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What is Reasonable? The Operation of 'Reasonable Accommodation' and 'Disability' Provisions Under The Employment Equality Acts 1998-2015

Research Article

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Abstract: Anti-discrimination legislation is a key policy measure used to improve employment outcomes for people with disabilities. Law though is not necessarily value-free and can be underpinned by various discourses notably the medical and social model of disability. This article examines the process and outcomes of legal complaints taken by employees against employers relating to reasonable accommodation provisions of the Employment Equality Acts 1998-2015. We find that legal claims can involve a medicalised inquiry process while a more social model is evident regarding accommodations provisions. Accommodations sought by employees overwhelming related to a modification of their role rather than the physical environment. The success rates for employee claimants in legal cases is relatively low but case law has developed the procedural obligations of employers in dealing with disability issues. The findings are based on an analysis of adjudicated decisions under the legislation and the views of expert practitioners.

Keywords: *anti-discrimination; law, disability; accommodation; workers; employers*

INTRODUCTION

The challenges faced by people with disabilities in the labour market are well documented. Half of people with disabilities in the EU are in employment compared to three quarters of people without disabilities (EPRS, 2020) while in the USA, the equivalent figures are 18 per cent and 66 per cent respectively (BLS, 2021). Employers face a strong likelihood of having to manage disability issues amongst their workforce given that disability prevalence increases strongly with age (OECD, 2010). To improve the employment prospects of disabled persons, many countries have introduced anti-discrimination legislation (OECD, 2010). The underlying impetus for such laws has been the elimination of "something in the nature of the caste system" where "a social or biological difference has the effect of systematically subordinating the relevant group…" (Sunstein, 1991: 35). The EU Employment Equality Directive (Art. 5), from which national legislation is derived, obliges employers to make reasonable accommodations to enable a person with a disability "to have access to, participate in, or advance in employment". Accommodations refer to "individualised adjustments to systems or processes to enhance equality and fairness" (Buckley and Quinlivan, 2021: 19). The EU Directive's measures on accommodations have been described as challenging for Members States (Waddington and Lawson, 2009).

The construction of anti-discrimination legislation and its implementation by employment rights bodies determines the extent to which individuals are covered by the legislation and the extent of obligations on employers. For workers, pursuing a complaint can be an uncertain process, and to successfully navigate it, they must acquire sufficient legal knowledge, submit complaints within statutory time limits, and satisfy the specific requirements of statutory provisions (O'Sullivan and McMahon, 2010). There has been debate in research internationally on the

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implications of discrimination legislation for employers. In the US context, the libertarian Epstein (1995) argued that discrimination decisions by employers were legitimate in a free market and the obligations on employers to provide accommodations would be excessive, yet evidence suggests a high failure rate of worker complaints relating to disability there (Konur, 2007). Similarly, in the UK, the success rate for workers legal claims has been low, leading Konur (2007: 187) to conclude that legislation had been "a windfall for employers" and that legal tests used in adjudications prevented disabled people from gaining legal protections. While anti-discrimination legislation alone will not resolve all social and economic inequalities experienced by disabled people, it can have symbolic and practical effects (Dickens, 2007) and can limit "the operation of private bigotry" in employment (Gregory, 1992: 262). Waddington and Lawson (2009) noted that national legislation across Member States can differ on the level of protections afforded to disabled workers, but they examined the content of national legislation while this article focuses on the operation of equality law. This study adds to our understanding of national diversity in the operation of equality principles and contributes to the limited research internationally on the process and outcomes of disability legal claims (Mudrick, 1997; Allen, 2011). If employees have a low success rate in legal complaints, or face significant obstacles in pursuing a claim, this may impact their sense of efficacy in the law as a remedy for discrimination. In addition, while there has been research on the prevalence of workplace discrimination experienced by disabled people in Ireland (at double the rate as compared with non-disabled people) (Banks et al., 2018), there has been limited analysis of the profile of those who have taken action on discrimination through legal complaints. The article examines the following overarching research questions: how successful have workers been in legal complaints under the reasonable accommodation provisions of the Employment Equality Acts 1998-2015? How extensive are employer obligations regarding workplace accommodations arising from legal complaints under the Employment Equality Acts 1998-2015? These questions require an analysis of the process and outcomes of equality complaints by employees. In doing so, the objectives of the study are to illuminate the characteristics of complaints and complainants and to examine the extent to which adjudication decisions on accommodations are underpinned by the social model or medical model of disability discourses. The findings are based on a review of 95 decisions issued by first instance employment rights bodies under the Acts between 2004 and 2020 and the findings of this review were supplemented by eliciting the views of three informed practitioners with significant knowledge of disability equality issues. The findings illustrate how legislative rights and obligations have been interpreted in legal forums over time and this can inform debate on equality rights internationally.

The article is structured as follows. The article first situates the exploration of anti-discrimination law through a discussion of various discourses on disability. Two prominent models of disability discourse have been medical and social models, respectively considered as regressive and progressive approaches, and these have influenced the approach of employment legislation to discrimination issues. We then outline key legal developments regarding the definition of disability and statutory provisions on accommodations in Ireland. The methodology is explained and is followed by a presentation of the findings from the case law review and interviews. We consider the key issues arising from the review in the discission and draw attention to the managerial and policy implications as well as identifying potential areas for further research.

