

# A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

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**A Report  
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of Legal Aid  
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# Executive Summary

Since the enactment of the Civil Legal Aid Act of 1995, legal aid has been provided to individuals in Ireland for a variety of proceedings before the courts. The Workplace Relations Commission (WRC) and the Labour Court are not included within the eligible tribunals under Section 27(2) of the Act of 1995 and therefore proceedings before these bodies do not qualify for legal aid. The WRC and Labour Court, however, are responsible for hearing cases regarding nine grounds of discrimination found under the Employment Equality Act 1998, as well as complaints under various employment law enactments and under the Equal Status Act 2000.

This Report offers an examination of law applicable in the Irish context to determine whether there is an obligation for Ireland's legal aid scheme to include eligibility for employment equality cases. Potential repercussions of the lack of provision for legal aid in employment equality cases are many, with statistical data collected from the WRC indicating that claimants without representation face a loss rate of more than 86% before the WRC.<sup>i</sup> Additionally, the complexities of employment equality cases brought before the WRC are discussed to demonstrate the likely obstacles faced by those seeking protection from workplace discrimination.

The Report presents its analysis in the context of three central documents: the Irish Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter). The right to equality and the right to earn a livelihood, as substantive rights under the Constitution point to a right to equality at work. The right of access to justice and the right to fair procedures build upon the right to equality at work and should ensure that individuals can access a fair judicial remedy. The protections found under the ECHR are incorporated into domestic law by the Constitution and the European Convention on Human Rights Act 2003. Under the Act of 2003, state organs and courts must ensure that Irish law is compatible with the ECHR. The exclusion of employment equality cases from legal aid, therefore, appears to contravene both the Constitution and the ECHR. Further, the State is bound by the EU's fundamental rights set out in the Charter whenever the state implements Union law. The Employment Equality Act transposes EU directives on employment anti-discrimination, and, as a result of the supremacy of EU law, all

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<sup>ii</sup> See table in Section 1.1.1 of this Report and the Appendix.

proceedings under the Act should comply with the Charter's right to legal aid as part of the right to an effective remedy found in Article 47(3).

This Report offers a series of conclusions and recommendations, with the foremost being that the Irish government should enable employment equality hearings held before the WRC and Labour Court to be eligible for legal aid. This would ensure compliance with the State's obligations under the Constitution, the ECHR, and the Charter.

## 1.0 Introduction

1. The Free Legal Advice Centre (FLAC Ireland) has consistently found that employment law issues are one of the most common queries from their clients. Indeed, data collected during the Covid-19 pandemic revealed that employment law matters had overtaken family law issues as the queries coming to them most frequently. While FLAC offers an array of legal advice clinics, it does not have the resources to provide full legal representation. The primary recourse for those who wish to bring a case before the Irish courts without having sufficient personal funds is to apply for legal aid through the Legal Aid Board.
2. Legal aid is provided under the Civil Legal Aid Act of 1995 (the Act of 1995), which established the Legal Aid Board to process and determine applications. Section 28 of the Act of 1995 outlines the criteria that must be met for a grant of legal aid to be made, while section 29 establishes the guidelines, or a ‘means test’, to determine financial eligibility for legal aid.
3. The Act of 1995 identifies which proceedings are eligible for a grant of legal aid<sup>1</sup>, meaning representation may be provided by a solicitor or barrister at a free or reduced cost. According to Section 27(2) of the Act of 1995, legal aid may be granted for matters before the District Court, the Circuit Court, the High Court, the Court of Appeal and the Supreme Court. Section 27(2)(b) of the Act of 1995 states that legal aid may also be granted for cases ‘conducted in any court or before any tribunal for the time being prescribed by the Minister, with the consent of the Minister for Finance, by order under this section, if provided by a ministerial order’. As of April 2021, the only such ministerial order is the one prescribing the International Protection Appeals Tribunal.<sup>2</sup> Thus, the current legal framework denies the Legal Aid Board any discretion to grant legal aid for proceedings before the WRC or the Labour Court as these are not prescribed tribunals for the purposes of the Act of 1995.
4. The lack of legal aid for employment equality issues means that valid cases of discrimination, bullying, or harassment in the workplace may not have the opportunity to be remedied in the courts due to claimants’ lack of personal funds to access legal advice and representation.

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<sup>1</sup> When legal aid is granted, the money is sourced from the Legal Aid Fund, established by Section 19(1) of the Civil Legal Aid Act of 1995.

<sup>2</sup> Civil Legal Aid (International Protection Appeals Tribunal) Order 2017, S.I. No. 81/2017 (This Order prescribes the International Protection Appeals Tribunal for the purposes of Section 27 (2(b)) of the Civil Legal Aid Act, 1995 (No. 32 of 1999) as a body at whose proceedings legal aid may be provided by the Legal Aid Board).

Vulnerable communities are often the most at-risk group for discrimination in the workplace and, without access to legal aid to defend their rights, are at a further disadvantage when seeking access to justice. For equality and human rights in the workplace to truly be protected, Irish workers must have access to justice and legal aid when their rights are infringed upon. In response to this need, FLAC Ireland has become increasingly involved in attempting to secure the right to equal treatment in workplace relationships, which is protected under the Employment Equality Act 1998 (the Act of 1998).

5. In the 2021 Supreme Court case of *Zalewski v Adjudication Officer*, the Court found that the adjudication process before the WRC constitutes the administration of justice.<sup>3</sup> The Court was divided 4:3 in upholding the constitutionality of the Workplace Relations Act 2015, but both the majority and minority stressed the importance of the issues being adjudicated by the WRC. For example, Charleton J, in the minority, observed that WRC cases touch on matters which may ‘ruin a career or devalue those individuals in the struggle to earn an honest living’.<sup>4</sup> This statement shows the significance of protecting the right to earn a livelihood. The case is important because it acknowledges the seriousness of matters being decided before the WRC and supports the argument that there should be a possibility of legal aid in complex adversarial cases that concern fundamental human rights.
6. The Employment Equality Act 1998 outlaws discrimination in the workplace based on the following nine grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race, or membership in the travelling community. Discrimination falling within the scope of the Act may be subject to a complaint made to the WRC, or, in the case of dismissals, to the Labour Court.<sup>5</sup> The Labour Court is also competent to decide over appeals against decisions by the WRC.<sup>6</sup> Gender discrimination claims can be made directly to the Circuit Court, and accordingly legal aid is available for these under section 27(1) of the Act of 1995. Section 82 of the Employment Equality Act outlines the types of redress available for employment-related disputes, which vary according to the particulars of the claim.

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<sup>3</sup> *Zalewski v Adjudication Officer* [2021] IESC 24.

<sup>4</sup> *Zalewski v Adjudication Officer* [2021] IESC 24 (Charleton J) [71].

<sup>5</sup> Employment Equality Act, s 77 (2).

<sup>6</sup> Employment Equality Act, s 77 (12).



## 1.1 The Need for Legal Aid in Employment Equality Claims

7. In Ireland the cost of legal representation is high.<sup>7</sup> Éilis Barry, the Chief Executive Officer of FLAC, has remarked that the absence of free legal aid in employment equality cases in the WRC has meant that many of the cases were not being taken.<sup>8</sup> Additionally, the judiciary has recognised that the cost of legal representation can in fact, act as a barrier to access to justice. In the case of *MacGairbhith v Attorney General*, the Court acknowledged that the costs of litigation are ‘frightening’ and are a ‘major deterrent’ to bringing a case.<sup>9</sup>
8. Employees in Ireland who wish to take an employment equality claim to the WRC must pay for their own legal representation if they wish to be legally represented. Therefore, professional representation by solicitors, barristers, unions, FLAC or by a Citizen Information Centre is subject to the good will of an organisation, membership in a union, or substantial financial commitment by the claimant. Given that only about 26%<sup>10</sup> of the Irish labour force are union members and organisations such as FLAC and the Citizen Information Centres have limited resources available, many potential claimants must rely solely on the service of solicitors or barristers to obtain professional representation. This problem is aggravated by the fact that the WRC has no jurisdiction to make awards of legal costs and therefore complainants will have to bear their legal costs even if they win their case. The absence of any possibility of recovering costs against the unsuccessful respondent hinders potential complainant in obtaining legal representation under a contingency agreement.
9. It is very difficult to win an employment equality case before the WRC. Of the cases brought before the WRC between 1 January 2018 and 31 January 2021, complainants lost over 75% of the cases.<sup>11</sup> From January 2018 to the end of January 2021, complainants with professional representation won more than 30% of the cases before the WRC and complainants with union

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<sup>7</sup> Kelly Review Group, *Review of the Administration of Civil Justice Report* (2020) 267ff <<https://www.gov.ie/en/publication/8eabe-review-of-the-administration-of-civil-justice-review-group-report/>> with reference to World Bank Group, ‘Doing Business 2020 - Country Profile Ireland’ (2020) <<https://www.doingbusiness.org/en/data/exploreconomies/ireland>> both accessed 19 April 2021.

<sup>8</sup> Kitty Holland, ‘Taking workplace equality cases ‘out of many people’s reach’ (2021) *Irish Times*, <<https://www.irishtimes.com/news/social-affairs/taking-workplace-equality-cases-out-of-many-people-s-reach-1.4503722>> accessed 19 April 2021.

<sup>9</sup> *MacGairbhith v Attorney General* [1991] IR 412.

<sup>10</sup> Central Statistics Office, ‘Labour Force Survey (LFS) Time Series - Union Membership Q2 2005 - Q2 2020’ (2020) <[https://www.cso.ie/en/media/csoie/statistics/lfstimeseries/Employees\\_15\\_years\\_by\\_sex\\_and\\_trade\\_union\\_membership\\_-\\_TO\\_ISSUE.xls](https://www.cso.ie/en/media/csoie/statistics/lfstimeseries/Employees_15_years_by_sex_and_trade_union_membership_-_TO_ISSUE.xls)> accessed 19 April 2021.

<sup>11</sup> See Table 1 and the Appendix.

representation won 32.6% of their cases.<sup>12</sup> For those complainants without representation, there was a loss rate of more than 86% before the WRC.<sup>13</sup> Overall, unrepresented complainants had a success rate of less than 14%, indicating that legal representation more than doubles the chance of success.<sup>14</sup> While this Report acknowledges its limited data set, the discrepancies in the rate of success suggest that professional legal representation significantly improves the chance of winning an employment equality dispute before the WRC. The table below provides an overview of the cases taken into consideration:

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<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

### 1.1.1 Table – Employment equality cases before the WRC

10.

	<b>Total Cases</b>	<b>Number of cases Won</b>	<b>% of cases Won</b>	<b>Number of cases lost</b>	<b>% of cases lost</b>
<b>Professionally represented</b>	148	45	30.41%	103	69.59%
<b>Represented by a union</b>	49	16	32.65%	33	67.35%
<b>Self-represented</b>	172	24	13.95%	148	86.05%
<b>Other representation*</b>	26	10	38.46%	16	61.54%
<b>Total</b>	<b>395</b>	<b>95</b>	<b>24.05%</b>	<b>300</b>	<b>75.95%</b>

\* Other representation includes representation by FLAC, Citizen Information Centres, consultants, family members and other third parties.

**Source:** decisions rendered by the WRC under the Employment Equality Act 1998 in the period from 1 January 2018 to 31 January 2021 as published in the WRC’s website. For the complete data set see the Appendix.

11. An additional challenge faced by those bringing an employment equality claim before the WRC is that the complainant must adduce evidence of unlawful discrimination. Providing evidence of unlawful discrimination is not straightforward, and the layperson may face difficulty in determining the sort of evidence required by the WRC adjudicator. The case studies below illustrate the high evidentiary threshold which must be met before a WRC adjudicator will find in favour of the complainant.

### 1.1.2 Case Study no. 1

The case of *Krzysztof Tryka v Thermal Insulation Distributors Ltd* highlights how complex employment equality cases can be before the Workplace Relations Commission.<sup>15</sup> The complainant argued that he had been discriminated against on the grounds of nationality when he was refused sick pay. He argued that two of his Irish colleagues in a similar situation had received sick pay.

The burden of proof was on the complainant to prove that he had been discriminated against. This required the complainant to establish facts from which discrimination may be inferred. The facts pointing to discrimination must be established through credible evidence.

The adjudicator in this case found that the complainant had failed to adduce substantial evidence of discrimination and found in favour of the employer. The adjudicator found that the complainant's claim was based on an assumption rather than evidence, noting the absence of witnesses to corroborate the complainant's claim. The adjudicator stated that the complainant should have specifically requested information from the respondent as to why he was denied sick pay.

The case shows how difficult it is for a person with no legal background to navigate the system. It also shows the importance of corroborating evidence in discrimination claims. The inability of the complainant to adduce such evidence potentially points to another difficulty for complainants: the imbalance of power between employer and employee, and the difficulty for complainants in persuading colleagues to testify as witnesses in support of complaints.

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<sup>15</sup> *Krzysztof Tryka v Thermal Insulation Distributors Ltd* (ADJ-00027767).

### 1.1.3 Case Study no. 2

The case of *A Job Applicant v A Recruitment Service* demonstrates the legal complexities of an employment equality case.<sup>16</sup> The case concerned a man who had attention deficit disorder (ADD), a condition which makes it difficult to concentrate.

The complainant had several legal issues to prove before the Adjudicator which is especially difficult for someone with ADD. First, the complaint had to prove that he had a disability within the definition given under Section 2 of the Employment Equality Acts (the Acts). Section 2 states that a disability is -

*“(a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,*

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

*(c) the malfunction, malformation or disfigurement of a part of a person’s body,*

*(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*

*(e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,*

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

This is a very long definition and uses technical language such as “malformation” and “disfigurement” which may be difficult for lay people to understand.

Then the complainant had to prove that he had been discriminated against on the grounds of his disability. Section 6(1) of the Employment Equality Acts, 1998 to 2008 provides that discrimination shall be taken to occur where *“a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2).....”* Section 6(2)(g) of the Acts defines the

discriminatory ground of disability as follows – “*as between any 2 persons, ... that one is a person with a disability and the other is not or is a person with a different disability*”.

The case also involved a claim of discrimination based on a failure to make reasonable accommodation. Section 16(3) of the Act of 1998 provides:

*(3)(a) For the purposes of this Act a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as ‘ appropriate measures ’ ) being provided by the person ’ s employer.*

*(b) The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability —*

*(i) to have access to employment,*

*(ii) to participate or advance in employment, or*

*(iii) to undergo training,*

*unless the measures would impose a disproportionate burden on the employer.*

*(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of —*

*(i) the financial and other costs entailed,*

*(ii) the scale and financial resources of the employer ’ s business, and*

*(iii) the possibility of obtaining public funding or other assistance.*

*(4) In subsection (3)—*

*‘ appropriate measures ’ , in relation to a person with a disability —*

*(a) means effective and practical measures, where needed in a particular case, to adapt the employer ’ s place of business to the disability concerned,*

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<sup>16</sup> A Job Applicant v A Recruitment Service (DEC-E2016-065).

