discrimination on the grounds of membership of the Traveller community.

## **Decision**

The Equality Officer found that the complainant had been discriminated against on the Traveller community ground in terms of sections 3(1)(a) and 3(2)(i) of the Equal Status Act 2000 in that he was not provided with a service which is generally available to the public, contrary to Section 5(1) of the Act. The Equality Officer found in favour of the complainant and ordered that the respondent pay him the sum of £1000 for the humiliation and embarrassment suffered by him.

*The claimant was represented by Michael McDarby, Solicitor. The respondent was represented by Sean Foy, Solicitor.*

## **DEC-S2001-003**

### ***Mr Michael Connors and Mrs Bridget Connors v Mr John Crowe, (Owner) Molly Heffernan's Public House***

*Equal Status Act, 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - refusal of service in a pub - section 5(1) - statutory deadlines - issue of Traveller identity - failure to give a reason for refusal - inference under section 26*

## **Background**

On 18th November, 2000, Mr Michael Connors was refused service in Molly Heffernan's Public House. His wife, Mrs Bridget Connors, was refused service there on 21st November 2000. Both complainants claimed that they were refused because of their membership of the Traveller community under section 3(1)(a) of the Act because they were not provided with a service which is available to the public, contrary to section 5(1) of the Act. The respondent claimed that he did not have any discriminatory policies. He claimed that the complainants were not known to his staff as members of the Traveller community and that Mr Michael Connors was not a Traveller. He also claimed that the complainants had not adhered to the statutory deadlines prescribed in the Act. The respondent did not provide a specific reason why the complainants were refused service.

## **Conclusions of Equality Officer**

The Equality Officer found that the complainants were both Travellers within the scope of the definition in the Act, that they had complied with the statutory deadlines and that they had established a *prima facie* case of discrimination. The Equality Officer also found that the respondent did not succeed in rebutting the inference of discrimination and took an inference under section 26 of the Act that the reason the claimants were refused service was because they were members of the Traveller community.

## **Decision**

The Equality Officer decided that both of the complainants had been discriminated against on the basis of their membership of the Traveller community and ordered that the respondent pay each of them £2,200 (2793 Euros). The Equality Officer also ordered that the respondent place a sign in his pub stating his commitment to equality and that he also bring this decision to the attention of all the staff of Molly Heffernan's public house

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by Tallaght Travellers CDP.*

## **DEC-S2001-004**

***Kathleen Mongon v Michael & Barbara Hogan, The Angler's Rest , Corofin***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in pubs .*

## **Background**

This dispute concerns a complaint by Mrs Kathleen Mongon that she was discriminated against by Michael and Barbara Hogan, owners of the Angler's Rest Pub, Corofin, Co Clare. The complainant maintained that she was discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in that she was not provided with a service which is generally available to the public contrary to Section 5(1) of the Act. Mrs Mongon stated that, on 28 December 2000, the landlady of the Angler's Rest first refused to serve her an alcoholic drink and then only agreed to do so on condition that herself and her husband leave after having one drink. The respondents in the case maintained that this alleged incident did not occur and that they did not restrict service to the complainant.

## **Conclusions of the Equality Officer**

The Equality Officer found that, while he had been provided with much hearsay evidence, there was a conspicuous lack of hard evidence available to him on which to base his decision. While there was evidence that some level of discussion occurred, the parties disputed the date of this discussion.. The complainant referred to 28 December 2000 while the respondents insisted that it was 30 December 2000. Also, while the complaint revolved around a conversation which allegedly occurred when drinks were being ordered, the respondent totally rejected that the alleged conversation took place and neither party produced independent witnesses to substantiate what had actually happened. Overall, the Equality Officer found that insufficient evidence had been produced to show that a *prima facie* case of discrimination existed.

## **Decision**

The Equality Officer found in favour of the respondents on the basis that the complainant had not established a *prima facie* case of discrimination on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000.

*The claimant was represented by Charles Foley, Solicitor. The respondent was represented by Mary Cashin, Solicitor.*

## **DEC-S2001-005**

### **Mr. Martin Collins v Mr. Jerry Kyle, Kyle's Pub**

*Equal Status Act, 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, Section 3(2)(i) - Supply of goods and services, Section 5(1) - Refusal of service in a pub - Barred because of conduct.*

## **Background**

The dispute concerns a claim by Mr. Martin Collins that he was discriminated against by Mr. Jerry Kyle, Kyle's Pub contrary to the Equal Status Act, 2000, on the grounds that he is a member of the Traveller Community. The complainant alleged that he was discriminated against on the Traveller community ground by the respondent when he was refused service in the pub on 9 December, 2001. The respondent's case was that he was entitled to refuse him because he was barred from the pub because of his previous conduct.