THE MEDICAL AND SOCIAL MODEL OF DISABILITY LAW

Identifying models of disability is necessary to understand the intention of laws that aim to combat disability discrimination (Bunbury, 2019). Under the medical model, disability is viewed in a biological way; as a medical or individual phenomenon where an individual's physical or mental impairment is viewed as inhibiting their ability to participate in society (Brittain, 2004). People are considered disabled because they cannot function like a "normal person" and their impairment is viewed as something that must be cured (Haegele and Hodge 2016: 195). It has been argued that the marginalization of disabled people has been constructed in the context of a capitalist system where they are considered less productive (Anastasiou and Kauffman, 2013). Under the medical model, "problems faced by individuals with disabilities are independent of wider sociocultural, physical, or political environments" and people with disabilities can feel that "the cause of many of their problems resides within them" (Brittain, 2004: 430). Under this model, the role of anti-discrimination legislation is to define what constitutes a disability and this leads to protection under the law (Bolger et al., 2017). The model has influenced the design of disability anti-discrimination laws in several countries including Australia, the USA and Great Britain and, consequently, it is argued, legislation can perpetuate attitudes on the dependency of disabled people rather than "transforming attitudes" (Bunbury, 2019:

28). Definitions of disability in discrimination legislation can focus on impairments which indicates a medicalised conception of disability and requires legal forums to spend a significant amount of time hearing medical evidence to decide if individuals garner legislative protections (Bunbury, 2019). Where legislation and employment rights bodies/judiciary view definitions of disability in a restrictive manner, this can prevent definitions of disability from being interpreted purposively (Lawson, 2008). Overall, the medical model has been criticised for its association with negative and regressive perceptions of disability and a social model of disability is considered more progressive.

The social model (also known as a barriers approach) of disability is an attempt to redefine the discourse on disability towards a focus on society rather than the individual (Brittain, 2004). The model "moves causal responsibility for disadvantage from physically and mentally impaired individuals to their architectural, social and economic environment" (Samaha, 2007: 1255). Under the model, disability is defined as disadvantage resulting from a combination of personal impairment and a social setting (Samaha, 2007). Impairment and disability are conceptually distinct with the former attributed to a functional limitation while the latter is a social creation (Samaha, 2007; Shakespeare, 2017). The model emphasises that the "problems disabled people face are the result of social oppression and exclusion not their individual deficits" (Shakespeare, 2017: 217). There is significant debate amongst scholars about the way in which the social model conceptualises impairment and disability that are beyond the scope of this research but the role of employment law under the social model is to remove barriers which prevent disabled individual's participation in work and society (Bunbury, 2019). The social model is now considered the dominant legislative model in Europe, and it has influenced the reform of American disability discrimination legislation (Bunbury, 2019). For employers, pursuing a social model, or barriers approach, in the workplace involves auditing and eliminating barriers faced by disabled employees rather than focusing on impairments (Roulstone and Warren, 2006). Roulstone and Warren (2006: 122) observe, however, that a purely social model approach could hypothetically lead to an organisation recording that they have no disabled employees (since their focus should only be on barriers to employment, not impairments) and they note the argument that state policies should reward "employers for the number of workers with impairments, alongside the quantified reduction in barriers".

DISABILITY AND ACCOMMODATIONS IN EQUALITY LAW

At the EU level, the Framework Directive 2000/78/EC prohibited discrimination on the grounds of 'disability' but did not define it. Early decisions of the European Court of Justice (ECJ) were criticised for "unthinkingly" adopting a medical model of disability without consideration of "the social constructs of the reality of disability" (Bolger et al., 2017: 7-17) and for undermining the goals of the Framework Directive (Bunbury, 2019). More recent ECJ decisions such as *Ring* (C-335/11) and *Werge* (C-337/11) have reflected the UN Convention on the Rights of Persons with Disabilities (CRPD) "which is steeped in the social model of disability" (Bolger et al., 2017: 7-18) and defines disability to include "an inclusive, non-exhaustive list of impairments, which when combined with societal barriers, can constitute disability" (O'Mara, 2013: 102-103). O'Mara (2013) notes that the ECJ's initial restrictive interpretation had little impact in Ireland as the Employment Equality Act 1998 had provided for a broad medical definition of disability. While many EU countries do not define disability in their legislation, the Employment Equality Acts 1998-2015 (Part 1, s2(1)) define disability as "the total or partial absence of a person's bodily or mental functions … 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". Bolger et al. (2017: 7-40) argue that "an overly restricted definition could be seen to unduly narrow the class of individuals to which the protection relates". Since the introduction of legislation in Ireland, complainants have not faced much resistance in convincing employers of their disability (Purdy, 2015).

The introduction of statutory obligations on employers to provide accommodations to disabled workers had a rocky passageway. The Supreme Court found the original Employment Equality Bill 1996 unconstitutional because it did not strike the appropriate balance between the employer's constitutional right to property and the principles of social justice that regulate that right (Bell, 2018). The Bill provided that employers should do all that is reasonable to accommodate the disabled person's needs unless this would give rise to undue hardship to the employer. This, allied to the broad definition of disability, introduced in the opinion of the Court, an unacceptable level of uncertainty as to the potential costs that could be faced by an employer (Mooney-Cotter, 2013). The redrafted Employment Equality Act 1998 provided that an employer shall do all that is reasonable to accommodate the needs of a person

who has a disability unless it would give rise to a cost, other than a nominal cost, to the employer - the "opposite extreme" of its predecessor (Buckley and Quinlivan, 2021: 28).

