



LOUTH VEC V THE EQUALITY TRIBUNAL

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WHY IS THE LOUTH VEC CASE IMPORTANT?

❖ Deals with historical evidence

❖ Deals with 

❖ Deals with the issue of further particulars/amendments through 

❖ Deals with the deference that is given to Equality Officers



THE STATUTORY COMPLAINT FORM: EE1

Revised 2009

<p>EE.1 EMPLOYMENT EQUALITY ACTS</p> <p>COMPLAINT TO THE EQUALITY TRIBUNAL OF DISCRIMINATION RELATING TO EMPLOYMENT</p> <p>Before you begin to fill the form please read the notes supplied then complete this form in BLOCK CAPITALS.</p>	Received Stamp (Office use only)
	CASE REF:

<p>1. Details of person making the complaint (see note 1)</p> <p>First Name:</p> <p>Surname:</p> <p>Address:</p> <p>.....</p> <p>Phone Number:</p> <p>Email Address:</p> <p><i>Please ensure you notify the Tribunal of any change.</i></p>	<p>2. Do you have a representative? (see note 2)</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes please complete:</p> <p>Name:</p> <p>Address:</p> <p>.....</p> <p>Phone Number:</p>
<p>3. Organisation / Company / Person you are complaining about (see note 3)</p>	
<p>Organisation/Company/Person:</p> <p>.....</p> <p>Address:</p> <p>.....</p> <p>.....</p>	<p>Phone Number:</p> <p>Fax Number:</p> <p>Email Address (if known):</p> <p>.....</p>

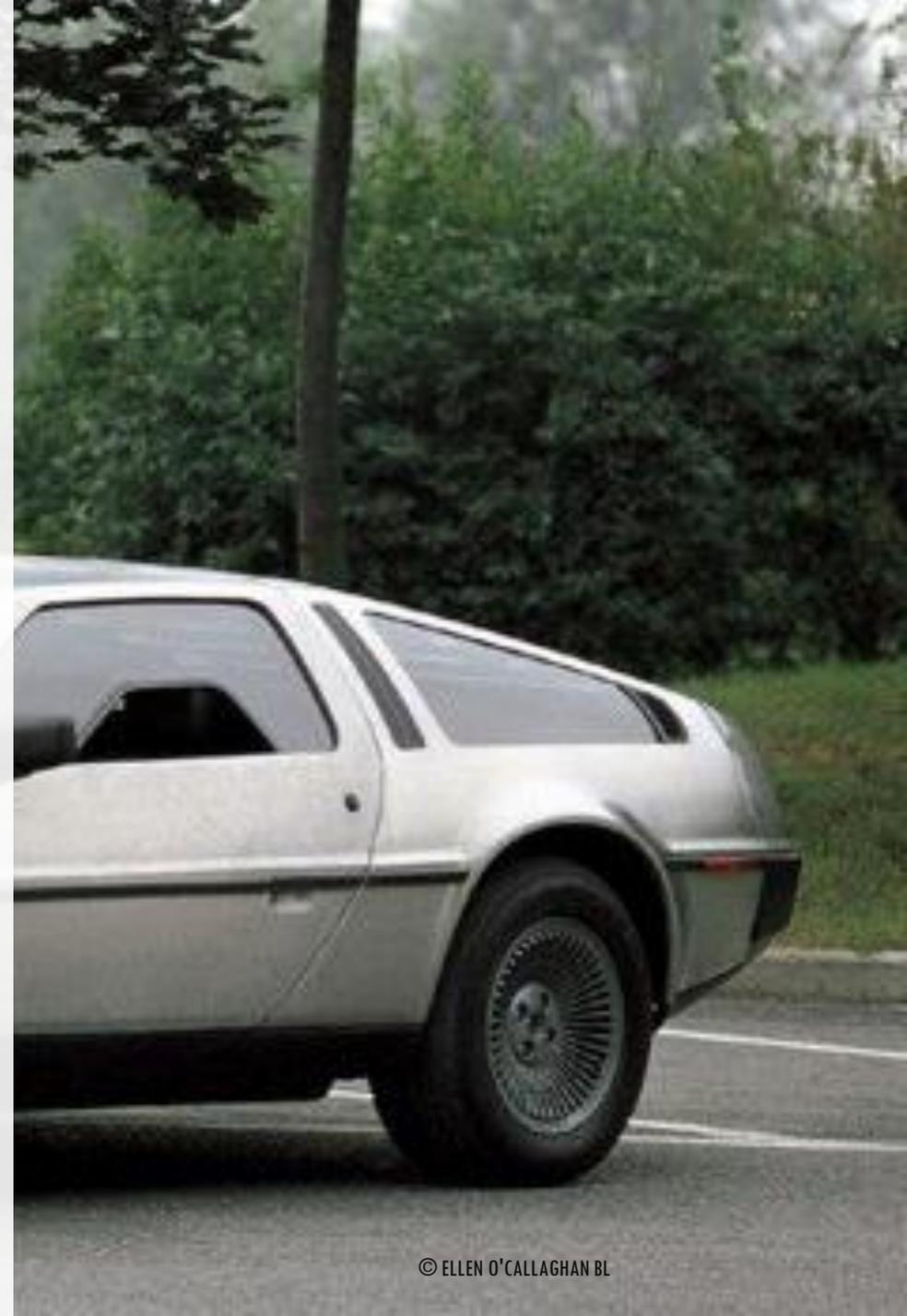
4. I say that I have been discriminated against by reason of my (see note 4)