*(b) without prejudice to the generality of paragraph (a) , includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but*

*(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself;*

*“employer” includes an employment agency, a person offering a course of vocational training as mentioned in section 12(1) and a regulatory body; and accordingly references to a person who has a disability include—*

*(a) such a person who is seeking or using any service provided by the employment agency,*

*(b) such a person who is participating in any such course or facility as is referred to in paragraphs (a) to (c) of section 12(1), and*

*(c) such a person who is a member of or is seeking membership of the regulatory body.*

Although, in the event, the complainant was able to adduce evidence that he had been unlawfully discriminated against and the adjudicator awarded the complainant €5,000 in compensation, these citations from from the statute demonstrate that a claim of discrimination is anything but legally straightforward. Where the discrimination alleged is one based on an intellectual disability, the burden placed on the complainant is even heavier.

12. Although inequality in the workplace is unlawful, it nevertheless remains a prevalent issue for employees in Ireland. Moreover, the intersectionality of these challenges in the workplace contributes to a multiplication of legal problems.

## 1.2 An Overview of the Procedure Before the WRC

13. As a general rule, complaints of violations of Employment Equality Act 1998 are made to the WRC under section 77. Accordingly, legal aid is not available for these complaints. An exception is made for gender-based claims which can be taken to the Circuit Court, and which will therefore be covered by section 27(2)(a) of the Civil Legal Aid Act 1995.
14. When a person believes they have been a victim of a contravention to the Act of 1998, they can make a complaint to the WRC within six months of the alleged contravention. The adjudicator can extend the time limit for up to twelve months if the complainant can demonstrate there was a reasonable cause for the delay.<sup>17</sup> Community Law and Mediation noted that this timeframe is extremely tight, especially for those emerging from a difficult experience.<sup>18</sup> A lawyer or representative is not needed for the proceedings, and it should be noted that the WRC does not have the ability to award legal costs, meaning that if the complainant wishes to have representation they must pay their own legal fees, regardless of the result of the complaint.<sup>19</sup>
15. The complaint is filed through the submission of a form which can be downloaded from the WRC website,<sup>20</sup> and requires details of the complainant, employment, pay and the employer's full legal and contact details. For employment equality cases, the complainant is required to provide a statement setting out 'the facts, the link between the ground(s) cited and the alleged discrimination, any other relevant information and, where appropriate, any legal points the complainant may wish to make'.<sup>21</sup> A WRC guide entitled 'Information for Practitioners/Representatives', provides further details, outlining that the written statement should, where possible, contain 'a) A summary of the factual background to the complaint. b) A summary of the evidence to be adduced by, or on behalf of the parties. c) A summary of any legal arguments that may be relied upon in the course of the hearing, appending case law where

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<sup>17</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

<sup>18</sup> Anonymous 'WRC procedures 'barrier' to low-paid workers – CLM' (2020) Law Society of Ireland Gazette, <<https://www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm>> accessed 09 April 2021.

<sup>19</sup> <[www.workplacerelations.ie/en/what\\_you\\_should\\_know/equal-status-and-employment-equality](http://www.workplacerelations.ie/en/what_you_should_know/equal-status-and-employment-equality)> accessed 12 April 2021.

<sup>20</sup> <[https://www.workplacerelations.ie/en/complaints\\_disputes/refer\\_a\\_dispute\\_make\\_a\\_complaint](https://www.workplacerelations.ie/en/complaints_disputes/refer_a_dispute_make_a_complaint)> accessed 12 April 2021.

<sup>21</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).



appropriate. d) Where relevant, the number and details/names of witnesses that it is proposed to call at the hearing'.<sup>22</sup> According to the Community Law Centre, the requirement for written statements in employment equality claims often creates 'an often-insurmountable barrier for claimants'.<sup>23</sup>

16. Once submitted, the complaint form will then be forwarded to the respondent, who has 21 days to send a statement to the WRC if they wish to raise any legal points. The WRC can decide to proceed with mediation if both parties consent. Otherwise, or if mediation is unsuccessful, the case is referred to an adjudicator officer for hearing. All information and documents the parties consider relevant to their case must be sent prior to the hearing. The adjudication officer can also require information and documentation before the hearing, as well as a list of proposed witnesses.<sup>24</sup>
17. During the hearing both parties will have the opportunity to call and question witnesses, question the other party, respond, address any legal points that have been raised, and provide evidence. The adjudication officer can ask questions to the witnesses and the parties. The decision can be appealed to the Labour Court within 42 days of the decision and after that time, if the decision was not appealed, it is legally binding and enforceable by the District Court.<sup>25</sup>
18. As provided by Section 85.1(a) of the Employment Equality Act, the complainant must prove the facts from which discrimination may be presumed, and once established it is on the respondent to prove the contrary. Establishing the facts can be challenging. Gathering evidence when most documentation is in the hands of the employer presents a difficulty for the complainant, who may even find it hard to know before filing the claim what kind of written documentation they can count on to support their complaint. Finding witnesses to build their case can also prove to be an obstacle, considering that the alleged discrimination would have most likely occurred in the workplace and potential witnesses would tend be other employees who can face pressure. In practice, as was previously analysed, many cases will fail on the grounds of not establishing sufficient evidence to prove discrimination.

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<sup>22</sup> Workplace Relations Commission, 'Information for Practitioners/Representatives' (19 January 2017).

<sup>23</sup> Anonymous 'WRC procedures 'barrier' to low-paid workers – CLM' (2020) Law Society of Ireland Gazette, <[www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm](http://www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm)> accessed 09 April 2021.

<sup>24</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

<sup>25</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

## 2.0 The Irish Constitution

### 2.1 Introduction

19. As the basic law of the state, the Irish Constitution, or Bunreacht na hÉireann in Irish, is responsible for identifying the rights afforded to all individuals in Ireland. Given the difficulties posed by the current system of redress for employment equality claims, it is important to first consider the manner in which the Constitution may provide for the right to legal aid in this context. Although it does not contain a provision explicitly identifying a right to legal aid, the Constitution nevertheless recognises a multitude of both enumerated and procedural rights that contribute to the overall argument in favour of the right. In particular, two basic human rights play an important role in the development of the right to legal aid for employment equality cases: the right to equality and the right to earn a livelihood.<sup>26</sup> Both of these rights are substantive, conferring their privileges upon all individuals in Ireland.<sup>27</sup> The right to an effective remedy and the right to fair procedures also serve as important touchstones for

### 2.2 The Right to Equality

20. The right to equality is applicable to this Report since it addresses the right to legal aid in employment equality claims in the WRC. There is an explicit right to equality in the Irish Constitution. Article 40.1 of Bunreacht na hÉireann states that, ‘All citizens shall, as human persons, be held equal before the law.’ Article 40.3.1 applies between individual actors and thus has a horizontal effect. There are several cases which support this position, for example, in *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court commented that Article 40.3.1 is applicable in private law.<sup>28</sup> In the case of *Quinn Supermarket v Attorney General*, Walsh J in the Supreme Court elaborated on the right to equality by stating that it is a guarantee against any inequalities grounded upon a belief that individuals by reason of their ‘human attributes or their ethnic or racial, social or religious ground’ are to be treated differently.<sup>29</sup>

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<sup>26</sup> Article 40.3.1.

<sup>27</sup> Substantive rights are rights which are not purely of practice and procedure.

<sup>28</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>29</sup> *Quinn Supermarket v Attorney General* [1972] IR 1, 13-14.

## 2.3 The Right to Earn a Livelihood

21. Over the years, Article 40.3.1 of the Constitution has served as the foundation for the identification of a number of derived rights, with the right to earn a livelihood serving as one of these rights.<sup>30</sup> The right to earn a livelihood is immensely important in relation to employment equality cases, as it codifies the general idea that those present in Ireland should be entitled to pursue employment free from wrongful constraints. The derived rights related to property serve as the primary source of the right to earn a livelihood,<sup>31</sup> originating in the case of *Tierney v Amalgamated Society of Woodworkers*.<sup>32</sup>
22. In *Tierney*, the High Court considered the case of a carpenter whose membership application was rejected by a union after a resolution was passed that barred the plaintiff from membership due to false claims of carpentry skill.<sup>33</sup> The Court was asked to decide whether or not the provisions of the Trade Union Act of 1941 grant individuals a statutory right in relation to trade union membership or proceedings relating to such membership.<sup>34</sup> Although the plaintiff's case was dismissed from the High Court, the judge acknowledged his agreement with a statement by the plaintiff's attorney which argued that '...the right to work and earn one's livelihood is just as important a personal right of the citizen... as the right to property'.<sup>35</sup> *Tierney* was appealed to the Supreme Court, where the Judgement of the High Court was upheld.<sup>36</sup> In effect, *Tierney* served to connect the pre-existing body of law regarding property rights to the right to earn a livelihood.
23. In *Educational Company of Ireland v Fitzpatrick (No. 2)*, the High Court considered whether picketing by the defendants on the property of the plaintiffs in regard to a union membership dispute was unconstitutional.<sup>37</sup> The High Court ruled in favour of the plaintiffs, arguing that the picketing was unlawful because it did not occur in the context of a recognised trade dispute. The Supreme Court dismissed the defendant's appeal and noted that 'the right to dispose of one's labour and to withdraw it seem[s] to me a fundamental personal right'.<sup>38</sup> Although this

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<sup>30</sup> *Hogan, Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 1683.

<sup>31</sup> *ibid.*

<sup>32</sup> *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254.

<sup>33</sup> *ibid.*, 254.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*, 260.

<sup>36</sup> *ibid.*

<sup>37</sup> *Educational Company of Ireland Ltd and Another v Fitzpatrick and Others (No 2)* [1961] IR 345, 397.

<sup>38</sup> *ibid.*

judgement did not specifically recognise the right to earn a livelihood as a right provided for in the Constitution, it paved the way for greater recognition of the right under Article 40.3.1.<sup>39</sup>

24. *Murtagh Properties v Cleary* considered claims on behalf of the plaintiffs that their right to earn a livelihood under Article 40.3.1 was restricted as a result of gender discrimination.<sup>40</sup> The defendant was the secretary of a trade union representing workers employed in public houses. The public house was being picketed as a result of the plaintiffs' non-cooperation with a trade union objection to their employment of women, and the plaintiffs wished to receive an injunction to end the picketing.<sup>41</sup> The High Court upheld the plaintiffs' request for an injunction. Importantly, the High Court offered analysis of the Constitution in relation to the plaintiff's claim and noted that under Article 45 'the right to an adequate means of livelihood.... while this is not enforceable against the State, its existence logically involves that each citizen has the right to earn a livelihood.'<sup>42</sup> This aspect of the Court's judgement is crucial because it links the right to earn a livelihood to basic principles of equality and non-discrimination. Furthermore, the High Court clearly attempted to shield the government of liability in the enforcement of the right to earn a livelihood.
25. *NVH v Minister for Justice and Equality* concerned the claim of a Burmese man in direct provision who appealed a decision under the Refugee Act 1996, which prevented him from accepting an offer of employment.<sup>43</sup> The Supreme Court noted that work is a fundamental aspect of the individual and their general well-being under the Constitution, yet it did not go so far as to say that there is an explicit right to work in the case of non-citizens.<sup>44</sup> Rather, the Supreme Court focused on the lack of a temporal limit during the asylum process when it decided that such a system is incompatible with the Constitution and the right to seek employment.<sup>45</sup>
26. In *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court received a referral from the President to decide whether the Employment Equality Bill was repugnant to the Constitution.<sup>46</sup> The Bill contained a multitude of provisions which were intended to promote

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<sup>39</sup> *ibid.*

<sup>40</sup> *Murtagh Properties v Cleary* [1972] IR 330.

<sup>41</sup> *ibid.*

<sup>42</sup> *Murtagh Properties v Cleary* [1972] IR 330, 336.

<sup>43</sup> *NVH v Minister for Justice and Equality* [2017] IESC 35.

<sup>44</sup> *ibid.*, 12.

<sup>45</sup> *ibid.*

<sup>46</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

equality in the workplace, as well as anti-discrimination measures.<sup>47</sup> The Court's analysis was mainly conducted in regard to Article 40 of the Constitution, and it found several provisions of the Bill repugnant to the Constitution. Most importantly, however, the Court in its reasoning acknowledged the right of citizens to earn their livelihood and its connection to property rights.<sup>48</sup>

## 2.4 Right to an Effective Remedy

27. The right to an effective remedy is an implied right in the Constitution. The right is closely related to the right of access to the courts under Article 40.3.1 of the Constitution. In *McCauley v Minister for Posts and Telegraphs* the right of access to the Courts was recognised as a constitutional right. In *McCauley*, Kenny J held that, 'there is a right to have recourse to the High Court to defend and vindicate a Legal Right and that is one of the personal rights of the citizen included in the General Guarantee in Article 40.3.'<sup>49</sup>
28. The case of *M.C. v Legal Aid Board* concerned a complaint that the Legal Aid Board had not considered the applicant's application for legal aid to assist her in defending or dealing with nullity proceedings brought by her husband.<sup>50</sup> The Legal Aid Board submitted that the delay was due to a lack of State funding. In the High Court, Gannon J held that the State had no duty under the Constitution to intervene by providing legal aid for civil litigation of a dispute with another citizen.<sup>51</sup> Nonetheless, the High Court found that the State has the responsibility to guarantee that the civil legal aid scheme was governed fairly and that it completed its objective.
29. In the case of *Kirwan v Minister for Justice, Ireland and the Attorney General*, the applicant argued that the legal aid had to be provided where prisoners sought a review of the detention, where such detention was of a person in the Central Mental Hospital following a plea of insanity.<sup>52</sup> The High Court held that considering the requirement 'to provide information and to formulate and present the appropriate information', there is a right to civil legal aid.<sup>53</sup> According to Laffoy J in *McCann v District Judges of Monaghan*, the *Kirwan* case establishes

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<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *McCauley v Minister for Posts and Telegraphs* [2000] 2 IR 360.

<sup>50</sup> *M.C. v Legal Aid Board* [1991] 2 I.R. 43.

<sup>51</sup> *ibid.*, 55.

<sup>52</sup> *Kirwan v Minister for Justice, Ireland and the Attorney General* [1994] 1 ILRM 444.