The provision on accommodations was revised again under the Equality Act 2004 which incorporated provisions from the Employment Equality Directive 2000/78/EC. The Directive stated that employers should take "appropriate measures" to enable a person who has a disability to access and advance in employment "unless the measures would impose a disproportionate burden on the employer". Appropriate measures in the Acts mean "effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned". In determining whether the measures would impose a disproportionate burden, the Acts state that account shall be taken of costs of measures, the financial resources of the employer's business, and the possibility of obtaining public funding or other assistance. These provisions though did not necessarily lead to clarity with employers "still confused about the real fiscal benchmark" (O'Neill and Urquhart, 2011: 239).

METHODOLOGY

The findings for this article are primarily based on an analysis of decisions by Irish employment rights bodies in employee claims of discrimination on the ground of disability and specifically in relation to reasonable accommodations. Case law reviews or judicial outcome analyses are a common and important form of research inquiry as they provide insights on the evolution of legal concepts, on trends, and on the interpretation of employment rights (Argyrou, 2017; Konur, 2007). As the most recent amendment to reasonable accommodation legislation was July 2004, we review first instance decisions issued between then and April 2020. The decisions reviewed were those of the Equality Tribunal (from 2004 until it was abolished in 2015) and the Workplace Relations Commission (WRC) (from October 2015-2020). Decisions were made by a single adjudicator after they heard submissions of both parties in a hearing. Decisions are publicly available on the WRC website and the decision database was searched using the filters of Section 16 of the Employment Equality Acts which yielded 69 case results from 2004 to 2016, all of which were analysed. No results were returned for the years 2017-2020 so an additional search was undertaken without the filters (Employment Equality Acts and sub section Section 16 – Reasonable Accommodation), utilising instead the key phrase "Reasonable Accommodation". This returned over 200 results from which a representative sample of 31 were randomly selected from case identifier numbers, so that the number of decisions selected varies in each year. The 69 cases from 2004-2016 and the 31 cases from 2017-2020 gave an initial total of 100 cases for review. Further screening led to five cases being eliminated because they concerned discrimination claims by non-employees relating to access to employment while this article focuses on discriminatory claims by employees on post-recruitment issues. This left 95 cases for extensive analysis.

The objectives for reviewing the 95 cases were to understand how the concepts of disability and reasonable accommodations were interpreted in adjudicated decisions, and how these influenced the success or failure of employees' claims. The findings presented are indicative of the content of adjudicated decisions that typically included a discussion of (i) the types of employee impairment and an assessment of whether they constituted a disability under the legislation (ii) the types of reasonable accommodations sought by employees (iii) the legal tests considered by adjudicators on which they based their decision (iv) the outcomes of decisions in terms of success rate of employees and redress awarded. Iteratively, observations on the gender of complainants and recurring industries where complaints originated were added to reveal trends in the characteristics of workers that pursued legal complaints to adjudication.

To gain further insight on the patterns found in the analysis of the legal claims, we purposively selected and contacted three informed practitioners with extensive experience on equality issues (Table 1). Following ethics approval from the University in 2020, the three practitioners agreed to provide emailed written responses to a limited set of questions. Specifically, they were asked for their views on the legislative definition of disability; on trends they have observed in their professional lives relating to reasonable accommodations in the workplace and reasonable accommodation; and on the fairness of adjudicated decisions relating to the 'disproportionate burden' test. They were also asked for their perspective on key findings from the legal claims review, specifically, on the proportion of decisions where procedural failings were found in employers' interactions with employees; on the types of impairments in claims; and the types of accommodations sought by workers. The Irish Wheelchair Association representative was asked an additional question on whether they believed the legislation ascribed to a medical or social model of disability, given their expertise in the area. The practitioners' observations illuminate

the practical implications of reasonable accommodation rights and obligations in the workplace and are presented in the findings below.

Table 1: Expert Practitioners

Practitioner	Relevance to the Study
Regional Director, Irish Business and Employers Confederation (IBEC)	Extensive experience representing employers in employment equality cases
HR Director, Multinational company	The company was the respondent in a seminal legal case on disability discrimination taken by an employee
Advocacy representative, Irish Wheelchair Association	Acts as a voice for disabled people; lobbies policy makers on disability related issues

FINDINGS

Complainant characteristics

Decisions under the Employment Equality Acts 1998-2015 were not required to anonymise the parties' identities to the dispute, as was the case with other employment legislation. Adjudicators, though, had the power to anonymise them and often did so where they felt sensitive issues were raised such as in medical evidence. Characteristics that could be discerned in many cases were the gender of the complainant and the sector where they worked, and this revealed important insights. Cases primarily involved employees in private sector organisations, with manufacturing presenting as the most frequent area of employment (Table 2). Complainants were more likely to be male (56%) and to work in non-managerial positions (82%). Overall, the number of decisions might be considered relatively low given the length of time examined, the size of the workforce and the prevalence of disability as people get older. Comments made by the advocacy representative of the Irish Wheelchair Association point to factors that may contribute to the low number of decisions. They noted that Ireland had a very large gap, of 45 percentage points, in employment rates between people with and without disabilities and they believed that *"many people do not know their rights and after sustaining an injury or acquiring a disability many people are unable to fight".* In addition, many complaints referred to employment rights bodies do not reach the decision stage because they can be settled in mediation, or they can be withdrawn or settled by the parties themselves (Equality Tribunal, 2014).