<p>7. Are you claiming a collective agreement contains discriminatory provisions? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, please provide copy of agreement and mark the sections you think are discriminatory (see note 7)</p>	
<p>8. Details of complaint (other than equal pay) (see note 8)</p> <p>Last date of discrimination:</p> <p>And, if applicable, the date you left your job or were dismissed:</p> <p>Please set out briefly in your own words what happened, when it happened and where it happened. Please continue on a separate sheet if necessary.</p>	
<p>9. Details of any related complaints (see note 9)</p> <p>If you have made a complaint about the same issues to the Labour Court, the Labour Relations Commission or the Employment Appeals Tribunal, please attach details and current status of that complaint.</p>	
<p>SIGNED: _____</p> <p>DATE: _____</p>	<p>The completed and signed complaint form should be returned to:</p> <p>The Equality Tribunal, 3 Clonmel Street, Dublin 2. Tel: 01 4774100 Lo call 1890 34 44 24</p>
<p>10. Data protection</p> <p>The Equality Tribunal will treat all information submitted in accordance with the purposes registered under the Data Protection Acts 1988 to 2003.</p>	

WHAT IS THE LOUTH VEC CASE ALL ABOUT

MAIN ISSUE:

The extent of the power of an Equality Officer to inquire into a complaint in the context of historical evidence which was not referred to in the complaint form



- ❖ The applicant in the *Louth VEC* case sought a number of declarations and injunctive relief that fundamentally sought to determine whether the Equality Tribunal had acted ultra vires in purporting to conduct an investigation into alleged acts of discrimination which fell outside of the terms of the complaint made by the notice party.
- ❖ The notice party, a retired teacher, had made an equality employment complaint in August 2006 alleging discrimination on the basis of gender and sexual orientation. In the body of the complaint, the notice party indicated that the first occasion of discrimination occurred in **December 2005** and that the most recent discrimination occurred in **March 2006**.
- ❖ An equality officer was appointed in 2008 and a request was made by the respondent tribunal for the notice party to provide further details of the claim by written submissions.
- ❖ The notice party alleged, by way of written submissions in September 2007, that he had been discriminated against by the applicant since **1997**. The respondent tribunal requested that the applicant respond to the written submissions but no such response was received until the day before the hearing in **January 2009**.
- ❖ The matter was adjourned on the basis that there was a second separate personal injury claim in being and to allow time to see if a settlement would be possible. On that basis, the hearing was adjourned to February 2009 and the notice party indicated that further written submissions would be delivered in order to deal with legal issues that had been raised. In the further written submissions, the notice party submitted that he was a victim of continuing discrimination which impacted adversely on him for many years and fundamentally submitted that the Equality Officer should not be confined to the terms of the complaint as set out in the original EE1 form.
- ❖ When the hearing resumed, the applicant, by way of preliminary applications, sought a stay of the hearing pending the determination of the personal injury proceedings. Secondly, the applicant sought for a ruling to be made in respect of the nature of the evidence that the notice party would be permitted to give. The applicant contended that the notice party should not be allowed to give evidence which related to events prior to **December 2005** (the first date of discrimination given in the EE1 form).
- ❖ The notice party submitted that evidence should be allowed to be given prior to December 2005, as the discriminatory acts were continuing and therefore capable of investigation by an Equality Officer.
- ❖ The stay application was refused and the Equality Officer decided to allow all evidence to be heard before making any decision in fact or law. During the course of the hearing, the notice party gave evidence of events spanning over the previous **10 to 12 years** and of which the applicant alleged that they had no notice.
- ❖ Counsel for the applicant objected and applied for an adjournment. The Equality Officer indicated that the applicant would be given the opportunity to bring witnesses to respond to any allegations. The hearing was adjourned for a further two-day hearing which was scheduled for March 2009. Prior to the resumption of the hearing, the judicial review proceedings were initiated and the Equality Tribunal hearing was adjourned pending the outcome of the judicial review.