<sup>53</sup> *ibid.*

that it is ‘incumbent upon the executive under the Constitution to afford such legal aid as is necessary to enable the citizen to defend themselves’.<sup>54</sup>

30. The case of *Stevenson v Landy* concerned wardship proceedings.<sup>55</sup> In the High Court, Lardner J held that the Legal Aid Board had a constitutional obligation to grant legal aid in wardship proceedings. This is significant because Lardner J concluded that the Government had a constitutional obligation to make legal aid available for wardship applications.
31. In the case of *O’Donoghue v Legal Aid Board*, it was argued that the failure of the Legal Aid Board to grant a certificate for legal aid in a timely fashion infringed upon the plaintiff’s constitutional right to legal aid in Ireland.<sup>56</sup> The High Court accepted that the delay was suffered due to the absence of resources to meet the demands of the Legal Aid Board. The Court addressed the current constitutional right to civil legal aid in Ireland. The Court found that fair procedures and the right of access to justice would require legal aid. The Court stated that the State must per Gannon J (in *M.C. v Legal Aid Board*) ensure that the scheme ‘is implemented fairly to all persons and in a manner, which fulfils its declared purpose’.<sup>57</sup> Kelly J expanded the scope of the right to civil legal aid by providing that the Civil Legal Aid Act of 1997 gives substance to the constitutional entitlement to legal aid for those who qualify. He acknowledged that the legislature was entitled to reasonably restrict that right. Nonetheless, the right could not be effectively empty for years as it had been in this case. In relation to the State’s argument that a decision in favour of the plaintiff would breach the principle of separation of powers, it was held that the Court was protecting a constitutional right and not granting mandatory relief against the State.<sup>58</sup> Finally, on the issue of what might be an acceptable delay in providing legal aid, it was held that the Legal Aid Board’s own target of two to four months was reasonable. Kelly J awarded the plaintiff damages for the loss she had suffered because of the excessive delay. Kelly J calculated the damages as the additional amount of maintenance the plaintiff would have received had the case come before the Court

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<sup>54</sup> *McCann v District Judges of Monaghan* [2009] 4 I.R. 200 [142].

<sup>55</sup> *Stevenson v Landy* Unreported, High Court, 2 February 1993.

<sup>56</sup> *O’Donoghue v The Legal Aid Board, The Minister for Justice, Equality and Law Reform, Ireland & the Attorney General* [2004] IEHC 413.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*, [111].

on time. According to Professor Gerry Whyte, this decision was the catalyst for the consequent improvement of the Civil Legal Aid Scheme.<sup>59</sup>

32. The case of *Magee v Farrell* substantially regressed the right of access to justice.<sup>60</sup> The case concerned a request for legal aid for an inquest into the death of Paul Magee who was found unconscious in Kilmainham Garda Station. Paul Magee's mother did not have the financial means to pay for legal aid and without legal aid the right to take part in the inquest was futile. She applied for legal aid but her request was denied as inquests did not fall under the legal aid scheme. As a result of the refusal, she then decided to challenge the scheme. The High Court referred to *Stevenson* and stated that 'fair procedures under the Constitution require that she be provided with legal aid for the purpose of being adequately represented'.<sup>61</sup>
33. The case was then appealed to the Supreme Court, where it was found that there is no constitutional right to state-funded legal aid in civil legal matters. The Supreme Court found that the case of *Stevenson* did not give rise to a constitutional right to state-funded legal aid, but the case was instead based on the inappropriate grounds of refusal used by the Legal Aid Board. The timing of the enactment of the European Convention on Human Rights Act 2003 was detrimental to the decision in *Magee*. Paul Magee died before the enactment of the Act and therefore, Article 2 of the ECHR could not be relied upon. Now, however, if a similar case was to come before the courts again, having regard to ECHR jurisprudence in Article 2, the result may be different.
34. Although the Supreme Court in *Magee* found that there was no constitutional right to state-funded legal aid in civil cases, its strength as a precedent is undermined by the fact that the State subsequently reached a friendly settlement in relation to a complaint by Ms Magee to the ECtHR.<sup>62</sup> The Government agreed to pay Magee for non-pecuniary losses that were incurred as well as for the cost of domestic proceedings. As part of the settlement, the Government also expressed the intention to enact the Coroners Bill (2007) and, in particular, Section 86 of the Bill which provides the right to legal aid in an inquest. In 2013, the Courts and Civil Law (Miscellaneous Provisions) Act 2013 amended the Coroners Act of 1962 so that there is a right to legal aid and legal advice in relation to coroners' inquests.<sup>63</sup> Therefore, despite the Supreme

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<sup>59</sup> Gerry Whyte, *Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement* (IHRC Conference on Economic, Social and Cultural Rights, December 2005).

<sup>60</sup> *Magee v Farrell & Ors* [2009] IESC 60.

<sup>61</sup> *Magee v Farrell* [2005] IEHC 388.

<sup>62</sup> *Magee v Ireland* Application no. 53743/09 (20 November 2012).

<sup>63</sup> Courts and Civil Law (Miscellaneous Provisions) Act 2013, s 24.

Court decision in *Magee v Farrell*, the Government subsequently expressed that there should be a right to legal aid in an inquest.

35. In addition to the fact that the government subsequently agreed that the absence of legal aid in inquests presented a problem, it is important to note that cases in the WRC are much more complex than that of coroner inquests and, therefore, the *Magee* Supreme Court decision may be distinguished on its facts. An inquest differs from the WRC in that it is an inquisitorial process. Most WRC cases, however, are adversarial, with parties obliged to present evidence for examination.<sup>64</sup> The adversarial nature of the WRC adds an additional layer of complexity to an already difficult legal process, standing in contrast to the more straightforward process found under inquests like that in *Magee*. As a result of the stark contrast between adversarial and inquisitorial proceedings, *Magee* may be distinguished on its facts force in employment equality cases.

## 2.5 Right to Fair Procedures

36. Natural and constitutional justice is a concept which has been developed through case law as an aspect of the right to fair procedures. The right to fair procedures has two parts: *audi alteram partem* ('hear the other side') and *nemo iudex in causa sua* ('one must not be a judge in one's own cause'). As lawyers are an indispensable tool for a fair hearing, this section will therefore focus on the principle of *audi alteram partem*.
37. Constitutional justice is considered as an unenumerated right under Article 40.3 of the Irish Constitution. This was first established in *Re Haughey*, where the applicant had been denied the opportunity to cross-examine and to address his accusers in his defence in an investigation into the expenditure of the grant-in-aid for Northern Ireland relief. The Supreme Court opined that Article 40.3 was a guarantee of basic fairness of procedures and it was the duty of the Court to ensure that the words of Article 40.3 'provide a positive protection for the citizen and his good name'.<sup>65</sup> The *Re Haughey* decision was then confirmed by O'Higgins C.J. in the case of *Garvey v Ireland* where it was stated that 'the Constitution impliedly assures to the citizen basic fairness of procedure'.<sup>66</sup>

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<sup>64</sup> Workplace Relations Act (2015), s 41(5).

<sup>65</sup> *Re Haughey* [1971] IR 217 (SC) 264 (O'Dalaigh CJ).

<sup>66</sup> *Garvey v Ireland* [1980] IR 75 (Henchy J).



38. The principle of *audi alteram partem* requires the courts to guarantee that judicial procedures are carried out with strict fairness given to each party.<sup>67</sup> The absence of a possibility of state-funded legal aid in employment equality cases adversely affects the parties' right to fair procedures. The process in the WRC is mostly adversarial as it involves questions of law, examination of witnesses and cross-examination of witnesses. Legal representation, therefore, represents an indispensable tool for individuals to succeed under an adversarial system. Although many complainants before the WRC have a strong argument to make, without legal representation they may struggle to adequately present their case.

## 2.6 Unconstitutional Statutory Lacunas

39. Under the Irish Constitution, Article 15.4.1 and Article 15.4.2 provide that the Legislature cannot enact any laws that are 'repugnant' to the Constitution. Any laws which are 'repugnant' to the Constitution are invalid. There are two ways in which a statute can be found invalid: a positive statutory provision or a lacuna in a statutory provision which is 'repugnant' to the Constitution. For example, in the case of *Zalewski v Adjudication Officer*, Section 41(13) of the Workplace Relations Act was held to be repugnant to the Constitution, as it positively infringed upon the constitutional guarantee that the administration of justice shall be done in public.<sup>68</sup> The Supreme Court also held that the absence of the capacity for an adjudication officer to require that certain evidence be provided under oath was an unconstitutional lacuna.<sup>69</sup>
40. The Civil Legal Aid Act 1995 confines the application of state-funded legal aid to cases in the District Court, High Court, and Supreme Court. Employment equality cases are taken in the WRC and any appeals are then brought to the Labour Court. Therefore, the Civil Legal Aid Act does not apply to employment equality cases. The blanket exclusion of employment equality cases denies deserving people of their right of access to justice and fair procedures. Insofar as the Act does not provide for legal aid in non-court cases, Section 27 may contain an unconstitutional lacuna.

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<sup>67</sup> *Nevin v Crowley* [1999 HC] 1 ILRM 376 and [2001] SC 1 IR 113.

<sup>68</sup> *Zalewski v Adjudication Officer* [2021] IESC 24.

<sup>69</sup> *ibid.*

## 2.7 Conclusion

41. The Constitution is the basic law of the State, and it describes the fundamental rights of every individual. As there is a constitutional right to equality and to earn a livelihood, as well as a right of access to justice and fair procedures, there should be a right to access legal aid in employment equality cases. In *O'Donoghue v Legal Aid Board*, the High Court held that the plaintiff's constitutional right of access to the courts and right to fair procedures included an entitlement to be provided with legal aid. While *Magee v Farrell* serves as the authority for the viewpoint that there is no constitutional right to legal aid for inquests, the State settled with the applicant rather than defend itself in an ECtHR appeal. As a result, the strength of *Magee v Farrell* as a precedent is significantly undermined.
42. There is a presumption that Irish law is compatible with the ECHR, and flowing from such compatibility, the Constitution should be interpreted in terms of its ECHR obligations. In *Byrne v Conroy*, the Supreme Court furthered this idea of the inherent link between national measures and EU law obligations. The case concerned an extradition for conspiracy to defraud the British Intervention Board of money due under the Common Agricultural Policy.<sup>70</sup> The appellant contended that the offences in question were revenue offences which were exempt under Section 50 of the Extradition Act 1965.<sup>71</sup> The Supreme Court held that where legislation is ambiguous, legislation must be interpreted in a manner which would allow the State to comply with its obligations under EU law.<sup>72</sup>
43. Additionally, there is a general presumption that the Oireachtas intends to uphold international legal obligations when it implements domestic legislation. This presumption was considered in *Ó Domhnaill v Merrick*, where the Court examined the extent of the ECHR's operation in Ireland.<sup>73</sup> A Court of Appeal majority stated that there is an assumption that enacted statutes would be interpreted and applied, 'in consonance with the State's obligations under international law, including any relevant treaty obligations'.<sup>74</sup>

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<sup>70</sup> *Byrne v Conroy* [1998] 3 IR 1.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid*, para 23.

<sup>73</sup> *Ó Domhnaill v Merrick* [1984] IR 151.

<sup>74</sup> *ibid*, para 159.

44. These rules relating to the interpretation of Irish law in accordance with the ECHR and EU law mean that the content of the relevant constitutional rights will be informed by the rights discussed in the following sections.

## 3.0 The European Convention on Human Rights

### 3.1 Introduction

45. Ireland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1953.<sup>75</sup> Ireland is bound to uphold its treaty obligations under international law, but also gave ‘further effect’ to many of its ECHR obligations through the passage of the European Convention of Human Rights Act of 2003 (ECHR Act 2003).<sup>76</sup> Furthermore, Ireland was the respondent in the landmark case *Airey v Ireland*, which was heard in front of the European Court of Human Rights (ECtHR) in 1979. *Airey v Ireland* is one of the most significant and oft-cited disputes in the Article 6 case law, and effectively precipitated the creation of more demanding obligations on states to provide legal aid. Article 6 is the key substantive right that is violated through Ireland’s exclusion of legal aid eligibility for employment equality issues.
46. The ECHR, the ECHR Act 2003, and the ECtHR's jurisprudence give rise to obligations of the Irish state to ensure that the rights contained therein are practical and effective. Ireland must ensure that it implements and maintains a domestic legal framework that provides effective protection of Convention rights, which would include providing legal aid for employment equality issues where this is necessary to ensure access to justice and an effective remedy.

### 3.2 Employment Disputes as Civil Rights & Obligations

47. Article 6.1 of the ECHR provides for the right to a fair trial within a reasonable time in the determination of civil rights and obligations or when facing criminal charges.
48. The reference to civil rights and obligations has to be interpreted as an ‘autonomous concept deriving from the Convention’ and it does not depend on the legal classification of the dispute

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<sup>75</sup> ‘Chart of Signatures and Ratifications of Treaty 005: The Convention for the Protection of Human Rights and Fundamental Freedoms’ (*Treaty Office, Council of Europe*, status as of 11/04/2021) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 8 April 2021.

<sup>76</sup> European Convention on Human Rights Act 2003, preamble.

or the nature of the court deciding the dispute, but rather on its ‘substantive content and effects’.<sup>77</sup> To come within the scope of Article 6, there must be a genuine and serious dispute that concerns a right that exists under national law. It can relate to the existence of a right, to its scope or manner of exercise, and the outcome of the dispute has to be directly decisive for the right in question.<sup>78</sup>

49. Employment rights fall within the scope of civil rights and obligations under Article 6 of the ECHR. This includes issues such as the right to continue professional activities,<sup>79</sup> disciplinary proceedings that decide on the right to continue to exercise a profession,<sup>80</sup> access to a liberal profession,<sup>81</sup> decisions that affect the possibility of access to employment and therefore earning a living,<sup>82</sup> the lawfulness of a dismissal,<sup>83</sup> suspensions<sup>84</sup> or reinstatements,<sup>85</sup> and compensation claims for inability to work due to work-related illness or accidents.<sup>86</sup>
50. The Court considers that the protection Article 6.1 provides also applies to ‘proceedings which, in domestic law, come under ‘public law’ and whose result is decisive for private rights and obligations or the protection of ‘pecuniary rights’.<sup>87</sup> Accordingly, Article 6.1 is also applicable to ordinary labour disputes even in the case of civil servants, regardless of the special relationship with the State.<sup>88</sup>

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<sup>77</sup> Council of Europe, *‘European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)’*, 6.

<sup>78</sup> Council of Europe, *‘European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)’* 6.

<sup>79</sup> *König v Germany*, no. 6232/73, 28 June 1978.

<sup>80</sup> *Le Compte, Van Leuven and De Meyere v Belgium*, no. 6878/75;7238/75, 23 June 1981, *Philis v Greece* (no. 1), no. 12750/87, 27 August 1991.

<sup>81</sup> *Thlimmenos v Greece* [GC], no. 34369/97, 6 April 2000.

<sup>82</sup> *Pocius v Lithuania*, no. 35601/04, 6 July 2010, *Užkauskas v Lithuania*, no. 16965/04, 6 July 2010.