Table 2: Sector of employment of complainants

Sector	No. of Decisions
Manufacturing	20
General Public Service	14
Retail	12
Local Gov. and Civil Service	9
Leisure/Hospitality	6
Driving	4
Warehousing	4
Construction	2
Caring (non-medical)	2
Security	2
Others	20
Total	95

The definition of disability

A differentiator between employment equality legislation and other laws like unfair dismissals relates to the burden of proof. In the latter, the burden of proof lies with employers whereas in the former, complainants must first show a *prima facie* case of discrimination before the burden of proof switches to employers. The facts presented by the claimant from which discrimination is inferred must be of "sufficient significance" before a prima facie case is established (*A Care Assistant v A Voluntary Organisation,* ADJ-00007638/ADJ-00009592, 2017). For a complainant to successfully argue a breach of their rights regarding reasonable accommodation, they must first satisfy the legislative requirement that they have a disability within the meaning of the Acts. The review of cases shows a broad range of conditions presented by complainants - 41 in total (Table 3). Back injuries were the most prominent accounting for 18 of the 95 cases that progressed beyond preliminary issues, followed by diabetes and depression. Physical conditions appear to dominate with a 3:1 ratio of physical conditions to psychological/ psychiatric conditions. The first decision involving a psychological/psychiatric condition was not issued until 2012, but between 2012 and 2020, the ratio of physical to psychological conditions was 2:1. In interviews, the HR director considered larger organisations to be *"more understanding of mental illness"* because workers more openly speak about their experiences but believed that challenges remain in smaller organisations which may not have sufficient understanding of mental illness or the resources to accommodate disabilities.

Table 3: Types of disability cited by complainants

Type of Disability Cited	No. of decisions	Type of Disability Cited	No. of decisions
Back injury	18	Bowel Condition	1
Diabetes	6	Chest pain	1
Depression	5	Elbow joint impairment	1
Eyesight	5	Limited Hand function	1
Stress	5	Infertility	1
Not stated	4	Imputed Depression	1
Mental Health	4	Kidney Failure	1
Hearing Impairment	3	Knee pain	1
Cancer	3	Lupus	1
Asthma	2	Lymphoedema	1
Balance	2	Multiple Sclerosis	1
Epilepsy	2	Narcolepsy	1
Fibromyalgia	2	Limited Neck function	1
Heart	2	Obsessive Compulsive Disorder	1
Hypertension	2	Phobia	1
Hypothyroidism	2	Schizophrenia	1
Acute chest infection	1	Shoulder	1
Alcoholism	1	Speech impediment	1
Anxiety	1	Ulcerative colitis	1
Arthritis	1	Varicose veins	1
Asperger's	1	Long term wrist injury	1
Bipolar	1	Brain Haemorrhage	1
Total			95

The data show that respondents (employers) rarely contested the disability presented by the complainant (employee) (only in 10 decisions). Where they did, employers had a 40 per cent success rate leading to the dismissal of the full complaint regarding reasonable accommodations. The employers' success generally rested on whether or not the condition had a significant impact on the individual and whether it was of a long- or short-term nature. In the four cases won by employers at least partly on definitional issues, the conditions were of a short-term nature, and related to mental and physical health. Two were claims relating to stress where adjudicators were hesitant to designate the claims as disabilities in the absence of a medical diagnosis and were cognisant of a Labour Court Determination (*Government Department v A Worker,* EDA094, 2009) which stated:

> if the [employment equality legislation] were to be construed so as to blur the distinction between emotional upset, unhappiness or the ordinary human reaction to stressful situations or the vicissitudes of life on the one hand, and recognised psychiatric illness on the other, it could be fairly described as an absurdity.

Where the employer unsuccessfully contested the complainant's protection under the definition of disability, almost all the conditions were of a long-term nature. The small number of cases where employers contested that the complainant had in fact a disability suggests widespread acceptance by employers of the definition of disability. Given the breath of the definition in the Acts, it is unsurprising that decisions found in favour of the complainant over twice as often as not. Where employers did contest cases, a medicalised process characterised hearings with adjudicators relying, at a minimum, on the diagnosis of general practitioners while some also used the expertise of consultant doctors and occupational health specialists, and adjudicators explored definitions of disabilities in medical texts and case law. The Irish Wheelchair Association representative considered the definition of disability in the legislation as conforming to a medical model of disability which *"has no place in today's society. The issue is not the person with the disability, but the restrictions imposed by the state/environment".*

The Nature of Reasonable Accommodations

The most common form of accommodation sought by claimants involved a modification of the job itself with very few requiring the purchase of special equipment or adaptations to the physical infrastructure of the workplace (Table 4). As expected, all requests for adaptations to infrastructure and purchase of special equipment came from complainants with physical disabilities. The terms "transfer" and "light duties" were used interchangeably throughout the case reports to describe requests for changes to the nature of work through a job transfer or changes in tasks. Examples include, in manufacturing, requests to move from production line jobs to warehouse positions or, in retail, from the grocery department to the clothing department. Together, "transfer/light duties" appeared in almost half of the decisions (Table 4). In only a small proportion of decisions (7%) did accommodations concern adaptations to physical infrastructure or the purchase of special equipment.