HIGH COURT JUDGMENT

“I accept the submission on behalf of the respondent that the Form EE1 was only intended to set out, in broad outline, the nature of the complaint. If it is permissible in court proceedings to amend pleadings where the justice of the case requires it, then a fortiori, it should be permissible to amend a claim as set out in a form such as the EE1, so long as the general nature of the complaint (in this case, discrimination on the grounds of sexual orientation) remains the same. What is in issue here is the furnishing of further and better particulars, although, it must be said, in the context of an expanded period of time. But, under the legislation it is clear that the complaints which are made within that expanded period are not time-barred. That is not to say that complaints going back over a very lengthy period would have to be considered as an issue of prejudice might arise. But this is something that would fall to be dealt with in the course of the hearing in any particular case”

RELIANCE THAT HAS BEEN PLACED ON THE HIGH COURT JUDGMENT

❖ *Clare County Council v The Equality Tribunal* ([2011] IEHC 303)

“It is clear from the foregoing that because the EEl form is only designed to set out the generality of a complaint, complainants should be allowed to expand on matters not specified in the form. So long as respondents are not taken by surprise or alternatively given adequate time to answer there can be no injustice therein”

❖ *Department of Foreign Affairs v Cullen* (EDA 6/2011)

“The fundamental principle adumbrated by the Judge is that, by analogy with the practice in civil proceedings in the ordinary Courts, a complainant should be permitted to amend his or her original claim where the justice of the case requires it. McGovern J did, however, add an important qualification to this general principle in pointing out that an amendment can only be made where the general nature of the complaint remains the same.”

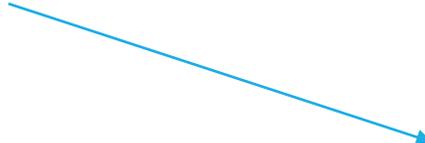
❖ *Gutaskiene v ALPS Electric Ireland Ltd* (DEC-E/2016-061)

“In the present case this new ground of race which the complainant sought to introduce at the hearing had not been referred to in any way in advance of the hearing. I am thus satisfied that the respondent was not on notice of any claim on the ground of race. In addition, and for the avoidance of doubt, I am also satisfied that any such claim on a new ground which relates to the complainant's retirement date of 25th of October 2014 would at this stage be out of time in accordance with the time limits provided for in Section 77(5) of the Acts.”

SUPREME COURT JUDGMENT

Early on we know the fate of the judgment.....

“To succeed, however, on what is in issue on this appeal, the appellant would have to show that the equality officer assigned to the case can only decide the contested issue at the point when it was raised by the Committee and that any other decision would be demonstrably wrong in law. That, in my view, is a step too far and a barrier too high for the VEC to overcome. Moreover, even if it could do so, the appeal would still have to be dismissed in circumstances where the undisputed facts are that the officer in question has yet to make any decision on the point and where it cannot be shown that she lacks jurisdiction to do so”.



This is the same view taken by the High Court

TIME IN EQUALITY CASES

- ❖ The six-month time limit is referred to as a “a condition precedent to the exercise of the Tribunal's jurisdiction”.
- ❖ The court helpfully summarises that when bringing a discrimination-based complaint, the six-month period runs either from:
 1. The most recent date of the offending conduct or
 2. The ending of a discriminatory regime or practice, or
 3. In the case of an isolated incident, simply six months from the date of the incident.

TIME IN EQUALITY CASES

Having considered both the provisions of ss. 6A and 77 of the Employment Equality Acts , McKechnie J. looks at the effect of these sections, indicated that where either a regime or practice exists or where a continuum of discrimination can be established, then it is possible to plead matters that have occurred “**far beyond**” a six-month period:

“In theory, such could extend for several years prior to the date of complaint. Even if that should occur, however, provided that the circumstances intended to be covered by the subsections are established, all such incidents will be regarded as being within time and thus will be within the competence of the Equality Tribunal to investigate for redress purposes. However, one should note the specific provisions of s.82(1) of the 1998 Act in respect of the periods for which compensation may be given”.