<sup>83</sup> *Buchholz v Germany*, no.7759/77, 6 May 1981, *Aleksandar Sabev v Bulgaria*, no. 43503/08, 19 July 2018.

<sup>84</sup> *Obermeier v Austria*, no. 11761/85, 28 June 1990.

<sup>85</sup> *Ruotolo v Italy*, no. 12460/86, 27 February 1992.

<sup>86</sup> *Chaudet v France*, no. 49037/06, 29 October 2009.

<sup>87</sup> Council of Europe, *‘European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)’*, 12.

<sup>88</sup> In *Regner v the Czech Republic*, the ECtHR stated that “Employment disputes, especially those concerning measures terminating employment in the private sector, concern civil rights within the meaning of Article 6.1 of the Convention.” On that basis, they found that the revocation of a public servant’s security clearance affected his duties and employment, and even if he was regarded to be a civil servant those disputes would in principle fall under the protection Article 6 (*Regner v the Czech Republic* [GC], no. 35289/11, 19 September 2017, para 121). The State could argue that the applicant’s status as a civil servant is outside the scope of Article 6 if two conditions are met: access to courts for the servant has to be expressly excluded by the national law of the State, and there must be objective grounds in the State’s interest for that exclusion (*Vilho Eskelinen and Others v Finland* [GC], no. 63235/00, 19 April 2007).

51. Furthermore, equal access to employment and to the civil service, if recognised under domestic law, could also enjoy the protection of Article 6.<sup>89</sup> Additionally, the court has established that '[e]mployment disputes by their nature call for expeditious decision'.<sup>90</sup>

### 3.3 Article 6: Right to a Fair Trial & *Airey v Ireland*

52. The European Court of Human Rights decided the case of *Airey v Ireland*<sup>91</sup> in 1979, with the Court finding that there had been a breach of Ms Airey's Article 6 rights to a fair trial, in addition to a breach of her Article 8 right to family life. Ms Airey was seeking a judicial separation from her husband in Ireland, but did not have the money to pay for legal representation. At the time, divorce was illegal in Ireland and judicial separations could only be obtained in the High Court. Ms Airey cited her husband's physical abuse as one of the reasons she sought separation, while also remarking on his lack of cooperation signing the appropriate documents to enable the separation process to move forward. Ms Airey could not find a lawyer willing to take a case *pro bono*, nor had she the funds to obtain legal representation. She contended that legal aid for her case should be provided by the State in order to protect her Article 8 right to family life and her Article 6 right to a fair trial. The ECtHR found that 'Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation' and that there was a breach of her Article 6.1 rights'.<sup>92</sup> Amongst other evidence, the ECtHR was presented with the statistic that of all the judicial separation cases that were brought before the High Court in Ireland, every single applicant had retained legal representation.<sup>93</sup> This reality, in combination with the undue financial and emotional burden that would be placed on Ms Airey if she were to be forced to represent herself in court, contributed to the Court's ruling that a fair trial could not be ensured without legal aid being provided to Ms Airey by the State. Accordingly, her Article 6.1 right had been breached.
53. *Airey v Ireland* is considered a landmark case in the ECtHR's jurisprudence relating to Article 6, as the ruling elucidated the broader understanding of Article 6 and established the idea that

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<sup>89</sup> *Tinnelly & Sons Ltd and Others and McElduff and Others v the United Kingdom*, no. 20390/92;21322/92, 10 July 1998.

<sup>90</sup> Council of Europe, 'European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)', 86.

<sup>91</sup> *Airey v Ireland*, no. 6289/73, 9 October 1979.

<sup>92</sup> *ibid*, para 28.

<sup>93</sup> *ibid*, para 24.

the state may be compelled by the Court to provide legal aid to a greater extent than is provided for in their own domestic system.<sup>94</sup> Moreover, *Airey* set the precedent for the protection of Article 6 necessitating effective access to the courts. Importantly, the ruling was made in the wake of another significant case involving Article 6, *Golder v the United Kingdom*, which was decided in 1975. *Golder* set the stage for the findings in the *Airey* case, as the Court was moved to consider the limitations of Article 6.1 and whether it secures the right of access to the courts for legal proceedings that have already begun or to all people wishing to commence an action in the interest of protecting a civil right or obligation.<sup>95</sup> In the *Golder* decision, the ECtHR came to the conclusion that Article 6.1 ‘secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal’.<sup>96</sup> On the heels of this decision, the ECtHR commented further on the bounds of Article 6.1 in their *Airey* judgment, stating that:

*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.*<sup>97</sup>

54. The Court gave great consideration to the difficulties that Ms Airey would face in presenting her case for a judicial separation from her husband, which would have demanded significant emotional involvement, financial resources, and evaluation of complex law. These facets of Ms Airey’s case and circumstances persuaded the Court that having to represent herself in court, due to a lack of financial means to afford legal aid, would constitute an unfair trial. In order for Ms Airey’s Article 8 right to family life to be protected, her Article 6 right to a fair trial had to be protected, in this case through the provision of legal aid by the state. The Court’s emphasis on these rights needing to be both practical and effective speaks to the positive nature of these obligations and that state involvement in protecting these rights may be mandated when applicable.

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<sup>94</sup> Ireland ratified the Convention with the sole reservation that the government of Ireland did “not interpret Article 6.3c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland.” “Chart of Signatures and Ratifications of Treaty 005: The Convention for the Protection of Human Rights and Fundamental Freedoms” (*Treaty Office, Council of Europe*, status as of 11/04/2021) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 8 April 2021.

<sup>95</sup> *Golder v the United Kingdom*, no. 4451/70, 21 February 1975, para 25.

<sup>96</sup> *Golder v the United Kingdom*, no. 4451/70, 21 February 1975, para 36.

<sup>97</sup> *Airey v Ireland*, no. 6289/73, 9 October 1979, para 24.

55. It should be noted that the Court emphasised that the State has free choice of the means provided to guarantee effective access to justice, which can be achieved through legal aid schemes or other means, such as simpler procedures. Significantly, it was the particular circumstances of the claim in the *Airey* judgement that led the Court to the conclusion that there has been a breach of Article 6. The Court clarified its reasoning as follows:

*...it would be erroneous to generalise the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6 para 1 (art. 6-1); there may be occasions when such a possibility secures adequate access even to the High Court.<sup>98</sup>*

56. As the Article 6 rights are not absolute, the applicability of positive state action has been clarified through both *Airey* and the case law from the following decades. The ECtHR has developed the consideration for the personal circumstances of an applicant, in addition to demonstrating a trend favouring the broader understanding of the civil nature of certain rights falling within the scope of Article 6. These trends illustrate a high likelihood that the Court would view the inclusion of employment equality cases in the eligibility criteria for Ireland's legal aid scheme as contributing to the practical and effective realisation of ECHR rights.

### 3.4 Article 6: Relevant ECtHR Case Law

57. Since *Airey*, the European Court of Human Rights has continued to consider the extent to which Article 6 may require legal aid in civil matters. In doing so, it has honed the scope of the right, in addition to elucidating the criteria for determining when state provision of legal aid is necessary to protect the right to a fair trial. The case law has established the considerations that must be taken into account when assessing whether States must provide legal aid, and through examination of the principles and guidelines consistently laid out in the case law built after the precedent set in *Airey*, the necessity of legal aid for employment equality issues can be further assessed.

58. The case of *P., C., and S. v the United Kingdom* was decided by the Strasbourg court in 2002, where the applicants were a mother (P.) and father (C.). The parents had been party to care proceedings in the UK regarding future contact with their child (S.) after the child was adopted by another family. P.'s legal team withdrew from the care proceedings, and the UK judge refused an adjournment for P. to have time to find new representation. The effect of the refusal

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<sup>98</sup> *ibid*, para 26.

of adjournment was that P. had to represent herself in the care proceedings. Taking her case to the ECtHR, she claimed that the refusal of adjournment violated her Article 6 right to a fair trial. In front of the ECtHR, it was argued that P. and C. could not be expected to appropriately represent themselves given the serious emotional considerations of the case. The judgment in favour of the applicants was supported and bolstered by reference to the previous rulings in *Golder v the United Kingdom*, as well as *Airey v Ireland*. The judgment expanded on the ‘principle of fairness’, with the Court stating that fairness is ‘the key principle governing the application of Article 6’ and further commenting that ‘the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures’.<sup>99</sup> The principle of fairness was elaborated on further in *Tabor v Poland* (2006). Under Polish domestic law, the national courts were not obliged to provide reasons for the refusal of legal aid, but the ECtHR held that the principle of fairness dictates that courts must give reasons for the rejection of legal aid claims.<sup>100</sup>

59. Decided in 2005, *Steel and Morris v The United Kingdom* was another key case concerning the Article 6 right to a fair trial.<sup>101</sup> Two UK nationals were sued by McDonald’s for defamation due to their contribution to an anti-McDonald’s campaign, which culminated in the production of a six-page leaflet. One of the applicants was unemployed, whilst the other was either unemployed or on a low wage throughout the period of the case. Nevertheless, the applicants were refused legal aid, and had to represent themselves throughout the trial and appeal, with only sporadic help from volunteer lawyers. They consequently lodged an application before the Strasbourg Court that they were denied a fair trial due to the lack of legal aid made available to them.
60. The ECtHR noted that the question of whether legal aid was necessary for a fair hearing depended on a number of factors. Amongst other things, these depended on the ‘importance of what was at stake for the applicant’, ‘the complexity of the law and procedure’, and ‘the applicant’s capacity to represent him or herself effectively’.<sup>102</sup> Determining the case by reference to these factors, the Court proceeded to analyse the extent to which the applicants were able to effectively defend themselves. Importantly, the judgement operates as a restatement of the ‘principle of effectiveness’ as first articulated in *Airey*, with the Court

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<sup>99</sup> *P., C., and S. v the United Kingdom*, no. 56547/00, 16 July 2002, para 91.

<sup>100</sup> *Tabor v Poland*, no. 12825/02, 27 June 2006, para 45-46.

<sup>101</sup> *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005.

<sup>102</sup> *ibid*, para 61.



reiterating that the purpose of the Convention is to guarantee, ‘practical and effective rights’.<sup>103</sup> However, the Court stressed that the right of access to the court under Article 6 ECHR is not absolute, and it can accordingly be subject to restrictions, providing that they ‘pursue a legitimate aim and are proportionate’.<sup>104</sup> For instance, such restrictions on the grant of legal aid could be justified according to the applicant's prospects of success or financial well-being. Significantly, though, these restrictions can only be justified insofar as a reasonable equality of arms can be achieved and substantial disadvantage for one party is avoided. As the Court articulated:

*...it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.*<sup>105</sup>

61. The ECtHR concluded that the denial of legal aid to the applicants deprived them of the opportunity to effectively present their case whilst also contributing to an ‘unacceptable inequality of arms’ with McDonald’s.<sup>106</sup> In this case, the legal and procedural issues were very complex such that sporadic help from volunteer lawyers was insufficient. Indeed, the case amounted to the longest trial in English history, spanning a period of two years and six months, with over 313 days spent in court.<sup>107</sup> This was representative of the applicant’s lack of skill and experience in legal representation, and highlighted the importance of ensuring that the applicant was not at an unfair disadvantage when facing opposition with exponentially more resources and finances at their disposal.
  
62. Finally, another key case in the Article 6 jurisprudence is *Shamoyan v Armenia*, which was argued before the ECtHR in 2015.<sup>108</sup> The applicant, an Armenian national who was disabled and confined to a wheelchair, first brought proceedings against her neighbour seeking to have a construction dismantled, as she was planning to install a ramp for wheelchair access. However, during the court proceedings the applicant changed her claim, asking for the construction in question not to be dismantled, but rather allocated to her in order to install the ramp. She did not have legal representation when she filed the claim, which was first dismissed by a regional court, and then by a court of appeal. She then lodged an appeal on points of law

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<sup>103</sup> *ibid*, para 59.

<sup>104</sup> *ibid*, para 62.

<sup>105</sup> *ibid*, para 62.

<sup>106</sup> *ibid*, para 72.

<sup>107</sup> *ibid*, para 49.

<sup>108</sup> *Shamoyan v Armenia*, no. 18499/08, 7 July 2015.

before the Court of Cassation, which was not admitted because it was not lodged by an advocate licensed to act before that court. The applicant then claimed that because she could not afford a licensed advocate, she was being denied access to court. The ECtHR considered that the impossibility to apply for legal aid in this case, given the procedural requirement of an advocate licensed to act before the Court of Cassation, placed a disproportionate restriction on the applicant's effective access to that court, and held that there was a violation of Article 6.1 of the Convention. In doing so the Court considered the difficult financial situation of the applicant, the lack of legal aid and the fact that the Government failed to prove that she could have obtained counsel willing to act *pro bono*.

63. These key cases, along with *Airey*, have drawn out the Court's understanding of the bounds and limitations of Article 6, and the judgments demonstrate that the Court's understanding of Article 6 disputes is heavily informed by the 'principle of fairness' and 'principle of effectiveness'. The principle of fairness, identified by the ECtHR as the key principle related to Article 6, begs consideration of whether the burden of self-representation 'in the teeth of... difficulties'<sup>109</sup> affects the fairness of the trial. The emotional burden of having no choice but to represent oneself in a case involving discrimination in the workplace is undoubtedly heavy. When examining the potential burden of self-representation in an employment equality dispute before the WRC, one consideration that must be made is for the applicant's fear of loss of livelihood or income, which can be related to the ability to provide for oneself and a family. This fear has the potential to be exacerbated by discriminatory practices in the workplace; the expectation that a complainant in the WRC would have to advocate for themselves and relive instances of discrimination that could be traumatic appears to fall within the Court's interpretation of contravention against the principle of fairness and a person's Article 6 right to a fair trial.
64. The implications of the *Steel and Morris* judgment also have relevance to an evaluation of fairness in the WRC. Just as the applicants in the *Steel and Morris* case were determined to be at an unfair disadvantage when self-representing against a corporate giant such as McDonald's, workers in Ireland may find themselves faced with an inequality of resources if pursuing a claim against a large company or wealthy employer with an abundance of resources. The nature of the relationship between a worker and whomever they are working for will often involve an unbalanced power dynamic, where an individual applicant would presumably have access to

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<sup>109</sup> *P., C., and S. v the United Kingdom*, no. 56547/00, 16 July 2002, para 91.

fewer resources than a company or employer in most cases. This imbalance could mean that self-representation in the WRC against a large corporate entity could be deemed an unfair trial based on a gross inequality of resources.

65. Additionally, the principle of effectiveness, which finds its foundations in the *Airey* judgment, and which was further developed in the *Steel and Morris* and *Shamoyan* judgments, asks for consideration of whether access to the courts is realised in an effective and practical manner. Notably, the *Shamoyan* judgment makes reference to the potential issues regarding effective access to the courts when there is an ‘absence of possibility to apply for legal aid’.<sup>110</sup> While this case referred specifically to the Cassation Court in Armenia, it would not be unreasonable to believe that the ECtHR would view disputes in the WRC and the Labour Court as similarly not realising effective access to the courts without at least the possibility to apply for legal aid, which is currently not an option for cases taken before the WRC in Ireland.