The extent to which non-infrastructural accommodations were sought by complainants was of no surprise to the employer practitioners interviewed. The IBEC representative noted a trend amongst their member employers of claims about the *"effects of shift/night work on employees' health and well-being and these outcomes can be stress related and mental health issues as employees seek to move to day shifts or reduced hours to enable them to have a better balance work/life balance".* The IBEC representative and the HR director stated that non-infrastructural claims were more challenging for employers particularly in private sector manufacturing where much of the work can be shift based and the organisation may not have alternative roles to accommodate employees. For the IBEC representative, accommodations requests relating to working hours were coming at a time *"when many employers are looking at shift working and increasing hours of operation to have better efficiencies in the workplace"*. According to the HR director, employers contested legal cases concerning accommodation requests for transfers because they might require the organisation to hire an additional person and employers might fear facilitating such requests would trigger additional claims by employees seeking alternative working arrangements. In contrast to accommodations involving transfers and changing hours, the IBEC representative was of the view that physical accommodations were less problematic for employers because they were *"less costly for them in the long run"*. The WRC and Equality Tribunal interpreted the reasonableness of accommodations as proposed by the complainant themselves and processed by the respondent. Thus, the propensity toward modifications in the duties of the complainant and their working hours are indicative of complainant desires rather than adjudicator demands.

Table 4: Reasonable accommodations sought by complainants

Types of Reasonable Accommodation sought	No. of decisions
Transfer/Light duties	47
Not stated	18
Adjustment to working hours	11
Equipment purchase	4
Infrastructure adjustment/provision	3
Hire another worker to assist/substitute for complainant	2
Roll over of fixed-term contract	2
Paid to attend medical appointments	2
Training for different role	1
Weighted score in promotion interview to compensate for disability	1
New disciplinary process that allows the introduction of disability related evidence	1
Change of Manager	1
Hire temporary cover during unpaid sick leave	1
Repeat of hearing test while complainant is wearing hearing aids	1
Total	95

Employers' procedural obligations

Employers were found to have breached their obligation to provide reasonable accommodations in just over a third of decisions and the majority of these turned on employers' adherence to procedural issues. While the Acts do not specify the procedural obligations on employers, the decisions of employment rights bodies frequently cited case law such as *Humphreys v Westwood Fitness Club* (2004] ELR 296 which sets out the necessity for the employer to:

- "Examine the factual position and seek clear medical guidance regarding the employee's capability including the degree of impairment arising from the disability and its likely duration; and
- Consider what appropriate measures (including any special treatment or facilities) can be made available by which the employee may become fully competent to perform his or her role; and
- Consult with the employee along the way to ensure that the employee has a say in any decisions which could adversely impact their terms and conditions of employment, or which could lead to the termination of employment and
- Document the entire process so that it is clear what has been examined and considered by the employer and what the response of the employee is before any decision is made regarding the employee" (A&L Goodbody, 2016).

Three categories of employer failure were evident in cases:

1. the employer's failure to undertake sufficient enquiries to determine the extent of the employee's disability and consider whether special treatment and facilities could be provided (Assessment);
2. the employer's failure to consult with the employee at all stages of the process (Engagement);
3. the employer's failure to process the request in a timely fashion (Time).

A lack of engagement by employers with disabled employees and their representatives such as union and medical personnel was the most common procedural failure identified by adjudicators followed by a deficiency in their obligations to undertake assessments of the individuals. Recent decisions have referred to the seminal Supreme Court decision in *Nano Nagle School v Marie Daly* [2019] IESC 63 where MacMenamin J. explored the issue of employee consultation. While he said that there was no mandatory duty on employers to consult with an employee in each and every case, and the legislation does not provide for compensation where consultation is absent, "a wise employer will provide meaningful participation in vindication of his or her duty under the Act. But absence of

consultation cannot, in itself, constitute discrimination under s.8 of the Act" (para. 105). The IBEC official considered *"the bar to be very high"* as regards the procedural obligations on employers, particularly in relation to the need for risk assessments and for employers to fully explore the employee's disability.

The tensions between accommodations and 'a fully competent' employee

Section 16(1) of the Employment Equality Acts provide that an employer is not required to recruit, retain, promote an individual if they are not "fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position". This is often referred to by adjudicators as the statutory defence, whereby employers legitimise their decision not to grant the full accommodations requested based on the competence and capability of the employee. The 'defence' is qualified by Section 16(3) which stipulates that the disabled employee must be considered competent and capable when reasonable accommodations are provided by the employer. In *Mr B v A Metal Processing Company,* (DEC-E2013-196, 2013), the Equality Tribunal relied on the Labour Court's 'objective test' on reasonable accommodation:

> …the scope of the duty is determined by what is reasonable, which includes consideration of the costs involved. This is an objective test which must have regard to all the circumstances of the particular case.

Adjudicators often considered the nature of accommodations requested and the financial position of the organisation. In *Mr B,* the employee was no longer competent to perform the role of a driver due to a disability and the employer transferred him to a different role and instituted a buddy system. This lasted for a year until the buddy was made redundant during a period of large-scale redundancies. The Equality Tribunal concluded that the costs of reasonable accommodations, to retain a buddy when no other work was available for them, amounted to a disproportionate burden. In *Mr Fergal O'Reilly v UPS CSTC Ireland Ltd.* (DEC-E2013-077, 2013), the Equality Tribunal noted that the company had a turnover of €70 million and a net profit of €4.5 million for the year and that "in such circumstances, I do not accept that the respondent would not have been able to provide reasonable accommodation for the complainant following a full examination of the situation". Similarly, in *A Medical Secretary v the HSE West, 2013*, the adjudicator awarded the complainant €70,000 and ordered the HSE to make physical modifications to the building to accommodate an employee "…given the overall budget for the Regional Hospital". Decisions since 2019 on accommodations took guidance from the Supreme Court decision in *Nano Nagle* which considered the extent of an employers' obligations in situations where an employee may be no longer competent to perform their role fully. The Supreme Court decided that reasonable accommodation can include the distribution or removal of essential as well as non-essential duties, but the duty of accommodation is not infinite. MacMenamin J. stated;

> It cannot result in removing all the duties which a disabled person is unable to perform. Then, almost inevitably, it would become a "disproportionate burden"…The test is one of reasonableness and proportionality; an employer cannot be under a duty entirely to redesignate or create a different job to facilitate an employee (para. 89).