ROLE OF THE TRIBUNAL

- ❖ MacMenamin J. refers to the role of the Superior Court in considering fact and law issues emerging from a tribunal as “significantly circumscribed”, and held that:

“At this stage it is sufficient to emphasise that it is not, generally, the function of the courts to substitute their own views for those of an Equality Officer on questions of fact. Nor should a court, in a judicial review, or an appeal therefrom, seek pre-emptively to exercise a statutory jurisdiction on legal issues which is vested, in the first instance, in an Equality Officer”.

- ❖ McKechnie J. highlighted that the Tribunal can investigate incidents of discrimination only where it has been properly referred to it and that it has no function to “*embark upon a wide ranging inquiry into discrimination generally, or to generally investigate such discrimination*”.
- ❖ McKechnie J. points out, that where it has been found that a complaint has been lawfully referred, the next matter that might arise is what is the “scope or remit” of that complaint. The court holds that this decision in relation to the scope of a complaint is one solely for the Tribunal.
- ❖ McKechnie J. considered that in regard to the applicant's submission, if the Equality Officer made a finding that the historical evidence comes within the six-month period, such a finding would be conferring a jurisdiction not provided by legislation - this position was rejected, at on the basis that the Equality Officer is entitled to make such a finding under the governing legislation.

ROLE OF THE TRIBUNAL & PROCEDURE

The scope of an Equality Officer's power over how a hearing is to be conducted was referred to by McKechnie J. , in the following terms:

“Even without such a statutory provision, however, I would be quite satisfied that, subject to overall fair procedures, an equality officer has a sizeable degree of latitude in deciding how the hearing before her should be conducted.”

The decision taken by the Equality Officer, in this case, to hear all evidence before making a finding on the “historical evidence” issue, was referred to by the court as a “case management decision”.

The court expressed a difficulty in understanding why the Equality Officer deemed it necessary to hear all evidence before determining the contested issue.

McKechnie J. did highlight, that in some cases deciding a central issue in a preliminary fashion may benefit all parties in terms of “efficiency, expedition and cost savings”.

JR RELIEF DURING A HEARING?

“The courts have consistently held that, although decisions of a court of trial might, ultimately, be subject to certiorari, such relief was scarcely ever granted during the course of a trial.”

MacMenamin J. went on to consider, that the rules of the Superior Court demanded that relief by means of judicial review would only be available where it was “just and convenient”

*“As Order 84, Rule 18(1) makes clear, the issue in this appeal concerns the question of whether or not it is “just and convenient” to grant a declaration. I do not consider that it would be either ‘just’ or ‘convenient’. **The hearing is still proceeding. It is to be presumed it will be fair. It is to be presumed that the Equality Officer will act within jurisdiction.** The policy of this Act and the courts generally, lean against interference in a pending hearing, save in the most exceptional circumstances. There has been no detriment, or denial of rights or interests, nor has it been sufficiently shown that there is an imminent danger of the appellant suffering such detriment.”*

SUBSTANTIVE FINDINGS BY THE SUPREME COURT

- ❖ The main question is not answered but what the Court does do is undermine the High Court judgment.

“In the High Court, McGovern J. appears to have held that the EE1 Form was intended only to set out the nature of the complaint in broad outline, and that it was possible to amend a claim, so long as the general nature of the complaint remained the same. The judge considered that Mr. Brannigan, in his second submission, had simply submitted further and better particulars of his claim, albeit in the context of an expanded period of time. He concluded that, under the legislation, complaints made within an expanded period were not time barred, but that any respondent to a claim must be given a reasonable opportunity to deal with the complaints, and observed the procedures adopted in that regard must be fair and reasonable.”

Applying the principles outlined in the case law cited earlier, insofar as any findings as to time issues, and the effect of the EE1 form, are part of the High Court judgment, I would set aside these parts of the judgment. They are pre-emptive. As yet, questions of fact or law fall to be determined first by the Officer”

- ❖ *“What she has to decide is whether the correct interpretation and application of, inter alia, ss.77, 79 and 82 of the 1998 Act permits the classification of the historical evidence to come within the EE1 Form for redress purposes. This evidently is quite distinct from entertaining an application to amend that form.”*

TAKE AWAYS FROM THE SUPREME COURT JUDGMENT

1. The duty of the Equality Officer is both statutory, and, ultimately, delimited by constitutional considerations;
2. It is necessary that all parties be aware, in a timely way, of the case which they must meet;
3. There may also be circumstances in which a tribunal, although holding jurisdiction to enter upon an investigation or inquiry, may render its decision a nullity by, for example, a denial of fair procedures;
4. The Court will be very slow to grant JR reliefs mid-hearing.



THANK YOU

❖ Full Article see (2016) 13(4) I.E.L.J 100-107

QUESTIONS