### 3.5 Additional Violations of ECHR Rights

66. While the right to legal aid arises primarily under Article 6 ECHR, these issues frequently arise in cases also alleging violations of other ECHR rights. Importantly, the Article 6 right to a fair trial often does not operate in a vacuum; its interaction with other ECHR rights may be seen to strengthen such cases and is revealing of their multifaceted nature. This is evident through Ms Airey’s claim that both her Article 6 right and Article 8 right to private and family life had been violated. As such, it is important to highlight that there are other ECHR rights violations that may be triggered through Ireland’s exclusion of legal aid for employment matters, depending on the particular nature of the employment dispute. ECHR rights that could be violated through discrimination in the workplace include Article 8 and the right to respect for private and family life, Article 10 and the right to freedom of expression, Article 14’s prohibition on discrimination, and Protocol No. 1, Article 1’s right to the protection of property, from which there is a derived right to earn an income.
67. Some or all of these rights may be relevant in employment equality disputes that involve common discriminatory practices. These practices could include discrimination on the basis of sexual orientation, race, gender, ability, or class - issues that were relevant to a majority of the cases taken before the Workplace Relations Commission in Ireland from 2018 to 2021.<sup>111</sup> The

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<sup>110</sup> *Shamoyan v Armenia*, no. 18499/08, 7 July 2015, para 36.

<sup>111</sup> See the Appendix for data on dispute classifications.

fact that employees in Ireland cannot apply for legal aid if they are discriminated against in the workplace has the potential to impinge upon the rights laid out in Article 8, 10, 14 and Protocol No. 1 by creating a barrier to accessing the courts. With the exclusion of legal aid for these cases, it may also be argued that there is a breach of Article 13 right to an effective remedy that is found in the Convention. In order to be guaranteed, people must in principle have unimpeded access to the judiciary to enforce laws and secure rights, and this cannot be done if complainants cannot afford, nor be awarded legal aid, to take their employment equality case before the WRC.

### 3.6 The European Convention on Human Rights Act 2003

68. The obligations laid out in the ECHR were further entrenched within the Irish domestic legal system through the passage of the European Convention on Human Rights Act 2003. The legislation's purpose was to 'enable further effect to be given, subject to the Constitution, to certain provisions of the Convention'.<sup>112</sup> Each of the articles from the ECHR that are referenced in this Report is protected by the ECHR Act 2003, including Article 1 of Protocol No. 1. The Act further requires interpretations of laws to be compatible with the ECHR,<sup>113</sup> whilst Section 3 places an obligation on organs of the state to perform their functions in a manner compatible with the Convention.<sup>114</sup> The Legal Aid Board is subject to this obligation.
69. Moreover, the Act of 2003 confers the High Court and Supreme Court with the power to issue declarations of incompatibility.<sup>115</sup> This judicial power comes from Section 5 of the Act, where it is stated that:

*In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.<sup>116</sup>*

70. In this way, Section 5 gives the Irish superior courts the power to issue a declaration of incompatibility if a statute or law contravenes Ireland's obligations under the ECHR. The ECHR Act has incorporated *inter alia* the Article 6, 8, 10, 13, and 14 rights laid out in the ECHR, in addition to the protection of property found in Article 1 of Protocol No. 1. Based on

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<sup>112</sup> European Convention on Human Rights Act 2003, preamble.

<sup>113</sup> *ibid*, s 4.

<sup>114</sup> *ibid*, s 3.

<sup>115</sup> *ibid*, s 5.

<sup>116</sup> *ibid*, s 5(1).

the manner in which these rights may be breached by the exclusion of legal aid for employment law cases, as has been expanded upon in this Report, the Irish courts could in principle have recourse to issue a declaration of incompatibility for the Civil Legal Aid Act 1995 in an appropriate case. This incompatibility could then be remedied through revision of the Act of 1995 to abide by Ireland's domestic and international obligations to the rights of the ECHR by providing for the opportunity to apply for legal aid when filing a complaint related to issues of employment law.

71. While the effects of a declaration of incompatibility under the ECHR Act 2003 are not as far-reaching as those provided by a declaration of unconstitutionality,<sup>117</sup> it could still be a valuable remedy. In fact, in *Foy v An t-Ard Chlaraitheoir & Others*, the High Court recognised that:

*Whilst it is correct to say that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the existing law, nevertheless it does have consequences and may be of value to an applicant. In the first instance, the Taoiseach is obliged to lay a copy of an order, containing such a declaration, before each House of the Oireachtas within the next twenty-one days on which that House sits. Secondly, as such a declaration can only issue from a constitutional court, such a court can have a reasonable expectation that the other branches of government (Article 6 of the Constitution) would not ignore the importance or significance of the making of such a declaration. Thirdly, a party in whose favour such a declaration is made, can apply to the Government through the Attorney General for an "ex gratia" payment under ss. 4 of s. 5 of the Act. And finally, the granting of such a declaration may have implications for the court's discretion with regard to the costs of proceedings.<sup>118</sup>*

72. However, the question of compatibility would only arise if no other remedies are available, or if those available are not adequate to ensure full compliance with the ECHR. In *Foy*, the High Court found that in some cases an interpretation compatible with the Convention is not possible even under the scope of Section 2 of the Act of 2003,<sup>119</sup> and that '[w]hen the court finds itself so restricted the only remedy is a declaration of incompatibility'.<sup>120</sup> Additionally, in *Donegan v Dublin City Council & Others*, the Supreme Court issued a declaration of incompatibility after finding there was no other legal remedy.<sup>121</sup> In doing so, the Court noted that judicial review may not always be considered an adequate remedy.<sup>122</sup>

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<sup>117</sup> Article 34 of the Irish Constitution gives the High Court with the power to strike down any law that breaches the Constitution.

<sup>118</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 110.

<sup>119</sup> European Convention on Human Rights Act 2003, section 2. Section 2(1) of the Act of 2003 provides: 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions'.

<sup>120</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 56.

<sup>121</sup> *Donegan v Dublin City Council & Others* [2012] IESC 18, 27 February 2012, para 159.

<sup>122</sup> *ibid*, para 128-132. The Court explained 'Any judicial review of this decision, save possibly where the District Court Judge patently failed to comply with the section itself, would be bound to fail. Certainly the court, on

73. As analysed, when there are other available remedies, seeking a declaration of incompatibility would not be suitable. Still, considerations made in both *Foy* and *Donegan* could apply to employment equality issues. In *Foy*, the High Court has found that ‘...failure by the State, through the absence of having any measures to honour the convention rights of its citizens, is every bit as much a breach of its responsibility as if it had enacted a piece of prohibited legislation’.<sup>123</sup> The complexity of the procedure before the WRC and the imbalance of power in the work environment will, in most cases, make it very difficult for an individual to successfully bring forward their case, which in light of the absence of legal aid appears to be incompatible with Article 6 of the ECHR.
74. As we discussed earlier in this analysis, a fair trial and opportunity for an effective remedy cannot be guaranteed without a provision for legal aid for issues of employment equality. Without legal aid, vulnerable communities may be at the mercy of discriminatory practices in the workplace without the ability to fairly represent themselves in court or to be aided in producing the financial resources necessary to defend themselves and seek justice.

### 3.7 Conclusion

75. While Article 6 does not expressly guarantee a right to legal aid in civil matters, since its landmark judgment in *Airey*, the Court has recognised that, in order to be practical and effective, the right to a fair trial may require legal aid where this is necessary to ensure access to justice or to the courts. The ECtHR has identified which guiding principles may be used to determine when state-funded legal aid may be necessary; the principle of effectiveness and the principle of fairness have been developed through the jurisprudence of the ECtHR, offering a more comprehensive understanding of what truly constitutes the protection of the right to a fair trial. The Court has further clarified that considerations must be taken into account when determining whether it is fair for an applicant to represent himself in proceedings. These considerations may include the vulnerability of the applicant, their financial means, their chances of success, what is at stake for the applicant, and the complexity of the law at issue.

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judicial review, could not enter into an assessment of the facts or personal circumstances behind the application, such matters are not even within the consideration of the District Court Judge. Judicial review of a s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application’.

<sup>123</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 108.

76. The treatment of Article 6 in the ECtHR case law provides support for the argument that restricting cases of employment equality from eligibility for legal aid offends both principles and contravenes the modern conception of a person's right to a fair trial under Article 6. A person's right to freedom of expression, protection of property, and prohibition of discrimination must also be protected through access to the courts when violations occur, and Ireland's current legal framework currently imposes a barrier to justice for those who have been discriminated against in the workplace. The positive obligations that arise as a result of Ireland's commitment to the ECHR, and entrenchment of ECHR rights into domestic law through the ECHR Act 2003, mandate reform of Ireland's legal aid system to include access to legal aid for employment equality cases.

# 4.0 The Charter of Fundamental Rights of the European Union

## 4.1 Introduction

77. This Chapter shall investigate the right to legal aid under European Union law in general and the Charter of Fundamental Rights of the European Union (the Charter) in particular. With the entry into force of the Lisbon Treaty, the Charter has become legally binding and so has its Article 47.3, which expressly provides a right to legal aid.<sup>124</sup> Moreover, the principle of effective judicial protection, that is expressly mentioned in Article 19.1 of the Treaty on the Functioning of the European Union (TFEU) (and enshrined in Article 47 of the Charter) must be taken into consideration when examining to what extent EU law requires Ireland to provide legal aid for proceedings before the WRC and consequently appeal proceedings in front of the Labour Court.
78. There is no secondary EU legislation that provides for legal aid in civil matters in general.<sup>125</sup> However, the procedural guarantees provided for in the EU's equality directives, which have been transposed in the Employment Equality Act, must be taken into account when considering whether legal aid has to be provided by the State.
79. In this Chapter we will analyse the scope of the Charter of Fundamental Rights of the European Union and will establish that employment equality disputes before the WRC fall within the scope of the Charter (Chapter 4.2). We will then look at the Charter provisions regarding effective judicial protection and legal aid (Chapter 4.3) and the relevant case law of the CJEU regarding legal aid under the Charter (Chapter 4.4). Finally, we will consider the procedural implications of relying on the Charter to establish a right to legal aid before the WRC (Chapter 4.5), before presenting a brief conclusion (Chapter 4.6).

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<sup>124</sup> TEU, Article 6.1.

<sup>125</sup> Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41 only covers cross-border disputes and has therefore very limited scope for disputes before the WRC, where the claimant in most cases is an Irish resident.



## 4.2. Scope of the Charter of Fundamental Rights of the EU

80. Before considering whether the Employment Equality Act must conform with the requirements of the Charter of Fundamental Rights of the European Union (Charter), we must determine the scope of the Charter within national law. The scope is defined in Article 51 of the Charter, which states:

*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

81. The case law from the Court of Justice of the European Union (CJEU) has concluded that Member States' requirement to respect fundamental rights defined in the law of the EU only apply to national entities when they act in the scope of Union law.<sup>126</sup>

82. The CJEU has provided a judgment indicating the scope of the Charter in *Åklagaren v Hans Åkerberg Fransson*, reiterating that Article 51 has a binding effect on Member States 'when they act in the scope of Union law'<sup>127</sup> and that where EU law applies, the fundamental rights guaranteed by the Charter must also apply.<sup>128</sup> The *Åkerberg Fransson* case similarly used an EU Directive to demonstrate how the national law on VAT follows from Union law, therefore falling within the scope of the Charter.<sup>129</sup> Although the case law makes it clear that 'European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law,'<sup>130</sup> it does determine what prevails when there is a conflict between national law and the Charter. The CJEU states:

*[I]t is settled case law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.<sup>131</sup>*

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<sup>126</sup> European Union Charter of Fundamental Rights, Article 51.

<sup>127</sup> Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 20.

<sup>128</sup> *ibid* para 21.

<sup>129</sup> *ibid* para 25.

<sup>130</sup> *ibid* para 44.

<sup>131</sup> *ibid* para 45.

83. Considering the scope of the Charter through Article 51, an analysis of whether the Employment Equality Act is considered as ‘implementing EU law’ must be conducted. The Charter, adopted in 2000, is legally binding since the entry into force of the Lisbon Treaty in 2009. If the scope of the Employment Equality Act falls under EU law, the Charter must be complied with under Irish law. The Employment Equality Act’s main provisions were meant to replace previous acts that implemented the EU equal pay and EU equal treatment Directives, and bring Irish legislation into line with decisions of the CJEU.<sup>132</sup> The Employment Equality Act outlaws discrimination on nine grounds: Gender; Family status; Sexual orientation; Religious belief; Age; Disability; Race, colour, nationality, ethnic or national origins; Membership of the Traveller community; Civil Status.<sup>133</sup> These grounds, with the exception of civil status, are based on sources of EU law and can be tied to several EU Directives.
84. Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)<sup>134</sup> evidently protects against discrimination based on gender.
85. Council Directive 2019/1158 on Work-Life Balance for Parents and Carers<sup>135</sup>, which replaced the revised Parental Leave Directive, covers the protection of workers on the grounds of family status. The intention of the Directive is to ‘address the issue of ‘women’s under-representation in employment’ and to provide for paid paternity and parental leave in order to allow more equal sharing of care responsibilities between men and women’, irrespective of workers’ marital or family status.<sup>136</sup> Directive 2006/54/EC also states the prohibition of discrimination on the basis of pregnancy at Article 2(2)(c), applying to EU law and consequently in the Member States.<sup>137</sup> The Pregnancy Directive 92/85/EEC<sup>138</sup> also supports the argument that EU

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<sup>132</sup> Employment Equality Act 1998.

<sup>133</sup> ibid s 6.

<sup>134</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>135</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

<sup>136</sup> European Parliament, ‘The scope of EU labour law’ 2020, p 20.

<sup>137</sup> European Commission, ‘Gender equality law in Europe’ 2016, p 31.

<sup>138</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

law outlaws discrimination on the basis of family status in the workplace. The inclusion of family status in the Employment Equality Act can be tied to these Directives.

86. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>139</sup> focuses on direct or indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation. This directive covers some of the grounds of discrimination outlawed in the Employment Equality Act.
87. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>140</sup> was implemented into national law through the Employment Equality Act to cover the grounds of race, colour, nationality, ethnic or national origins, as well as the membership of the Traveller Community. Although the EU Directive does not specifically mention the traveller community, a report by the Commissioner of Human Rights of the Council of Europe on *Human rights of Roma and Travellers in Europe* stated that:

*In EU member states, such discrimination [towards Roma and Travellers] violates the EU Racial Equality Directive (Directive 2000/43/EC). Measures to address Roma and Traveller unemployment must include assistance to victims of discrimination in claiming their rights through the courts so that employers who discriminate can be punished and impunity for discrimination in employment can be brought to an end.*<sup>141</sup>

88. These EU Directives cover most of the grounds of discrimination outlawed in the Employment Equality Act, with the exception of civil status which was added by Ireland to push further than what was prescribed by EU law. Member States are bound by the Charter when applying EU law in their national systems. It is safe to say that the Employment Equality Act is predicated on European law and that employment equality disputes, specifically on the basis of the 8 grounds, fall within the scope of Article 51. Therefore, the Charter applies to proceedings under the Employment Equality Acts, including the WRC and the Labour Court.
89. The Charter outlines equality and working provisions in chapters II, III and IV making it evermore clear that the scope of national labour law needs to conform with EU law. In the next section, we will delve into article 47 of the Charter that clarifies the right to an effective remedy and to a fair trial, which includes access to legal aid.<sup>142</sup> Although Ireland has brought national

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<sup>139</sup> Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>140</sup> Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>141</sup> Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, 2012, 160.

<sup>142</sup> European Union Charter of Fundamental Rights, Article 47.

laws up to speed with EU equal pay and EU equal treatment Directives and the Charter through the adoption of the Employment Equality Act, Ireland is not applying the justice element of the Charter in regards to access to legal aid for those facing labour disputes and needing legal recourse due to discrimination in the workplace. This has an adverse effect on the progress of Ireland's equality laws, as those facing discrimination on one of the grounds listed in the Employment Equality Act cannot access legal aid, although it is guaranteed to citizens of the EU under the Charter. As stated by Equinet, 'Countries have the obligation not only to respect and apply the EU laws themselves, but to transpose them in their national legislation to ensure that all individuals and organisations respect and apply them as well.'<sup>143</sup> Ireland should therefore revisit its current legislation to bring it into conformity with EU law, by allowing access to legal aid to workers who face human rights violations, and ensure that all human rights violations are treated with due process.

### 4.3 The Right to Legal Aid Under Article 47 of the Charter

90. Article 47 of the Charter provides for the following:

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

91. The ECHR is the basis for the Charter as expressly stated in Article 52.3 of the Charter, according to which the ECHR functions as a foundation for the Charter where it provides the same rights. Therefore, the corresponding rights guaranteed under the ECHR define the minimum requirement of protection under Article 47 of the Charter. The scope and meaning of those rights are not only determined by reference to the text of the ECHR but also by reference to the relevant case law of the ECtHR.<sup>144</sup>

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<sup>143</sup> European Network of Equality Bodies <<https://equineteurope.org/equality-in-europe/eu-legislative-framework/>> accessed 20 March 2021.

<sup>144</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 35.

92. Article 47 of the Charter in its three paragraphs provides different rights, all promoting the principle of effective judicial protection. Their counterparts can be found in different provisions of the ECHR.
93. Article 47.1 of the Charter provides for an effective remedy as does Article 13 ECHR. However, whereas the ECHR only guarantees such remedy in front of a national authority, Article 47.1 of the Charter goes beyond that in requiring Member States to provide an effective remedy before a tribunal.<sup>145</sup>
94. Relating to Article 47.2 of the Charter the CJEU has found that this paragraph corresponds to Article 6.1 ECHR.<sup>146</sup> However, the scope of the right under the Charter goes beyond the ECHR, since the right to a fair trial is not limited to proceedings on civil law rights and obligations or criminal charges.
95. Article 47.3 of the Charter provides for legal aid. This right has no explicit counterpart for civil matters in the ECHR but only provides for a right to legal assistance in criminal matters.<sup>147</sup> Therefore, the wording of Article 47.3 of the Charter goes beyond the right provided in Article 6 ECHR. Nevertheless, starting with the decision in *Airey v Ireland*,<sup>148</sup> the ECtHR acknowledged that the ECHR requires access to legal aid, whenever the absence of access to legal aid would render the access to an effective remedy factually impossible. Article 47.3 of the Charter shall mirror this approach taken by the ECtHR.<sup>149</sup>
96. In summary, all rights granted in Article 47 of the Charter have a counterpart in the ECHR or the relevant ECtHR case law, which serve as minimum requirements for the level of protection and the rights guaranteed by Article 47 of the Charter. Therefore, the ECHR and the relevant case law of the ECtHR provide the basis to determine the scope and content of rights granted in Article 47 of the Charter.

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<sup>145</sup> Explanations relating to the Charter of Fundamental Rights [2007] OJ L303/17 (Charter Explanations), 29.

<sup>146</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 32.

<sup>147</sup> For criminal matters see ECHR, Article 6(3)(c): which grants the following right to anyone charged with a criminal offence: ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’.

<sup>148</sup> *Airey v Ireland* (1979) 2 EHRR 305, 11; Charter Explanations 30; see in more detail Chapter 3.3.

<sup>149</sup> Charter Explanations, 30.

## 4.3 The European Court of Justice's Case Law on Legal Aid – the *DEB* Case

### 4.3.1 Facts of the Case

97. The CJEU has given detailed consideration to the issue of legal aid in a 2010 case; in *DEB*,<sup>150</sup> the CJEU had to decide on a request for a preliminary ruling of the Kammergericht Berlin, Germany. The main question at issue was whether the principle of effectiveness requires a Member State to provide access to legal aid to legal persons.
98. In the national proceedings, Deutsche Energiehandels- und Beratungsgesellschaft ('DEB') has applied for legal aid in front of a German court to file a state liability claim under EU law, based on the delayed transposition of a directive. Due to a lack of funds, DEB was not able to make the advanced payment obligatory under German law, nor to hire legal representation legally required in the state liability claim proceedings.

### 4.3.2 Questions Referred to the European Court of Justice

99. The CJEU rephrased the question by the referring court, considering whether the fact that a legal person is unable to qualify for legal aid renders the exercise of its rights impossible in practice.<sup>151</sup> According to the CJEU this question has to be answered in the light of the principle of effective judicial protection established by Article 47 of the Charter.<sup>152</sup> Even though the question referred to the CJEU focuses on the access to legal aid for legal persons, the CJEU made some general remarks on the right to legal aid under EU law and in particular under Article 47 of the Charter.
100. The CJEU divided the question referred to it into two subsidiary questions: 1) does the right to legal aid cover assistance by a lawyer and exclusion from court fees and 2) are legal persons entitled to legal aid.

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<sup>150</sup> Case C-279/09 *DEB* [2010] ECR I-13849; confirmed in Case C-156/12 *GREP* [2012] ECLI:EU:C:2012:342; for a detailed analysis of the Case *DEB* and the interaction of this case law with general principles of EU law see Ágnes Váradi, 'The Concept of Legal Aid in the Most Recent Case Law of ECJ' (2015) 3 Hungarian Yearbook of International Law and European Law 461 and Johanna Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 Review of European Administrative Law 53.

<sup>151</sup> *ibid*, para 28.

<sup>152</sup> *ibid*, para 33.

### 4.3.3 Findings of the European Court of Justice

101. On the first question, after a review of the case law of the ECtHR on legal aid, the CJEU acknowledges that the right to legal aid could extend to both elements that *DEB* sought, namely the assistance of a lawyer and dispensation from payment of the costs of the proceedings.<sup>153</sup>
102. Secondly, on the question as to whether legal aid must be granted to legal persons, the CJEU found – again based on the case law of the ECtHR – that it is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned.<sup>154</sup>
103. In the light of its findings, the CJEU concludes that legal aid must be granted where a failure to do so would constitute a limitation on the right of access to the courts and would therefore undermine the very core of the right to effective judicial protection. Therefore, the CJEU follows that the national court must apply a proportionality test to any rule restricting legal aid. This test shall scrutinise whether such a rule pursues a legitimate aim and if so whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.<sup>155</sup>
104. Most importantly for the purposes of this Report, the CJEU outlined certain general criteria to be taken into consideration by national courts when assessing whether the access to legal aid is required under EU law:

*In making that assessment, the national court must take into consideration the subject matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.*<sup>156</sup>

105. The CJEU derives these criteria from the ECtHR jurisprudence, according to which the assessment of whether legal aid has to be provided depends on the importance of the case for the applicant, the complexity of the applicable law and the procedure, the applicant's capacity

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<sup>153</sup> *ibid*, para 48.

<sup>154</sup> *ibid*, para 52.

<sup>155</sup> *ibid*, para 60.

<sup>156</sup> *ibid*, para 61.

to represent himself effectively, as well as the financial situation and the prospect of success for the potential litigant.<sup>157</sup>

106. These criteria are to be applied to natural and legal persons likewise; however, the Court also recognised in paragraph 62 that the access to legal aid for legal persons might be restricted beyond the mentioned criteria.<sup>158</sup> Regarding legal persons the CJEU indicated that non-profit-making legal person might be treated more favourable than profit-making legal persons when it comes to legal aid.<sup>159</sup>

#### 4.3.4 The Principles of Effective Judicial Protection and of Effectiveness

107. None of the anti-discrimination directives transposed through the Employment Equality Act<sup>160</sup> provides for detailed procedural rules on remedies against alleged discrimination, nor makes any reference to the availability of legal aid. However, all three directives oblige the Member States to ensure adequate enforcement of obligations under those directives is available to persons who consider themselves wronged.<sup>161</sup> The preambles of all three directives point out that the effective implementation of equal treatment requires adequate judicial protection against victimisation.<sup>162</sup>
108. In addition to this emphasis on the importance of judicial protection to ensure equal treatment, any national procedural rule adopted in the implementation of these obligations has to be in line with the principle of effectiveness in EU law. This principle was developed in the early case law of the CJEU and has since become settled case law and is now explicitly expressed in the treaties.<sup>163</sup>

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<sup>157</sup> *ibid*, paras 46 and 47 with reference to the ECtHR's case-law in *Airey v Ireland* [1979] 2 E.H.R.R. 305; *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005; *McVicar v the United Kingdom*, no 46311/99, 7 May 2002 and *P., C. and S. v the United Kingdom*, no. 56547/00, 16 July 2002; for a detailed analysis of the relevant case-law of the ECtHR see Chapter 3.4.

<sup>158</sup> See to that effect Peter Oliver, 'Case C-279/09, *DEB v Germany*, Judgment of the European Court of Justice (Second Chamber) of 22 December 2010' (2011) 48 *Common Market Law Review* 2036.

<sup>159</sup> Case C-279/09 *DEB* [2010] ECR I-13849, paras 44, 50 and 62.

<sup>160</sup> Directive 2006/54/EC of the European Parliament and of the Council; Council Directive 2000/43/EC and Council Directive 2000/78/EC.

<sup>161</sup> Directive 2006/54/EC of the European Parliament and of the Council, Article 17; Council Directive 2000/43/EC, Article 7 and Council Directive 2000/78/EC, Article 9.

<sup>162</sup> Directive 2006/54/EC of the European Parliament and of the Council, recitals 28 and 29; Council Directive 2000/43/EC, recital 20 and Council Directive 2000/78/EC, recital 30.

<sup>163</sup> TEU, Article 19.1 obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.



109. According to the principle of effectiveness, in the absence of detailed EU rules it is for the domestic legal system to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.<sup>164</sup> Therefore, the principle of effectiveness prohibits detailed procedural rules governing actions for safeguarding an individual's rights under EU law to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.<sup>165</sup>
110. This means that legal aid has to be provided for cases to be brought before the WRC and the Labour Court where without legal aid, the person seeking legal aid would be denied effective judicial protection.<sup>166</sup> In other words: where a failure to grant legal aid leads to a disproportionate restriction to access to the courts, it constitutes a violation of the principle of effective judicial protection and therefore of Article 47 of the Charter. Whether access to courts is restricted has to be decided on a case-by-case basis using the criteria provided in *DEB*.<sup>167</sup>

#### 4.4 The Principle of Supremacy and the Charter

111. Having established that there is in principle a right to legal aid in EU law, we will examine if and how a potential claimant may invoke this right in front of the Legal Aid Board.
112. The CJEU has confirmed in various cases that any national legislation that conflicts with EU law is automatically inapplicable. This principle of supremacy of EU law applies with no regard to whether the EU provision or the conflicting national provision came into force first.<sup>168</sup> This has two implications.
113. First, the conflicting national law stays in force and remains applicable in cases that have no EU element. Secondly, the supremacy of EU law and therefore the inapplicability of conflicting national law stems directly from EU law and does not require any act by either the national legislator or the supreme court or any other court.

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<sup>164</sup> Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case C-268/06 *Impact* [2008] I-2483, para 44.

<sup>165</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 28.

<sup>166</sup> *ibid*, para 59.

<sup>167</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 61.

<sup>168</sup> Case 106/77 *Simmenthal* [1978] ECR 629, para 17.

114. Furthermore, the obligation to disapply EU law does not only concern national courts but also by all organs of the State that apply EU law — including administrative authorities.<sup>169</sup>

115. In *Minister for Justice and Equality and Commissioner of the Garda Síochána*, the CJEU made it clear that this is also true for Irish administrative authorities and explicitly stated that this applies to the Workplace Relations Commission:

*...the Workplace Relations Commission, as a body upon which the national legislature has conferred the power to ensure enforcement of the principle — as given concrete expression by Directive 2000/78 and the Equality Acts — of non-discrimination in respect of employment and occupation, has before it a dispute involving observance of that principle, the principle of primacy of EU law requires it to provide, within the framework of that power, the legal protection which individuals derive from EU law and to ensure that EU law is fully effective, disapplying, if need be, any provision of national legislation that may be contrary thereto<sup>170</sup>*

116. The CJEU made it clear that there is no room for 'national procedural autonomy' that only entitles the High Court to decide over disapplying national law as had been suggested in *An Taoiseach v Commissioner for Environmental Information & Fitzgerald*.<sup>171</sup> On the contrary, the principle of supremacy entitles any statutory body to disapply national law that is contrary to EU law.<sup>172</sup>

117. Since the entry into force of the Treaty of Lisbon on the 1<sup>st</sup> of December 2009, the Charter is binding EU law and has the same legal value as the Treaties<sup>173</sup> and therefore Irish administrative authorities are not only entitled but obliged to disapply any Irish law that is inconsistent with the State's obligations under the Charter in those areas falling within the scope of EU law.

118. The possibility to file complaints before the WRC was *inter alia* established to fulfil Ireland's obligations under various EU anti-discrimination regulations,<sup>174</sup> and the CJEU explicitly found that the WRC is entitled not to apply Irish law that is in conflict with EU law.

119. Where the Legal Aid Board must decide about granting legal aid for proceedings in front of the WRC, we suggest that the Legal Aid Board, just like the WRC, is applying EU law and therefore is bound by the principle of supremacy. As a result, the Legal Aid Board, as competent authority for awarding legal aid, must consider the criteria laid out in *DEB* as to

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<sup>169</sup> Case C-378/17 *Minister for Justice and Equality and Commissioner of the Garda Síochána* [2017] ECLI:EU:C:2018:979, para 38.