## **Conclusions of the Equality Officer**

The Equality Officer found that the complainant had not established a *prima facie* case of discrimination. The respondent maintained he was entitled to refuse service because the

complainant was barred from his premises because of his behaviour some 13 years previously. The Equality Officer found that the complainant was barred because of unacceptable behaviour, that the respondent's policy was to bar people for life for violent conduct and that this policy was applied equally to both the settled and Traveller community. The Equality Officer further found that there was no evidence to support the complainant's contention that the respondent operated a discriminatory policy against Travellers.

## **Decision**

The Equality Officer decided that the complainant was not discriminated against on the Traveller ground contrary to Section 3(1) and 3(2)(i) of the Equal Status Act and in terms of Section 5(1) of that Act.

*The claimant was represented by Northside Traveller Support Group. The respondent was represented by Michael J Kennedy Solicitor.*

## **DEC-S2001-006**

### ***Mr John Donovan v Gort Community Council Ltd***

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - refusal of entry to a soccer competition - issue of Traveller identity.*

## **Background**

Gort Community Council Ltd ran a leisure centre in Gort. On 6th November, 2000, Mr John Donovan was refused entry to a soccer competition which was due to take place in the leisure centre. Mr Donovan claimed that he was discriminated against under section 3(1)(a) and contrary to section 5(1) of the Act because of his membership of the Traveller community when he was not allowed to participate in the competition. Gort Community Council Ltd denied Mr Donovan's allegation of discrimination. It claimed that it did not identify Mr Donovan as a member of the Traveller community and that the reason for his exclusion from the soccer competition was based on his past behaviour. It claimed that it did not have a discriminatory policy against Travellers.

## **Conclusions of the Equality Officer**

The Equality Officer concluded that the complainant was a member of the Traveller community within the scope of the Act and also concluded that the complainant had established a *prima facie* case of discrimination. The Equality Officer found that the respondent did not succeed in rebutting the inference of discrimination.

## Decision

The Equality Officer decided that the complainant had been discriminated against on the basis of his membership of the Traveller community and ordered that the respondent pay £500 (635 Euros) compensation. The respondent was also ordered to put an appeal system in place for people who are refused membership of the leisure centre or the use of the facilities there.

*The claimant was represented by Mr Charles Foley, Solicitor. The respondent was represented by Mr Colman Sherry, Solicitor.*

## DEC-S2001-007

### **Mr Willam McDonagh v Ms Rachel Quinn, Licensee of The Coach House**

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - alleged refusal of service in a pub - burden of proof on complainant to present a prima facie case.*

## Background

Ms Rachel Quinn, was the licensee of a pub called the The Coach House in Clarecastle, County Clare. Mr McDonagh claimed that on 24th December, 2000, he entered The Coach House and was refused service by Ms Quinn. He claimed that Ms Quinn discriminated against him on the basis of his membership of the Traveller community in terms of section 3(1)(a) of the Act by not providing him with a service which is available to the public generally contrary to section 5(1) of the Act. Ms Quinn denied this and maintained that she had no recollection of refusing Mr McDonagh service on that, or any other occasion.

## Conclusions of the Equality Officer

The Equality Officer found that there was a direct conflict between the evidence of both parties. He considered that the burden of proof to establish a *prima facie* case of discrimination rested with the complainant. He considered that the lack of independent witnesses was not helpful to the complainant's attempts to establish a *prima facie* case. Having considered fully the evidence provided by the complainant and the inferences of discrimination which could be drawn from the case, the Equality Officer found that the complainant did not succeed in establishing a *prima facie* case of discrimination.

## Decision

The Equality Officer found that the respondent did not discriminate against the complainant.

*The claimant was represented by Mr Charles Foley, Solicitor. The respondent was represented by John Casey and Company, Solicitors.*

## **DEC-S2001-008**

### **Patrick O'Brien v Killarney Ryan Hotel**

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Proper adherence to Notification procedure, section 21(2) - Membership of the Traveller community, section 3(2)(i) - Imputed membership of the Traveller community, section 3(1)(a) - Supply of goods and services, section 5(1) - Service in pubs - Risk of disorderly conduct, section 15 - Establishment of a prima facie case.*

### **Background**

This dispute concerns a complaint by Mr Patrick O' Brien that he was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by the Killarney Ryan Hotel, on the grounds of his membership of the Traveller community. The complainant maintained that he was discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in that he was not provided with a service which is generally available to the public contrary to Section 5(1) of the Act. The respondents denied discrimination and maintained that they were entitled, under section 15 of the Act, to refuse him service because the complainant posed a risk of criminal or disorderly behaviour.