The WRC has referenced the authority of Nano Nagle. For example, in A Manufacturing Team Member v A Manufacturing Company (ADJ-00012037, 2019) the employer argued that the employee, who was seeking a change in working hours, was not capable of performing the core elements of their role and the obligation to provide reasonable accommodation did not extend to creating a new role or removing core duties from the job. The WRC concluded that in applying the principles set in Nano Nagle, the employer's obligation to provide reasonable accommodation did not extend to creating an entirely different job and on that basis, complainant had failed to raise a prima facie case of discrimination. Overall, in 7 of the 52 decisions reviewed which favoured the employer, adjudicators made specific pronouncements on the disproportionality of the accommodations sought, denying complainants paid assistants, new shift patterns, expensive software upgrades and new office spaces.

Importantly, employment equality cases emphasise the care employers must take in addressing disability issues and how they must refrain from uneducated assumptions about accommodations required. Instead, an assessment of accommodations must follow a thorough examination of the employee's disability and environmental barriers to their participation in work. In *Mr Fergal O'Reilly*, the employer had believed that the employee's accommodations request would require hiring an additional person at an annual cost of €28,000 but the Equality Tribunal criticised the company for not proactively engaging with the employee or doctor and they referred to a Labour Court decision (*A Government Dept v A Worker,* ADE0156) where it stated that

> The duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability ...

WRC decisions praised employers who had a process-oriented approach in dealing with requests for accommodations, who invested in occupational health advice at an early stage, maintained communication with the employee, assessed requests carefully and attempted to facilitate them. During interviews, the IBEC representative noted that WRC decisions have rarely been overturned on appeal, but they believed that they sometimes interpreted the disproportionate burden provision *"out of context"*. In this regard, they noted that employers must take into consideration many factors in deciding requests for accommodations including industrial relations issues and they commented that WRC decisions may not take full account of the real size of a company, for example, by focusing on the large size of a parent company rather than the small size of a subsidiary. Yet the case review shows that decisions rarely proceeded to determinations on proportionality, and where they did, the trend has been in favour of employers. Decisions turned on employers' procedural duties and it appears that process itself is as important as the outcome. The Irish Wheelchair Association representative criticised the use of the term 'disproportionate burden' in the law because it was *"too closely linked with the person with a disability"*.

Outcomes and awards

The review of cases indicates that it is challenging for claimants to succeed. Of the 95 cases analysed, complainants were unsuccessful in almost two thirds of decisions. Ten complaints failed because (i) the complainant did not attend the adjudication hearing or (ii) claims were submitted outside of statutory time limits, or (iii) the complainant had submitted the same claim under multiple laws. The remainder (52) failed over more substantive issues like the complainants' impairment did not meet the definition of disability or the employer had met their obligations on reasonable accommodations.

Where successful, complainants could be awarded various forms of redress including orders for reinstatement or reengagement in the case of discriminatory dismissal, orders that an employer should repay arrears in wages, orders that an employer should take a specified course of action, or that an employer should pay compensation to a maximum of two years remuneration to an employee. Of the successful complaints (33), 30 were awarded compensation and these were relatively low - 12 involved compensation of less than €10,000 and all bar four involved compensation of less than €30,000. In addition to compensation, adjudicators also ordered employers to take courses of action such as to transfer an employee, to provide psychological support, to provide a new office with bathroom facilities, to allow the employee time off to attend medical appointments, to reassess reasonable accommodations, and to train staff on disability awareness. In three decisions found in favour of complainants, no financial redress was made but the employer was ordered to take actions like to provide reasonable accommodation or to reinstate the employee following dismissal. The majority of decisions in favour of the complainant concerned discriminatory dismissal (23) and compensation was the most common redress. This is not unusual in dismissal cases more generally where the adjudicator or the parties themselves can consider the employment relationship is beyond repair. Commenting on dismissals and the importance of procedures, the advocacy representative of the Irish Wheelchair Association was of the view that in *"many cases employers are afraid of "disability" and are unsure how to deal with a person in this environment. They are unaware of entitlements that are available to them and their employees to make reasonable accommodation so letting someone go from their job is seen as an easier option".* Three of the four highest financial awards were issued in cases of discriminatory dismissal which is unsurprising as these awards considered the financial damage the claimant experienced from job loss and the adjudicators specifically noted the employers' extensive resources.