<sup>170</sup> *ibid*, para 45.

<sup>171</sup> *An Taoiseach v Commissioner for Environmental Information & Fitzgerald* [2013] 2 IR 510.

<sup>172</sup> Trevor Redmond, *Law of the European Union* (Clarus Press Ltd 2019) 13–50.

<sup>173</sup> TEU, Article 6.1 subpara 1.

<sup>174</sup> See in more detail, Chapter 4.2.

when legal aid must be provided to fulfil the obligations under Article 47.3 of the Charter. A failure to do so might unlawfully restrict the right to effective judicial protection and the right to legal aid according to Article 47.3. of the Charter. From an EU law point of view, the right to legal aid can therefore be enforced before the Legal Aid Board without involving the courts.

## 4.5 Conclusion

120. What becomes clear from *DEB* is that access to legal aid is fundamentally important to ensuring effective judicial protection in line with EU law. According to the Civil Legal Aid Act 1995 a claimant bringing a case of discrimination before the WRC or an appeal before the Labour Court has no possibility to get legal aid.<sup>175</sup> While Article 47 of the Charter as interpreted by the CJEU does not provide clear rules or guidelines on when legal aid has to be provided, the CJEU did define a list of criteria that must be considered when determining whether EU law requires access to legal aid in a certain case.<sup>176</sup> The absolute exclusion from any proceedings before the WRC and the Labour Court under the Employment Equality Act from access to legal aid is difficult to reconcile with EU law, since it gives the competent authority (the Legal Aid Board) no discretion for a case-by-case analysis. This is especially problematic in the light of the complex cases that employment equality gives rise to.<sup>177</sup> A detailed analysis of the criteria set out in the CJEU case law applied to equal employment disputes before the WRC is carried out in the following Chapter.

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<sup>175</sup> There has been no ministerial order issued according to Civil Legal Aid Act 1995, s 27.2(b); see in detail Chapter 1.

<sup>176</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 61.

<sup>177</sup> See already case studies 1 and 2 in Sections Chapter 1.1.2 and 1.1.3.

## 5.0 Conclusions and Recommendations

121. As has been detailed in this Report, the exclusion of issues relating to employment equality law from eligibility for state-provided legal aid presents a gap in Ireland’s legal aid system with serious human rights implications. This absolute exclusion for cases concerning the WRC contravenes the commitments of the Irish state deriving from the Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter).
122. As discussed in Chapter 2, the Irish Constitution, in its role as the basic law of the state, is responsible for outlining the fundamental rights provided to all individuals in Ireland. Furthermore, the Constitution contains a number of substantive rights— namely the right to equality and the right to earn a livelihood— which, when looked at together, support the view that there is a right to equality at work. Flowing from this right to equality at work, individuals should be able to seek out the realisation of this right through enforcement by the Courts or statutory tribunals. The right of access to justice and the right to fair procedures, therefore, should ensure the individual is able to engage with the proper mechanisms to access a fair and equitable judicial remedy.
123. As prescribed by Article 51 of the Charter and elaborated by the CJEU in *Åkerberg Fransson*,<sup>178</sup> Member States are bound by the EU’s fundamental rights set out in the Charter whenever they are implementing Union law. Given that the EU directives on employment anti-discrimination are transposed through the Employment Equality Act, proceedings covered by this Act should comply with the Charter, which guarantees *inter alia* the right to legal aid in Article 47(3). According to the *DEB* case law of the CJEU, legal aid must be granted when the lack thereof limits the right to access the court. National courts and authorities, however, must apply the criteria given by the CJEU in *DEB* to assess whether legal aid must be provided in order to comply with the principle of effective judicial protection enshrined in Article 47 of the Charter. The CJEU has derived the criteria from the ECtHR’s case law, including the prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedure as well as the applicant’s capacity to represent himself effectively.

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<sup>178</sup> Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

124. According to the principle of supremacy of EU law, rights that stem from the Charter bind both Member States and their governmental entities, when they are applying national law that implements EU law. To comply with EU law and in particular with Article 47 of the Charter, the Legal Aid Board should be able to grant access to legal aid in employment equality disputes, where a failure to do so would deny a person's right to effective judicial protection.
125. Moreover, the protections found in the ECHR have been entrenched in Ireland's domestic law since the passage of the European Convention on Human Rights Act 2003. Both state organs and the Irish courts must ensure that Ireland's laws are compatible with the ECHR. The necessity for compatibility is subject only to the Constitution, but as has been analysed in this Report, the fact that applicants in employment equality cases may not apply for legal aid contravenes both the Constitution and the ECHR.
126. The ECHR and EU Charter have developed the bounds and limitations of the protections within their texts through the case law of their respective courts. The ECtHR and CJEU have consistently built upon the concepts of the 'principle of fairness' and the 'principle of effectiveness' as being key to upholding an individual's right to fair procedures and access to justice.
127. The principle of fairness requires consideration of certain aspects of an applicant's personal circumstances, and the standards by which the fairness of the trial may be evaluated have been identified by the ECtHR and the CJEU. Both European courts have developed similar criteria, including taking into account the vulnerability of the applicant, the applicant's ability to represent himself effectively, the applicant's financial resources, the complexity of the relevant law and procedure, and the emotional burden that may be placed on an applicant when the subject matter of the litigation is distressing or of a very personal nature.
128. Each of these considerations may be relevant to an applicant seeking to take an employment equality claim before the WRC. This Report has identified the statistical disadvantages of self-representation before the WRC. Additionally, the relevance of the personal circumstances of an applicant are undeniable in employment equality claims. The potential for emotional distress and bias is high when the subject matter may reference instances of traumatic discrimination and the result of the dispute may have implications for the applicant's ability to make a living. Furthermore, the statistics regarding successful cases in the WRC show that there is a lower

chance of winning one's case when self-representing, which speaks to a potential correlation with the fairness of a trial.

129. The international courts have shown a clear and consistent trend towards placing great weight on the personal circumstances of an application when determining the fairness of a trial. These trends demonstrate a high likelihood that the ECtHR and CJEU would have reason to find some employment equality cases taken in the WRC as not being fair without having the opportunity to retain professional legal representation. While this conclusion may not mean that all applicants in employment equality cases are entitled to legal aid, the current scheme does not even allow for the opportunity to apply, which does not appear to abide by the 'principle of fairness'.
130. The ECHR and the Charter have also identified the 'principle of effectiveness' as guiding evaluations of the right to access to the courts. This right is not meant to be 'theoretical or illusory', as mentioned in the ECtHR's *Airey* judgment, but rather 'practical and effective'. As the legal framework now stands in Ireland, it could be said that the right to protect oneself from discrimination in the workplace is more 'illusory' than effective, due to the prohibitively high costs of taking a case before the Workplace Relations Commission and the difficulty of representing oneself in court that have been identified in this Report.
131. This Report recommends that the Irish government take the necessary steps to allow for issues of employment equality law in front of the WRC and the Labour Court to be eligible for state-funded legal aid.

## Appendix – WRC cases under the Employment Equality Act

The dataset below includes all cases that have been decided by the WRC in the period from 1<sup>st</sup> January 2018 to 31<sup>st</sup> January 2021 on the basis of the Employment Equality Act and for which information of the representation of the claimant and the respondent are available. The data was drawn from the case database on the WRC website that can be accessed through the following link (filters already applied): <<https://www.workplacerelations.ie/en/search/?decisions=1&from=1/1/2018&to=31/1/2021&legislation=23>> accessed 23 April 2021.

The criteria set out above is fulfilled by a total of 410 cases, whereas in a total of 13 the WRC decided that it has no jurisdiction or ruled “Statute barred”. Therefore those 13 cases are not considered in any statistic drawn from the dataset below.

The following abbreviations and terms are used in the table below:

Professional.....	the party was represented by a solicitor or a barrister (firms of solicitors that are formally not represented are considered professionally represented for the purpose of this Report)
Union.....	the party was represented by a Union representative
Self-representation .....	the party did represent itself
Consultant .....	the party was represented by a professional consultant
Citizens Information Service .....	the party was represented by a representative of a Citizen Information Center
FLAC .....	the party was represented by a representative of FLAC (Free Legal Advice Centres)
IBEC.....	the party was represented by a representative of the Irish Business and Employers Confederation
Other.....	the party was represented by another person or organization not mentioned above
n/a.....	Information not available

Please note that this table is based on the information in the public domain on the Workplace Relations Commission website. The authors do not accept any liability in respect of the accuracy of the information contained on the Workplace Relations Commission website.

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00026791	Union	age	lost
ADJ-00026242	Self-representation	race	lost
ADJ-00025722	Self-representation	age	lost
ADJ-00025773	Professional	race	lost
ADJ-00027364	Professional	family	lost
ADJ-00028649	Self-representation	gender	lost
ADJ-00025554	Union	age	won
ADJ-00016629	Professional	disability	lost
ADJ-00013276	Union	age	lost
ADJ-00019975	Union	age	won
ADJ-00016512	Professional	age	won
ADJ-00025202	Professional	race, religion	lost
ADJ-00027767	Self-representation	race	lost
ADJ-00012188	Professional	gender, age	won
ADJ-00027749	Consultant	fixed-term	won
ADJ-00027515	Self-representation	gender	lost
ADJ-00026333	Union	age	lost
ADJ-00007375	Professional	gender	lost
ADJ-00026839	Self-representation	race	lost



## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00026978	Union	age	lost
ADJ-00025639	Professional	disability	lost
ADJ-00018470	Union	gender	lost
ADJ-00023582	Self-representation	gender, sexual orientation	lost
ADJ-00027228	Self-representation	family status	lost
ADJ-00026294	Self-representation	family status	lost
ADJ-00027323	Self-representation	gender	won
ADJ-00026823	Self-representation	penalisation	lost
ADJ-00010297	Professional	gender	won
ADJ-00022892	Professional	disability	lost
ADJ-00023463	Professional	disability	lost
ADJ-00019839	Professional	gender	Statute barred
ADJ-00022851	Professional	disability	lost
ADJ-00021643	Professional	disability	won
ADJ-00021648	Professional	disability	won
ADJ-00021267	Union	race	lost
ADJ-00021266	Union	race	lost
ADJ-00024805	Professional	disability	lost
ADJ-00015842	Self-representation	disability	lost
ADJ-00025681	FLAC	age	won
ADJ-00022172	Professional	gender	Statute barred

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00023614	Professional	race	won
ADJ-00023691	Self-representation	gender	lost
ADJ-00015253	Self-representation	race	lost
ADJ-00020011	Union	disability	lost
ADJ-00021516	Self-representation	age	lost
ADJ-00017346	Professional	fixed-term	lost
ADJ-00023720	Professional	disability	lost
ADJ-00018823	Self-representation	age	won
ADJ-00023019	Professional	gender	won
ADJ-00015339	Professional	disability	won
ADJ-00020524	Other	gender	lost
ADJ-00024869	Professional	age	lost
ADJ-00016529	Professional	disability	lost
ADJ-00025124	Self-representation	gender	lost
ADJ-00020441	Self-representation	gender	lost
ADJ-00003730	Self-representation	age	lost
ADJ-00017854	Union	disability	won
ADJ-00021220	Professional	race	lost
ADJ-00017891	Union	gender	won
ADJ-00023837	Self-representation	religion	lost
ADJ-00019938	Professional	disability	lost

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00019764	Self-representation	race	lost
ADJ-00021423	Professional	disability	lost
ADJ-00021765	Self-representation	disability	lost
ADJ-00021355	Self-representation	race	lost
ADJ-00020991	Professional	victimisation	lost
ADJ-00021811	Consultant	gender	lost
ADJ-00021979	Self-representation	race	lost
ADJ-00023183	Consultant	gender	won
ADJ-00019651	Self-representation	race	won
ADJ-00021626	Self-representation	race, gender, age	statute barred
ADJ-00024277	Self-representation	race	lost
ADJ-00016575	Self-representation	gender	won
ADJ-00020828	Professional	age, family	lost
ADJ-00015922	Professional	gender	won
ADJ-00020498	Self-representation	disability	lost
ADJ-00017729	Professional	race	lost
ADJ-00023549	Professional	gender	lost
ADJ-00019185	Professional	sexual orientation	lost
ADJ-00020368	Union	disability	lost
ADJ-00017345	Professional	victimisation	Statute barred
ADJ-00016116	Professional	gender, family status	lost

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00015870	Professional	disability, race	lost
ADJ-00018880	Professional	family status, victimisation	lost
ADJ-00016274	Union	gender	won
ADJ-00000026	Professional	family status, gender	lost
ADJ-00019429	Professional	victimisation	won
ADJ-00021089	Union	gender	won
ADJ-00019670	Self-representation	civil status	lost
ADJ-00020897	Professional	sexual harassment	lost
ADJ-00023395	Self-representation	civil status	lost
ADJ-00021708	Self-representation	family status	lost
ADJ-00020129	Professional	age	lost
ADJ-00018924	Professional	disability	lost
ADJ-00021049	Self-representation	gender	lost
ADJ-00013917	Professional	disability	won
ADJ-00024123	Professional	disability	won
ADJ-00018576	Self-representation	family status	lost
ADJ-00016513	Self-representation	gender	won
ADJ-00014284	Professional	disability	lost
ADJ-00015987	Self-representation	gender	won
ADJ-00014412	Self-representation	religion	lost
ADJ-00014857	Union	age	won