### **Conclusions of the Equality Officer**

While the complainant denied that he had ever threatened or acted aggressively towards the staff of the Killarney Ryan Hotel, the Equality Officer was satisfied, having considered the evidence of all the parties, including that provided by different members of the Hotel's staff, that the complainant had been involved in incidents of a serious nature on the Hotel premises which would have given rise to concerns about staff safety. Overall, the Equality Officer found that insufficient evidence had been produced to show that a *prima facie* case of discrimination existed.

### **Decision**

The Equality Officer found in favour of the respondents on the basis that the complainant had not established a *prima facie* case of discrimination on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 .

*The respondent was represented by Mason Hayes & Curran, Solicitors*

## DEC-S2001-009

### **Mr Michael Moorehouse v Ayleswood Ltd**

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - refusal of service in a pub - complainant previously barred - respondent claimed it did not know he was a Traveller - section 15(1) and 15(2) defence.*

### **Background**

Mr Michael Moorehouse was a regular customer in a pub owned by the respondent called Clancy's in Bray, Co. Wicklow, for nine months up to November, 2000. In November, 2000, he was refused service. He claimed that the reason for his refusal was based on his membership of the Traveller community. This was denied by the respondent. It claimed that the reason the complainant was refused service was because it only discovered in November, 2000, that the complainant had been barred from the pub in 1997 by the then manager of the pub. The respondent also claimed that the manager of the pub who refused to serve the complainant in November, 2000, did not know that the complainant was a member of the Traveller community.

### **Conclusions of the Equality Officer**

The Equality Officer found that the manager of the pub knew that the complainant was a member of the Traveller community and that the complainant had established a *prima facie* case of discrimination. It was established that although the complainant was previously barred from the pub in 1997, the decision to refuse him service in November 2000 was based on hearsay. The Equality Officer was satisfied that the respondent could not rely on the defences provided for in the Act to enable it to rebut the inference of discrimination.

### **Decision**

The Equality Officer decided that the respondent discriminated against the complainant on the basis of his membership of the Traveller community and awarded £500 (635 Euros) compensation.

*The claimant was represented by Haughtons Solicitors. The respondent was represented by Malone & Martin, Solicitors*

## DEC-S2001-010

### **Robert & Mary Coffey, John & Margaret Quilligan, Francie & Bridget McCarthy v The Blasket Public House, Tralee**

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in pubs - Establishment of a prima facie case - Risk of disorderly conduct, section 15(1) - Vintners' Age Card scheme - Action taken in good faith under Licensing Acts, section 15(2)*

## **Dispute**

This dispute concerns complaints by Robert & Mary Coffey, John & Margaret Quilligan, Francie & Bridget McCarthy that they were discriminated against, contrary to the Equal Status Act 2000, by the management of the Blasket Public House, Tralee. The complainants maintained that they were discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public, contrary to Section 5(1) of the Act.

## **Background**

The complainants stated that, on Saturday 9 December 2001, they sought access to the Blasket Public House at 9.30 pm. They said that initially one couple were granted access but, when it was realised that they were Travellers, the whole group were refused admission. The respondents totally rejected that they operate a discriminatory policy towards Travellers and stated that the complainants were refused admission because they did not have Vintners' ID Cards.

## **Decision**

The Equality Officer found that the complainants had established a *prima facie* case of discrimination on the Traveller community ground. He also found that the respondents had not provided sufficient evidence to rebut the claim that they operate a discriminatory policy towards Travellers, nor had they provided proof that they apply the same rules and procedures to both settled people and Travellers alike. The Equality Officer awarded the six complainants £1000 each for the discrimination and humiliation suffered.

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***

## **DEC-S2001-011 (Preliminary Decision)**

***Mr Paddy Donovan v Garda Olive Donnellan***

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - investigation and prosecution of crime by the Gardai - using plain*

*meaning and legislative history as aids to interpretation of definition of service defined in section 2(1) - incident which happened before Act came into operation giving rise to alleged discrimination before and after that date - complaint outside scope of Act.*

## **Background**

On 8th August, 2000, four horses were wandering on a public road in Gort, Co Galway. The respondent investigated this incident and prosecuted the complainant, who was a member of the Traveller community, because he owned at least one of the horses. The complainant made a complaint to the Director of Equality Investigations claiming that the respondent discriminated against him. While he accepted he was guilty of the offence, he claimed that he did not own all of the horses and that the respondent did not summons the other horse owners, who were not Travellers. The respondent objected to the investigation of the complaint on the basis that it was outside the scope of the Act. She argued that i) the investigation and prosecution of crime by the Gardai were not services which are available to the public within the meaning defined in the Act, and ii) the Act was not retrospective and incidents which occurred before it came into operation cannot be investigated.