This study contributes to our understanding of national legislation on disability and reasonable accommodations (Waddington and Lawson, 2009; Kovačević, 2014; Harpur et al., 2012). It also incorporates a profile of claimants as well as practitioner perspectives, both of which are often absent in studies of disability anti-discrimination legislation (Buckley and Quinlavin, 2021; Kovačević, 2014; Harpur et al., 2012). Studies of disability discrimination in Ireland have not identified sectoral variation in reports of discrimination (Banks et al., 2018) and, while legal claims are not equivalent to experiences of discrimination, this study provides an analysis of the types of jobs where disabled worked pursued legal complaints. Complainants were mostly male and from specific sectors, notably manufacturing. The prevalence of claims from manufacturing, retail and the public sector, are perhaps not unusual in the context of statistics on workplace injuries. Health, manufacturing, retail, and public administration accounted for almost two

thirds of all non-fatal workplace injuries in 2018 (HSA, 2019). It was surprising though that sectors with high rates of injuries, like agriculture, and sectors with high exposure to physical and mental stressors were not more common in claims such as construction and caring (non-medical). An extensive range of impairments was identified in claims, and they were notable for the gap, though closing, between physical and psychological conditions. This indicates a gradual broadening of the diversity of conditions appearing before employment rights bodies though notably, there were few cases involving people with intellectual disabilities with only one complainant with a condition on the autism spectrum in the period under review. Relatedly, most of the accommodations sought by employees concerned the nature of the job or working conditions rather than infrastructural changes. In interviews, the expert practitioners noted the changing nature of jobs and employers' need for workplace efficiencies such as through atypical working hours patterns. These efficiencies have arguably led to work practices entailing psychological stresses for employees, but organisations differ in their capacity to address mental health issues. Employer representatives believed that employers have greater concern over the consequences and costs of providing non-physical than physical accommodations. In relation to the process of reasonable accommodation claims, we find that employers rarely contested employees' claim that their impairment met the definition of disability. In examining the definition of disability, adjudicators considered the temporal nature of the impairment and whether it had attracted a medical diagnosis. Most cases turned on the issue of reasonable accommodations and decisions emphasised, where employees won, that employers must be pay close attention to assessing accommodations sought and engaging with the employee in a timely manner. Given that awards in discrimination cases are critical to recognising an injustice and deterring future violations (Sternlight, 2004), this study identified in an Irish context, a low rate of claimant success and therefore a limited number of awards have been issued.

DISCUSSION

The overall objective of the study was to examine the extent to which adjudication decisions on accommodations were underpinned by the social model or medical model of disability discourses. We find that employers rarely contested employees' claims of being disabled. This contrasts with the UK where employers frequently contest whether an individual is disabled within the meaning of equality legislation, leading to scrutiny of personal medical histories (Bell, 2015). The lack of contestation on definitions in Ireland, however, did not mean that legal processes did not have a strong medical focus. Complaints by employees reached the stage of an adjudication hearing because employers contested claims that they discriminated employees by not providing reasonable accommodations. In exploring such complaints, adjudicators used the following tests:

a) Does the complainant have a disability within the meaning of the Act?
b) Did the complainant make the respondent aware of the disability?
c) Did the respondent adhere to procedural obligations?
d) Was the complainant fit and capable to perform the duties of the role with the relevant reasonable accommodations?
e) Is the reasonable accommodation a disproportionate burden on the employer?

In assessing the employees' coverage by the legislation and the nature of accommodations requested, adjudicators referred to the employees' medical history including assessments and recommendations made by medical and health professionals. In addition, adjudicators emphasised the importance of employers' obligations to carry out assessments of the employee by engaging with medical professionals. Adjudicators have relied on the authority of ECJ decisions which used a definition of disability confirming to the social model, but the adjudication process which explores the definition of disability assumed quite a medicalised approach. Ultimately though, conforming to the definition of disability was one of the least problematic issues for employees in legal cases reviewed.

The legislation shifts towards a social model in relation to reasonable accommodations by obliging employers to adjust aspects of the work environment, such as hours, infrastructure - and as *Nano Nagle* noted, duties - which can facilitate a disabled employee to be competent in their position. But these obligations are not absolute - an individual can be found to have been not discriminated against even where they have a disability if the accommodations requested amount to a disproportionate burden on an employer. In the UK context, Dickens (2007) argued that legislation can be weakened where a government prioritises economic efficiency and refrains from over burdening employers. In the Irish context, the accommodation provisions of the equality legislation were

constructed cautiously, so as not to fall foul of employers' constitutional property rights, given the legal difficulties of the Employment Equality Bill 1996. Where a disproportionate burden on employers is found, it is the employee who may have to adjust to their environment ostensibly by having to resign from their position or being dismissed. The comments of the IBEC representative illustrate the problems faced by disabled employees in a capitalist system – where requests for certain types of accommodations can be viewed by employers as conflicting with the efficiency demands of organisations. For the Irish Wheelchair representative, the legislation places too much emphasises on the person rather than the barriers they face.

In returning to the research question on how successful employees were in legal complaints, we find that success rates were relatively low, mirroring the trend in outcomes in the UK and USA (Konur, 2007). While employment laws confer many rights on individuals, barriers to the resolution of employment law claims include the complexity of the law and the concomitant requirement for workers to have substantial knowledge of legal provisions (Colling, 2009; Sternlight, 2004). Anti-discrimination laws which rely on individuals enforcing their own rights may be particularly challenging for disabled people who may not realise they are discriminated against, and who may not have the resources to pursue claims (Harpur et al., 2012). In addition, individual enforcement may not address "systematic" discrimination against multiple people (Harpur et al., 2012: 216). Even where employee claimants in this case law review were found to have experienced discrimination, financial penalties were relatively low. While redress also included orders of actions which would incorporate a cost element, the relatively low financial penalties raises questions about the extent to which low awards can serve the purpose of being proportionate, effective and dissuasive (O'Sullivan and McMahon, 2010).