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Reference No	Employee representation	Grounds	Outcome
ADJ-00018810	Union	age	won
ADJ-00021131	Self-representation	race	lost
ADJ-00019765	Self-representation	disability	lost
ADJ-00017730	Professional	gender, family status	lost
ADJ-00013554	Professional	gender	won
ADJ-00020545	Self-representation	disability	lost
ADJ-00017571	Self-representation	age	lost
ADJ-00021831	Self-representation	disability	lost
ADJ-00019594	Self-representation	disability	lost
ADJ-00018615	Self-representation	race	lost
ADJ-00020234	Professional	gender, family status	lost
ADJ-00018053	Professional	gender, family status	won
ADJ-00019742	Self-representation	family status, age, gender	lost
ADJ-00020817	Self-representation	disability	won
ADJ-00016441	Union	age	won
DEC-E2019-007	Citizens Information Service	disability	won
ADJ-00015144	Professional	disability	lost
ADJ-00019239	Self-representation	age	lost
ADJ-00015142	Professional	disability	lost
ADJ-00012833	Self-representation	disability	lost
ADJ-00019308	Self-representation	family status, age, gender	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00019789	Union	disability	won
ADJ-00019756	Professional	gender, family status	won
ADJ-00017070	Professional	disability, gender, family status	won
ADJ-00017749	Professional	disability	lost
ADJ-00013259	Professional	gender	lost
ADJ-00018800	Union	disability	lost
ADJ-00020065	Self-representation	gender, family status, disability, race	lost
ADJ-00017442	Self-representation	age	lost
ADJ-00016881	Self-representation	n/a	lost (no show)
ADJ-00016415	Professional	age	lost
ADJ-00013612	Union	gender	won
ADJ-00015003	Professional	gender	won
ADJ-00018058	Union	disability	won
ADJ-00016897	Self-representation	n/a	lost (no show)
ADJ-00012722	Union	gender	lost (no jurisdiction)
ADJ-00019738	Self-representation	gender, age, civil status	lost
ADJ-00016233	Self-representation	gender	lost
ADJ-00015986	Self-representation	7 grounds (all but travel community)	statute barred
ADJ-00012863	Self-representation	disability	lost
ADJ-00010763	Self-representation	race, age, gender	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00020127	Self-representation	n/a	lost (no show)
ADJ-00017836	Professional	gender	won
ADJ-00016923	Self-representation	age	lost (no show)
DEC-E2019-006	Union	disability	won
ADJ-00017748	Professional	race	lost
ADJ-00017765	Professional	race	lost
ADJ-00017766	Professional	race	lost
ADJ-00013650	Professional	disability	lost
ADJ-00016013	Self-representation	gender	lost
ADJ-00017439	Professional	disability	won
ADJ-00016891	Self-representation	gender	statute barred
ADJ-00014913	Self-representation	race	lost
ADJ-00018064	Self-representation	age, gender	lost
ADJ-00018061	Self-representation	age, gender	lost
ADJ-00013697	Professional	disability	lost
ADJ-00011207	Professional	age	won
ADJ-00015652	Self-representation	n/a	lost (no show)
ADJ-00018094	Citizens Information Service	disability	won
ADJ-00017221	Self-representation	n/a	lost
ADJ-00017344	Self-representation	family status	lost
ADJ-00015030	Self-representation	gender	won

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Reference No	Employee representation	Grounds	Outcome
ADJ-00016752	Professional	sexual orientation, race	won
ADJ-00014893	Self-representation	n/a	lost (no show)
ADJ-00016566	Other	disability	lost
ADJ-00014747	Self-representation	n/a	lost (no show)
ADJ-00017044	Professional	gender, family status	won
ADJ-00017677	Professional	disability	lost
ADJ-00016053	Professional	gender	lost
ADJ-00013590	Union	gender, disaility	lost
ADJ-00012244	Self-representation	disability	lost
DEC-E2019-004	Professional	gender, family status	lost
ADJ-00019125	Professional	n/a	lost (no show)
DEC-E2019-005	Professional	gender, family status	lost
ADJ-00014743	Self-representation	age	lost
ADJ-00015888	Self-representation	disability	lost
ADJ-00012659	Professional	gender, family status, race	lost
ADJ-00013708	Self-representation	family status	lost
DEC-E2019-003	Self-representation	disability	lost (no show)
ADJ-00013240	Self-representation	n/a	lost
ADJ-00015470	Self-representation	gender	lost (no show)
ADJ-00014091	Self-representation	disability	won
ADJ – 00017848	Self-representation	gender	lost



## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00014236	Professional	gender, race	lost
ADJ-00016123	Professional	gender, race	lost
ADJ-00012426	Professional	gender, race	lost
ADJ-00015400	Professional	gender, race	lost
ADJ-00014516	Professional	gender	lost
ADJ-00014991	Union	gender	lost
ADJ-00013628	Citizens Information Service	disability	lost
ADJ-00014615	Self-representation	n/a	lost
ADJ-00013028	Professional	gender	lost
ADJ-00013236	Self-representation	n/a	lost (no show)
ADJ-00017337	Consultant	race, religion	lost
ADJ-00016270	Self-representation	n/a	lost
ADJ-00013739	Professional	gender	won
ADJ-00017082	Union	race	lost
ADJ-00012976	Self-representation	disability	lost
ADJ-00014510	Self-representation	civil status	lost
ADJ-00014609	Self-representation	n/a	lost
ADJ-00013092	Self-representation	age	lost
ADJ-00013052	Self-representation	n/a	lost (no show)
ADJ-00018042	Self-representation	race	lost
ADJ-00013406	Professional	n/a	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00017293	Self-representation	age	lost
ADJ-00014318	Professional	race	lost
ADJ-00014152	Professional	age	lost
ADJ-00016284	Self-representation	race	lost
ADJ-00014909	Self-representation	age	won
ADJ-00015993	Professional	race	lost
ADJ-00012712	Professional	gender, age	lost
ADJ-00010453	Union	gender	lost
ADJ-00010073	Self-representation	n/a	lost
ADJ-00004560	Professional	age	lost
ADJ-00012162	Self-representation	8 grounds	lost
ADJ-00012306	Union	family status, gender	lost
ADJ-00015038	Union	gender, disability	Statute barred
ADJ-00012924	Professional	gender, family status	won
DEC-E2019-002	Ohter	gender, age	lost
ADJ-00016645	Citizens Information Service	age	won
ADJ-00008396	Professional	disability	lost
ADJ-00014454	Self-representation	disability	lost
ADJ-00007341	Professional	disability	lost
ADJ-00015316	Self-representation	age	lost
ADJ-00015283	Professional	gender	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00002985	Union	gender	lost
ADJ-00012941	Professional	race, family status	lost
ADJ-00014733	Self-representation	race	lost
ADJ-00014491	Self-representation	n/a	lost (no show)
ADJ-00012153	Union	race	lost
DEC-E2018-026	Professional	disability	won
ADJ-00012416	Self-representation	n/a	lost
ADJ-00019572	Self-representation	n/a	lost (no show)
ADJ-00019899	Self-representation	n/a	lost (no show)
ADJ-00020437	Self-representation	n/a	lost (no show)
ADJ-00016382	Self-representation	n/a	lost (no show)
ADJ-00021759	Self-representation	n/a	lost (no show)
ADJ-00017258	Self-representation	n/a	lost (no show)
ADJ-00015458	Self-representation	gender	lost
ADJ-00014522	Self-representation	race	lost
ADJ-00014519	Self-representation	disability	lost
ADJ-00012220	Self-representation	5 Grounds	lost
ADJ-00015172	Professional	gender	won
ADJ-00011847	Self-representation	race	won
ADJ-00009021	Professional	race	lost
ADJ-00012205	Consultant	gender, family status	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00012428	Self-representation	disability	lost
ADJ-00011974	Self-representation	gender, disability	lost
DEC-E2018-025	Self-representation	gender, race, age and disability	statute barred
ADJ-00014455	Professional	gender, family status	won
ADJ-00013822	Other	age, disability	lost
ADJ-00014097	Union	gender	lost
ADJ-00014356	Union	gender	lost
ADJ-00010569	Self-representation	race	lost
DEC-E2018-024	Self-representation	race	won
ADJ-00014806	Self-representation	n/a	lost
ADJ-00014131	Self-representation	disability	won
ADJ-00008530	Professional	gender, age	lost
ADJ-00007121	Professional	disability	lost
ADJ-00013861	Professional	gender, race	lost
ADJ-00011059	Professional	gender, family status	won
ADJ-00008526	Professional	gender	won
ADJ-00010061	Professional	family grounds, disability	lost
ADJ-00013581	Professional	race	won
ADJ-00009361	Professional	disability	lost
DEC-E2018-023	Professional	disability	won
ADJ-00009322, ADJ-00009305	Union	disability	lost

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00013904	Self-representation	race	won
ADJ-00014012	Professional	n/a	no jurisdiction
ADJ-00003593	Union	age, gender	won
ADJ-00013531	Union	n/a	lost
DEC-E2018-022	Professional	disability	lost
ADJ-00009956	Self-representation	age	lost
ADJ-00015538	Self-representation	pregnancy	won
ADJ-00007778	Union	n/a	lost
ADJ-00009631	Self-representation	gender, race	won
ADJ-00011959	Professional	disability	won
<u>ADJ-00010440</u>	Professional	race	lost
ADJ-00012899	Union	disability	lost
ADJ-00012718	Self-representation	gender	lost
ADJ-00010243	Self-representation	n/a	lost (no show)
ADJ-00010072	Professional	disability	won
ADJ-00014192	Self-representation	race	lost
ADJ-000131	Self-representation	disability, harassment	no jurisdiction
DEC-E2018-020	Self-representation	gender	won
ADJ-00008998	Professional	disability	won
ADJ-00013382	Self-representation	civil status, family status	lost
<u>ADJ-00011724</u>	Self-representation	n/a	lost

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
DEC-E2018-019	Other	race, sexual orientation	lost
ADJ-00010321	Self-representation	family status, age	lost
<u>ADJ-00004879</u>	Union	age	lost (no show)
ADJ-00010660	Professional	disability, race	won
ADJ-00013268	Self-representation	race	lost
ADJ-00013978	Professional	discrimination, harassment	lost
ADJ-00010284	Self-representation	race	lost
ADJ-00008372	Professional	disability	lost
ADJ-00011852	Self-representation	discrimination	lost
ADJ-00014043	Self-representation	family status	lost
DEC-E2018-017	Professional	gender	lost
DEC-E2018-018	Professional	gender	lost
ADJ-00006961	Professional	gender, harassment	won
ADJ-00012946	Consultant	disability	won
ADJ-00014754	Self-representation	n/a	lost
ADJ-00006075	Professional	gender, family status	lost
ADJ-00006020	Union	gender	lost
ADJ-00007905	Union	discrimination	lost
ADJ-00011143	Self-representation	disability	lost
DEC-E2018-016	Self-representation	age, disability	lost
ADJ-00012307	Self-representation	age	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00011912	Self-representation	n/a	lost
ADJ-00012606	Self-representation	race	won
<u>ADJ-00014554</u>	Professional	n/a	lost
ADJ-00013700	Self-representation	gender	lost
ADJ-00013029	Professional	disability	lost
ADJ-00010483	Self-representation	n/a	lost
ADJ-00010096	Other	disability, race	lost
ADJ-00012701	Self-representation	gender	won
ADJ-00013564	Union	disability	lost
ADJ-00011920	Professional	n/a	lost
ADJ-00007774	Union	disability	lost
ADJ-00014206	Self-representation	n/a	lost (no show)
ADJ-00012376	Self-representation	discrimination	lost
ADJ-00013267	Self-representation	race	lost
ADJ-00010716	Self-representation	gender, family status	won
ADJ-00007327	Self-representation	gender	won
ADJ-00008856	Self-representation	disability	statute barred
DEC-E2018-015	Professional	age, gender, disability	won
ADJ-00014032	Self-representation	n/a	lost
ADJ-00009612	Self-representation	disability	lost
ADJ-00008902	Professional	gender	won

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00003893	Other	disability	lost
ADJ-00011111	Self-representation	age, disability, sexual orientation	lost
ADJ-00002616	Professional	gender	won
ADJ-00011608	Professional	n/a	lost
ADJ-00014288	Self-representation	n/a	lost (no show)
ADJ-00003120	Self-representation	race	lost
ADJ-00010108	Professional	gender	lost
ADJ-00004807	Self-representation	gender	lost (no show)
ADJ-00009626	Professional	age, disability	lost
ADJ-00010217	Union	harassment	won
ADJ-00008622	Self-representation	disability	won
ADJ-00003243	Professional	civil status	lost
ADJ-00012185	Professional	gender, age	statute barred
ADJ-00004267	Consultant	race	won
ADJ-00011992	Union	race	lost
ADJ-00009162	Professional	gender	lost
ADJ-00008454	Professional	age	lost
ADJ-00011134	Professional	age	lost
ADJ-00009975	Self-representation	age	lost
ADJ-00008217	Self-representation	sexual orientation	lost (no show)
ADJ-00012105	Professional	n/a	lost



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Reference No	Employee representation	Grounds	Outcome
ADJ-00011039	Self-representation	age, race	lost
ADJ-00010354	Professional	race, religion	lost
ADJ-00008637	Self-representation	age, religion	lost
ADJ-00009146	Professional	disability	lost
ADJ-00006876	Union	age	lost
ADJ-00007944	Self-representation	race	lost
ADJ-00011021	Professional	age	lost
ADJ-00009919	Self-representation	n/a	lost
ADJ-00003850	Self-representation	gender, victimisation	won
ADJ-00011206	Self-representation	n/a	lost
ADJ-00012886	Self-representation	gender	lost
ADJ-00008945	Self-representation	civil status	no jurisdiction
ADJ-00009545	Self-representation	race	lost
ADJ-00007911	Self-representation	n/a	lost
ADJ-00008900	Consultant	n/a	lost
ADJ-00008972	Consultant	n/a	lost
ADJ-00009047	Consultant	n/a	lost
ADJ-00010948	Citizens Information Service	n/a	lost
ADJ-00009422	Professional	n/a	lost
ADJ-00004786	Self-representation	n/a	lost
ADJ-00008534	Self-representation	disability	lost

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Reference No	Employee representation	Grounds	Outcome
ADJ-00008073	Union	age	won
ADJ-00008926	Self-representation	disability	lost
DEC-2018-013	Self-representation	Victimisation	lost
ADJ-00008582	Self-representation	gender	lost
ADJ-00005226	Professional	age	lost
ADJ-00009293	Professional	disability	won
DEC-E2018-012	Professional	race, harassment	lost
ADJ-00008405	Self-representation	disability	lost
ADJ-00008313	Professional	race, sexual orientation	won
ADJ-00004188	Self-representation	gender	statute barred
ADJ-00007818	Professional	age, harassment	lost
ADJ-00008524	Citizens Information Service	age	won
ADJ-00009122	Self-representation	nationally, gender	lost
DEC-E2018-011	Professional	age, race	won
DEC-E2018-009	Professional	gender, age	won
ADJ-00008025	Professional	race	won
ADJ-00005772	Professional	disability	lost
DEC-E2018-010	Union	gender, religion	lost
DEC-E2018-007	Self-representation	race	lost
DEC-E2018-008	Professional	age	lost
ADJ-00009794	Citizens Information Service	sexual harassment	won

## A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

Reference No	Employee representation	Grounds	Outcome
ADJ-00006175	Professional	n/a	lost
ADJ-00005949	Professional	harassment	lost
ADJ-00003616	Professional	gender	won
ADJ-00005119	Professional	gender, disability	lost
ADJ-00003880	Self-representation	disability, discrimination	won
ADJ-00005910	Professional	disability	lost
DEC-E2018-003	Union	disability	lost
DEC-E2018-005	Self-representation	disability	lost
ADJ-00007640	Self-representation	race	lost
ADJ-00005228	Professional	age	lost
ADJ-00008274	Union	age	lost
DEC-E2018-002	Self-representation	age	lost
DEC-E2018-001	Professional	race	lost