## **Conclusions**

The Equality Officer found that the investigation and prosecution of crime by the Gardai are not services which are available to the public within the meaning defined in section 2(1). It was also found that a complaint arising from an incident which occurred before the Act came into operation can be investigated in circumstances where discrimination may have taken place after the Act came into operation. However, this was not appropriate in this case because the complaint is outside the scope of the Act.

## **Decision**

The Equality Officer decided that the complaint was outside the scope of the Act.

*The claimant was represented by Mr Charles Foley, Solicitor. The respondent was represented by the Chief State Solicitor's Office.*

## **DEC-S2001-012**

***Ms Bridget Ann Joyce, Ms Mary Margaret Joyce, Ms Margaret Mongon, and Mr Patrick McDonagh v Mr John Madden, Licensee, The Temple Gate Hotel***

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - refusal of service in a hotel bar - prima facie evidence - respondent*

*claimed one of the complainants became abusive - respondent failed to rebut the inference of discrimination.*

## **Background**

The complainants claimed that on 8th January, 2001, they went into the bar of the respondent's hotel and ordered tea for four. They claimed that the assistant manager of the hotel approached them shortly afterwards and asked them to leave. They claimed that the reason for their refusal was based on their membership of the Traveller community. The respondent denied that the complainants were asked to leave because they were members of the Traveller community. The respondent claimed that there were two conferences on in the hotel that day and the area where the complainants were sitting was reserved. The respondent claimed that the reason the complainants were refused service was because one of them became abusive.

## **Conclusions**

The Equality Officer found that the complainants had established *prima facie* evidence of discrimination on the basis of their membership of the Traveller community and that the respondent failed to rebut the inference of discrimination.

## **Decision**

The Equality Officer decided that the respondent discriminated against the complainants on the basis of their membership of the Traveller community and awarded £1,000 (1,270 Euros) compensation to each of them.

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***

*The claimants were represented by Mr Charles Foley, Solicitor. The respondent was represented by Cahir & Co, Solicitors.*

## **DEC-S2001-013**

***Greg Scanlon and Kevin Ryan v The Russell Court Hotel***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Discrimination on the Age ground, section 3(2)(f) - Treatment of persons under 18, section 3(3) - Supply of goods and services, section 5(1) - Admission to a Hotel Nightclub - Establishment of a prima facie case - Risk of disorderly conduct, section 15(1) - Action taken in good faith under Licensing Acts, section 15(2) - Drawing of inferences, section 26*

## **Dispute**

This dispute concerns complaints by Mr Greg Scanlon and Mr Kevin Ryan that they were discriminated against, contrary to the Equal Status Act 2000, by the Management of the Russell Court Hotel, Harcourt Street, Dublin 2. The complainants maintained that they were discriminated against on the ground of age in terms of sections 3(1) and 3(2)(f) of the Equal Status Act 2000 in not being granted admission to a function in the hotel on 31 December 2000. The respondents denied that they operate a discriminatory policy on the grounds of age. They said that they always act in good faith and that, from time to time, admission is refused when there are legitimate concerns on the part of Management relating to compliance with the Licensing Acts. In this case the respondents stated that some of the complainants' group were unable to produce valid proof of age.

## **Decision**

The Equality Officer found that the complainants had established a *prima facie* case of discrimination on the age ground. He also found that the respondents had not provided sufficient evidence to rebut the claim that they had discriminated against the complainants on 31 December 2000. The Equality Officer awarded the complainants £1000 each for the discrimination, humiliation, embarrassment and loss of amenity suffered by them.