CONCLUSION

Discrimination based on disability has been shown to have a significant impact on individuals and there is a consensus at policy level nationally and internationally that there should be greater inclusion of disabled people in the labour market. Legislation has been a key policy measure aiming to improve employment outcomes for people with disabilities and this article sought to understand how employee rights and employer obligations have been interpreted in legal claims. This article contributes to literature which has explored disability and anti-discrimination legislation (Konur, 2007; Waddington and Lawson, 2009; Harpur et al., 2012) and literature which has examined how workers and employers have fared in legal processes (Allen, 2011; Dickens, 2007). Reasonable accommodation can potentially be "transformative due to the substantive equality it provides for individuals" but this potential depends on "appropriate legislative formulation" (Buckley and Quinlivan, 2021: 19). This article highlights that an assessment of the impact of legislation should include not just its design but also its operation. For disabled employees, they bear primary responsibility for enforcing the employment equality legislation and the review of decisions shows they must meet a high bar to have a *prima facie* case of discrimination. The review also shows that the adjudication process retains a strongly medicalised approach. Despite the relatively high failure rate of workers complaints, employer representatives interviewed believed that obligations on employers to accommodate people with disabilities are significant and show how such obligations can been seen to conflict with the competitiveness objectives of business. The low employee success rate though suggests that there can be a significant difference between employees' perception of being treated unfairly in the workplace and the legislative requirement to have been treated illegally to acquire protection under the legislation.

Managerial and policy implications

A key outcome of legislation and its interpretation in case law has been that the onus is on employers to engage in a transparent and fair process in dealing with accommodations for employees with disabilities. In the decisions reviewed, adjudicators examined whether employers inquired into, and considered, accommodations in a timely manner and if they have done so in consultation with the employee. For this reason, employer organisations have encouraged employers to deal with equality issues by having in place effective policies and procedures (ISME, 2011). In this way, the legislation has accentuated the trend towards the proceduralisation of the employment relationship (Wallace et al., 2020).

Despite the presence of anti-discrimination legislation, research nationally and internationally shows that discriminatory practices persist. Not only actual discrimination, but the fear of discrimination can prevent people with disabilities from seeking or remaining in employment (Banks et al., 2018) and from disclosing their disability to

an employer, especially regarding mental health issues (Elraz, 2018; Scanlon et al., 2020). Studies suggest that such worker fears are at times warranted as managers can be reluctant to hire and retain people with disabilities. Common reasons proffered by managers for this are their lack of knowledge about how to accommodate workers with disabilities, their concern about (and overestimation of) the potential costs of accommodating someone with a disability, and their worry about greater liability to legal actions if they employ someone with a disability (Kaye et al., 2011). Employers can also hold negative beliefs regarding the nature of psychological conditions and have concerns about the performance ability of such individuals (Biggs et al., 2010). These comments illustrate the "unavoidable" tensions that can exist between "fairness as opposed to employer prerogatives" (Ford, 2014: 1415). Various measures have been proposed to tackle employer concerns including employer education on the benefits of hiring disabled persons and on employers' legal obligations, state income supports to workers, and financial incentives to employers (Kaye et al., 2011; EPRS, 2020; Watson et al., 2015). In recent years, IBEC has advocated the "business case for diversity" and launched a voluntary initiative, the Reasonable Accommodations Passport scheme, with the Irish Congress of Trade Unions (IBEC/ICTU, 2019: 1-2). The comments of interviewees in this study suggest that some employers may need support in understanding and managing disability accommodation issues. Ultimately, as Robert and Harlan (2006) argue, while anti-discrimination legislation holds organisations to account for their practices, it is but one measure towards eliminating discrimination and organisations must be willing to examine their beliefs about disability and recognise how they encourage and tolerate discrimination.

Limitations and future research

There are several limitations to this research which could be addressed in future research. While this study focused only on adjudicated decisions in discrimination cases, future research could examine the workplace experiences of employees and employers in dealing with disability and accommodation issues. Given the legal interest of this study, further research could assess how the law influences employees and their representatives to exercise their rights in negotiations with employers. For example, previous research found that trade unions believe that employment law is effective in helping protect minority groups and many frequently threaten use of the law as a negotiating tactic (O'Sullivan et al., 2015). A second related limitation of this study was the limited number of practitioner contributions and future research could expand the qualitative analysis of practitioner and disabled employees' perspectives. This article pointed to the medicalised adjudicative process in legal complaints and to the medicalised approach taken by employers in assessing disability and accommodation requests in the workplace. Further research could explore how such processes impact employees and their sense of belonging in the workplace.

There are additional areas worthy of additional research. As the findings in this study revealed, physical conditions outnumbered psychological ones in discrimination complaints. This is unsurprising given evidence that employees are particularly reluctant to disclose mental health issues and employers also believe underreporting is a serious issue (O'Brien, 2020). There has been much greater attention paid to mental health issues in the workplace in recent years with employer organisations offering guidance and support to employers (O'Donnell, 2021). Further research could investigate whether such measures have beneficial outcomes in terms of employers creating more supportive workplace cultures for employees to disclose psychological conditions. Lastly, further inquiry arising from this research concerns the employment characteristics of claimants. The review of decisions revealed prevalence of reasonable accommodation claims from employees in private sector manufacturing but also to a dearth of claims from the public sector given the size of its workforce, and from sectors where jobs would be expected to have significant physical or psychological stresses. The reasons for such sectoral variation in cases are worthy of examination. We can conjecture the potential factors influencing sectoral variation including sectoral differences in employment rates of disabled persons, the extent of proceduralisation across sectors, and the degree to which disabled people feel comfortable disclosing disabilities.

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