## **DEC-S2001-014**

### ***Mr. Tom Conroy v Mr. Martin Costello, Costello's Bar***

*Equal Status Act, 2000 -Direct Discrimination, Section 3(1) - Membership of the Traveller community, section 3(2)(i) - supply of goods and services, Section 5(1) - Refusal of service in a pub - Risk of criminal and disorderly conduct, Section 15(1) - Decision made in good faith, Section 15(2).*

## **Background**

This dispute concerns a claim by Mr. Tom Conroy that he was discriminated against by Mr. Martin Costello of Costello's Bar on the grounds that he was a member of the Traveller community. The complainant alleged that the respondent discriminated against him in terms of Sections 3 (1)(a), and 3(2)(i) of the Equal Status Act, 2000, in that he was not provided with a service which is generally available to the public contrary to Section 5 (1) of that Act. The complainant said that he was refused a drink by the respondent on the 30 October, 2000 and he believed the reason for the refusal was because he was a member of the Traveller community. The respondent's case was that the complainant was refused service because he had too much to drink and in making that decision he took into consideration his reputation for being involved in trouble and rows. He submitted that he was obliged under the Licensing Acts to run an orderly house.

## **Conclusions of the Equality Officer**

The Equality Officer found that the complainant established a *prima facie* case of discrimination. The Equality Officer also found that there was insufficient evidence, to substantiate the claim by the respondent, that by serving the complainant there was a substantial risk of criminal or disorderly conduct or behaviour, and concluded that the respondent's actions on the night constituted discrimination on the grounds of membership of the Traveller community.

## **Decision**

The Equality Officer concluded that the respondent discriminated against the complainant on the grounds of his membership of the Traveller community and awarded him £300 (381 Euro) compensation.

*The claimant was represented by Michael McDarby & Co., Solicitors. The respondent was represented by Mr. Diarmuid Connolly B.L. instructed by Coleman & Co., Solicitors*

## **DEC-S2001-015**

***Martina Collins, Fiona Muldoon, Helen Muldoon, Rosey Maughan, Philomena Collins, Caroline Maughan, Caroline Maughan-Muldoon, Bernadette Conroy, v Bartra House Hotel***

*Equal Status Act, 2000 - Direct Discrimination, Section 3(1) - Membership of the Traveller community, Section 3(2)(i) - supply of goods and services, Section 5(1) - Refusal of service in a pub, prima facie case, vicarious liability - Section 42(1).*

## **Background**

This dispute concerns a claim by 8 complainants that they were discriminated against by Bartra House Hotel contrary to the Equal Status Act, 2000, on the grounds that they were members of the Traveller community. The complainants alleged that the respondent discriminated against them in terms of Sections 3 (1)(a), and 3(2)(i) of the Equal Status Act, 2000, in that they were not provided with a service which is generally available to the public contrary to Section 5 (1) of that Act. The complainants case was that following a meal in the respondent's hotel they were refused a drink in the bar because the respondent alleged that the bar was closed and they were served water instead. The complainants submitted that there were other people drinking in the bar and that the only reason they were refused service was because they are members of the Traveller community. The respondent submitted that there was no intention to discriminate against the complainants. The bar was closing early due to a staff party and the complainants were not informed due to a breakdown in communications.

## **Conclusions of the Equality Officer**

The Equality Officer found that the complainants established a *prima facie* case of discrimination on the Traveller community ground. The Equality Officer also found that the respondent failed to rebut the inference of discrimination raised by the complainants.

## **Decision**

The Equality Officer concluded that the respondent unlawfully discriminated against the complainants on the grounds that they were members of the Traveller community contrary to the terms of the Act. She awarded each complainant the sum of £600 (762 euro) compensation for the distress and embarrassment suffered by them as a result of the discriminatory treatment.

*The claimants were represented by John Gordon & Son, Solicitors. The respondent was represented by Denis M. Molloy Solicitors.*

## **DEC-S2001-016**

### ***Ms Ann McDonagh v Tesco Ireland Ltd***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in a Supermarket/Shop - Establishment of a prima facie case - Allegation of shoplifting - Functions of security personnel - Hypothetical comparator*

## **Dispute**

This dispute concerns a complaint by Ms Ann McDonagh that she was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by Tesco Ireland Ltd, Lisduggan Branch, Waterford on the grounds of her membership of the Traveller community.

The complainant maintained that she was discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in that she was denied a service which is generally available to the public contrary to Section 5(1) of the Act.

## **Background**

The complainant maintained that, while shopping in Tesco's, Waterford on 27 February 2001, she was approached by a floor manager and asked to leave the premises. She believed that this was on the grounds of her membership of the Traveller community. The respondents denied this

allegation and stated that the complainant was asked to leave because she had been barred previously from the store.

## **Decision**

The Equality Officer found that the complainant has established a *prima facie* case of discrimination on the Traveller community ground and that the respondents failed to provide sufficient evidence to rebut the claim that they discriminated against the complainant.

The Equality Officer ordered that Tesco Ireland Ltd provide the complainant with free shopping in their Waterford stores to the value of £1,000 (EURO 1,270). He also ordered that Tesco Ireland Ltd pay the complainant a further £1,500 (EURO 1,905) for the embarrassment and humiliation suffered by her on 27 February 2001 and for the loss of amenity suffered by her since then.

## **DEC-S2001-017**

***Mr Patrick Wall, Mrs Margaret Wall, Mr John O'Brien and Mrs Carmel O'Brien v Green Isle Hotel***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - supply of goods and services, section 3(1)(a) - service in public bars - Action taken in good faith, section 15(2) - Establishment of prima facie case - rebuttal of prima facie case.*

## **Background**

On 6th January 2001, having had a meal at the hotel restaurant, the complainants went to the bar of the Green Isle Hotel and ordered drinks for four people. The senior barman served the drinks but the Head Barman approached the complainants and asked them to leave. The complainants claimed that this was due to their membership of the Traveller community.

The Respondent agreed that service was declined but said that this was because of an incident involving some of the complainants on 1st January, 2001. The respondents denied that refusal was based on the complainant's membership of the Traveller community and claimed that they were treated the same as non-Travellers would be treated in the same circumstances.

## **Conclusions of the Equality Officer**

The Equality Officer found that Mrs. Margaret Wall, Mr. John O'Brien and Mrs Carmel O'Brien had been involved in a previous incident at the hotel. She found that this was the basis for the

refusal of service and was in accordance with the general hotel policy to decline service where disorderly conduct had occurred. She also found that Mr. Patrick Wall had made a *prima facie* case of discrimination but that this was rebutted by the respondent having regard to section 15(2) of the Equal Status Act, 2000.

## **Decision**

The Equality Officer found that Mr. John O'Brien, Mrs. Carmel O'Brien, Mr. Patrick Wall and Mrs. Margaret Wall were not discriminated against by the Green Isle Hotel on 6th January 2001 and that while a *prima facie* case of discrimination was made as regards Mr. Patrick Wall, the respondent had rebutted the inference of discrimination in relation to him. As the complaint had not been upheld the Equality Officer had no power to make an order for redress. However, she recommended that the Green Isle Hotel draw up a written code of practice on refusals of service, inform all relevant staff and emphasise the need for sensitivity and courtesy in all such situations.

*The claimant was represented by the Equality Authority. The respondent was represented by Vincent & Beatty Solicitors*

## **DEC-S2001-018**

### ***P.J. Forrestal v Hearn's Hotel Clonmel***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Discrimination on the Disability ground, section 3(2)(g) - Supply of goods and services, section 5(1) - Admission to a Hotel Nightclub - Non-admission of a person in a wheelchair - Establishment of a prima facie case - Risk of disorderly conduct, section 15(1) - Action taken in good faith by the holder of a liquor licence, section 15 (2) - Discriminatory comments.*

## **Dispute**

This dispute concerns a complaint by Mr PJ Forrestal that he was discriminated against, contrary to Sections 3(1) and 3(2)(g) of the Equal Status Act 2000, by the staff of the Vault Nightclub, Hearn's Hotel, Clonmel on the grounds of his disability. The complainant maintained that, in not being granted access to the Vault Nightclub on 20 December 2000, because he was in a wheelchair, he was discriminated against in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act. The respondents denied that they discriminated against the complainant and said that he was refused access because of previous trouble with some of his relatives in other establishments.

## **Decision**

The Equality Officer found that the Hotel did not deliberately set out to discriminate against the complainant. However, the Hotel did not communicate the real reason for his refusal to the complainant on the night. Instead, the Equality Officer found that the Hotel used the complainant's wheelchair as an excuse and that this action constituted discriminatory treatment. The Equality Officer ordered the Hotel to pay £500 (Euro 635) to the complainant for the humiliation and distress caused.

*The claimant was represented by O'Brien & Binchy Solicitors. The respondent was represented by Nolan, Farrell & Goff Solicitors.*

## **DEC-S2001-019**

### ***Mr Paddy Collins v Mr Jerry Kyle, Kyle's Pub***

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - refusal of service in a pub - burden of proof on complainant to present prima facie evidence of discrimination - no prima facie evidence presented.*

## **Background**

Mr Paddy Collins claimed that he entered Kyles Pub at 5 o'clock on 9th December, 2000, and was served two pints with a friend of his named Mr Martin Collins, who also claimed to be a member of the Traveller community. He claimed that when they sought a third pint each they were refused service by Mr Kyle. Mr Collins claimed that the reason for his refusal was based on his membership of the Traveller community. Mr Jerry Kyle was the owner of Kyles Pub and claimed that he did not refuse service to the complainant because he was a member of the Traveller community. He claimed that he was not on duty when the complainant and Mr Martin Collins were first served. He claimed that when he came on duty at 6 o'clock that day he refused further service to Mr Martin Collins because he had barred him from the pub previously. He claimed that he refused service to the complainant because he was drinking in the company of someone who was barred and it was clear to him that he was involved in a scheme to obtain drink for someone who was barred.

## **Conclusions of Equality Officer**

The Equality Officer was satisfied that the complainant did not succeed in establishing *prima facie* evidence of discrimination. Accordingly, the question of the respondent rebutting an inference of discrimination did not arise.

## **Decision**

The Equality Officer found that Mr Jerry Kyle, Kyles Pub, did not discriminate against Mr Paddy Collins, on the basis of his membership of the Traveller community on 9th December, 2000.

*The claimant was represented by Northside Traveller Support Group. The respondent was represented by Michael J. Kennedy & Co. Solicitors.*

## **DEC-S2001-020**

### ***Mr John Maughan v The Glimmer Man Ltd***

*Equal Status Act 2000 - direct discrimination - section 3(1)(a) - three grounds claimed under section 3(2) - family status 3(2)(c) - disability 3(2)(g)- membership of the Traveller community 3(2)(i) - section 5(1) - refusal of service in a pub - prima facie evidence - section 15 defence.*

## **Background**

The complainant was visually impaired and claimed that on 2nd November, 2000, at 4.15 p.m. approximately, he entered the Glimmer Man pub with his wife (who was also visually impaired but not as severely as the complainant) his thirteen year old son and his guide dog. The complainant claimed that he was refused service contrary to the Equal Status Act, 2000, because of i) his family status, ii) his disability and iii) his membership of the Traveller community. The respondent claimed that the complainant was not discriminated against contrary to the Act on the three grounds. It claimed that the reason the complainant was refused service was because it had a no children policy and the complainant's son kept coming into the pub while the complainant was being served there. It claimed that in having a no children policy it was acting in good faith for the sole purpose of ensuring compliance with the Licensing Acts and was not in breach of the Equal Status Act, 2000. The respondent also claimed that when parents are consuming alcohol they tend not to supervise their children properly and that its no children policy was also designed to prevent disorderly conduct on its premises.

## **Conclusions of Equality Officer**

The Equality Officer was satisfied that the complainant established *prima facie* evidence of discrimination on the three grounds claimed. The Equality Officer found that the respondent did not succeed in rebutting the inference of discrimination on the family status ground but that the respondent did rebut the inferences of discrimination on the disability and membership of the Traveller community grounds.

## **Decision**

The Equality Officer found that The Glimmer Man Ltd discriminated against Mr John Maughan on the basis of his family status but that it did not discriminate against him on the basis of his disability or his membership of the Traveller community.

*The claimant was represented by The Equality Authority. The respondent was represented by McKeever Rowan, Solicitors*

## **DEC-S2001-021**

### ***Bernard, Richard & Thomas Joyce v Liz Delaney's Pub***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Admission to pubs - Establishment of a prima facie case - Risk of disorderly conduct, section 15(1)*

## **Dispute**

This dispute concerns complaints by Bernard, Richard and Thomas Joyce that they were discriminated against, contrary to the Equal Status Act 2000, by the management of Liz Delaney's Pub, Coolock. The complainants maintained that they were discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

## **Background**

The complainants stated that, on Friday 19 January 2001, and on two subsequent occasions, they sought access to Liz Delaney's Pub at 9 pm but were refused admission on the basis that it was a "regulars only" establishment.

The respondents totally rejected that they operate a discriminatory policy towards Travellers and stated that the complainants were refused admission because they acted in an abusive and threatening manner at the door.

## **Decision**

The Equality Officer found that the complainants had established a *prima facie* case of discrimination on the Traveller community ground. He also found that the respondents had not

provided sufficient evidence to rebut the claim that they operate a discriminatory policy against Travellers, nor had they provided proof that they apply the same rules and procedures to both settled people and Travellers alike. The Equality Officer awarded the complainants a total of £1,900 (Euro 2,413) for the discrimination and humiliation suffered

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***

*The respondent was represented by D C Shaw & Co, Solicitors.*

## **DEC-S2001-022**

***Mr Michael McDonagh v The Castle Inn, Birr***

*Equal Status Act 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Service in pubs - Establishment of a prima facie case - Risk of disorderly conduct, section 15(1)*

### **Dispute**

This dispute concerns a complaint by Mr Michael McDonagh that he was discriminated against, contrary to the Equal Status Act 2000, by the proprietors of the Castle Inn, Birr. The complainant maintains that he was discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

### **Background**

The complainant states that around lunchtime on Tuesday 7 November 2000, he and his brother entered the Castle Inn, Birr for a drink but were refused service by the lady serving behind the counter. The respondents totally rejected that they operated a discriminatory policy against Travellers and denied the allegations made by the complainant. The respondents stated that the complainant appeared to have drink taken and that this was the reason service was refused.

### **Decision**

In evidence, the proprietor of the pub openly admitted that he treated Travellers less favourably than non-Travellers and described how he operated a "quota system" whereby no more than 5 Travellers were served in his pub at any given time. With regard to the incident in question, the

Equality Officer did not accept that the complainant was refused service because he had drink taken and concluded that the real reason for the refusal was the proprietor's bias against members of the Traveller community. The Equality Officer ordered that the publican pay the complainant the sum of £1,000 (Euro 1,270) for the humiliation and distress caused.

*The claimant was represented by the Equality Authority*

## **DEC-S2001-023**

### **Mr. Dan Griffin v Mary B. Public House**

*Equal Status Act, 2000 - Date of discrimination - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Victimisation ground, section 3(2)(j) - Supply of goods and services, section 5(1) - Service in pubs - Risk of criminal and disorderly conduct, section 15(1) - Action taken in good faith, section 15(2).*

### **Background**

This dispute concerns a claim by Mr. Dan Griffin that he was discriminated against by the Mary B. Public House contrary to the Equal Status Act, 2000, on the grounds that he was a member of the Traveller community. The complainant alleged that the respondent discriminated against him in terms of Section 3(1)(a), and 3(2)(i) in that he was not provided with a service which is generally available to the public, contrary to Section 5(1) of the Act. He also alleged that he was discriminated against contrary to Section 3(2)(j) of the Equal Status Act, 2000, in that he was victimised for taking a complaint under the Act. The respondent submitted firstly that the incident of alleged discrimination took place before the Act came into operation on 25 October, 2000. Secondly he denied that the complainant was discriminated against and submitted that he was entitled to bar him as he associated with another group of Travellers, which made it impossible for him to run an orderly house, and which was in breach of the rules of the pub.

### **Conclusions of the Equality Officer**

The Equality Officer found that the complainant established a *prima facie* case of discrimination. The Equality Officer also found that there was no evidence, to substantiate the claim by the respondent, that by serving the complainant there was a substantial risk of criminal or disorderly conduct or behaviour, and concluded that the respondent's actions by imposing an indefinite bar on the complainant from service in the pub constituted discrimination on the grounds of membership of the Traveller community. The Equality Officer also found that the complainant was victimised by the respondent for making a complaint of discrimination under the Act.

## **Decision**

The Equality Officer concluded that the respondent discriminated against the complainant on the grounds of his membership of the Traveller community and awarded him £2,000 (2,539 Euro) compensation. She also conclude that the respondent victimised him for applying for redress under the Act and awarded him £1,500 (1,905 Euro).

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***

*The claimant was represented by Augustus Cullen & Sons, Solicitors. The respondent was represented by Sherry Solicitors.*

## **DEC-S2001-024**

***Mr. David Green v Quinn Direct Insurance Limited***

*Equal Status Act, 2000 - Age ground, Section 3(2)(f) - Discriminatory treatment, Section 5(1) - Date of discrimination - Jurisdiction issue.*

## **Background**

This was a preliminary issue for decision whether a complaint by the complainant, that he was discriminated against by the respondent, on the grounds of age, contrary to the provisions of the Equal Status Act, 2000, was within the scope of the Act or whether the alleged discrimination occurred before the Act came into operation on 25 October, 2000. The respondent submitted that the contract for the insurance was entered into in July, 2000 and that the Equality Officer had no jurisdiction to hear the case. The complainant submitted that the alleged discrimination was ongoing and extended over the period of the insurance contract.

## **Conclusions of the Equality Officer**

The Equality Officer found that the alleged discrimination was not ongoing, it was a once-off act which occurred before the Equal Status came into force, and that she had no jurisdiction to hear the case.

***This decision was under appeal to the Circuit Court on 1<sup>st</sup> April 2002.***



