

EQUALITY COMMISSION FOR NORTHERN IRELAND

Review of Legal Services 2016-17

1. Introduction

This paper seeks to inform Commissioners of the work undertaken in the past year within Legal Services, to provide advice and guidance to individuals who believe they have been subjected to discriminatory treatment; to consider applications for assistance with legal cases; to provide legal representation in strategic cases and to report on the outcomes of casework.

2. Advisory Service

2.1 The Commission provides an information and guidance service for members of the public who believe that they have been discriminated against. For many individuals this is their main point of contact with the Commission. In the year from 1 April 2016 to 31 March 2017 the Discrimination Advice Officers dealt with enquiries from **3454** people. This is the highest number of enquiries to this service in the past 5 years. Of the enquiries received this year

- 43% were about disability discrimination (including) SENDO
- 27% were about sex discrimination
- 11% were about religious/political discrimination
- 9% were about racial discrimination
- 8% were about age discrimination
- 2% were about sexual orientation discrimination.

2.2 The percentage breakdown of enquiries has remained consistent over the past five years. Disability enquiries have risen slightly, being 41% of the overall total last year. In the past five years, disability enquiries have been the biggest area of calls to the Commission's help line, followed by complaints of alleged sex discrimination. There is a generally consistent pattern, with increasing volume of calls reflecting more calls about disability discrimination.

2.3 Enquirers to the helpline receive advice on rights and remedies, jurisdiction (Tribunal or County Court usually), time limits, lodgement of proceedings, information resolutions and ECNI assistance with litigation. Information and materials on the Commission's website support this service. The Discrimination Advice Officers signpost enquirers to the website and to other potential sources of help and assistance. The service aims to empower individuals to resolve discrimination problems in relation to employment and in the provision of good facilities and service at an early stage, by providing authoritative information. A small proportion of those who seek advice do not resolve the issue to their satisfaction and a number return to the Commission to apply for assistance with a legal case.

3. Legal Assistance

3.1 Applications for assistance with a legal case are decided by Legal Funding Committees, comprising of three Commissioners on each occasion. Legal Funding Committees (LFC) met for 23 scheduled meetings and 11 ad-hoc meetings during the business year. The ad hoc meetings were in respect of single applications and were convened to facilitate responsiveness to Tribunal/court timetables.

3.2 The LFCs considered 255 **new applications** for assistance. Assistance was granted to 59 of those and it was refused on 196 applications. All applications for assistance were considered in line with the Commission's *Policy for the Provision of Legal Advice and Assistance*. Applicants were advised at the outset that not all cases would be assisted. The assistance rate this year was 23.1%, compared to 24.4% in 2015-16 and 20.6% in 2014-15.

3.3 The largest number of new applications was granted in the area of sex discrimination. This coincided with the publication and publicity for the formal investigation into the experiences of pregnancy in the workplace: *Expecting Equality*. Many of the cases illustrated the nature of problems faced by pregnant women in the work place, on maternity leave or in returning to work following pregnancy. This has been the single biggest area of enquiries with respect to sex discrimination for some years and was the focus of a Commission conference in November 2016 that also marked 40 years of sex discrimination legislation in Northern Ireland.

3.4 Assisted cases are routinely **reviewed** to determine whether assistance should be continued or withdrawn. 62 cases that had

been granted assistance (including some in the previous year) were reviewed in 2016-17. Cases may be reviewed by LFC more than once during the lifetime of a case. Unless withdrawn by the Applicant, all cases will be reviewed by a LFC when sufficient evidence has been gathered to enable Counsel to assess whether or not the case has 'reasonable prospects' of success. All claimants are advised of the strengths and weaknesses in their cases. 52 of the cases reviewed were granted further assistance and 10 cases had assistance withdrawn by the Commission, following receipt of counsel's opinion in which Counsel could not indicate that there were reasonable prospects of success.

- 3.5 Applicants who had been refused assistance at the outset may request to have the decision **re-considered** by LFC. A decision not to grant assistance can be overturned if the claimant can show a 'material change in circumstances' that warrants a review. During this year, nine applicants requested a re-consideration but none of the cases re-examined had the original decision overturned.

4 Settlements for assisted complainants

- 4.1 In 2016-17 cases on behalf of 41 individuals were concluded by way of negotiated /conciliated settlement. Settlement terms were agreed in writing between the parties and the implementation of terms concluded proceedings. During this business year £343,500 was recovered by way of compensation; along with secured agreements to:-

- commit to equality principles;
- undertake to liaise with the Commission to review policies, practices and procedures;
- provide training for staff and management;
- provide references;
- provide reasonable adjustments (in disability cases);
- provide pay parity (equal pay cases).

- 4.2 **Appendix 1** sets out short summaries of cases that settled this year. When published on the website most of these cases will name both the Complainant and the Respondent (known as a Defendant in county court actions relating to goods, facilities and services). Three exceptions were agreed – in a case where a Tribunal anonymised the case due to the allegations therein; in a case where there were security concerns; and in a case where the claimant had particular vulnerabilities.

- 4.3 Some of these cases attracted significant press and media publicity. Further details of each of these cases will be placed on the Commission's website as a 'learning tool' to assist in fulfilling the Commission's statutory functions. They are used in education and training by Commission staff and others, as well as a reference point for individuals who feel they may have been the victims of discrimination. The Commission's Advice and Compliance Division provide follow up on all settlements where a liaison clause has been agreed. They meet with the employers and service providers; provide information, guidance and 'model' policies; and discuss how the organisation or business can ensure 'best practice' and avoid discrimination claims in the future.
- 4.4 The combination of this post litigation action by the Commission ensures that the support for individuals meets Commission's aims by:-
- raising public awareness regarding individual complaints and about the protection afforded by the law;
 - having a significant impact either in terms of bringing about changes in discriminatory practices and procedures or otherwise;
 - having potential for follow-up by the Commission in discharging its statutory functions.

5 Decisions

5.1 In addition to the cases, which settled before hearing, the Commission provided legal representation for nine people in cases, which were heard during the year. At the year-end two of those cases were still waiting a decision. Of the remaining six cases (on behalf of seven people), only one claim was dismissed. The rest, including two cases in the Northern Ireland Court of Appeal, were successful.

5.2 The decided cases (click on links to see the written judgements) were as follows:

5.3 [Gareth Lee –v- C & K McArthur & Ashers Baking Co. Ltd](#)

A claim of **sexual orientation and political opinion** discrimination in a goods and services case concerning the refusal by a 'Christian bakery' to provide a cake from its bespoke cake service with the iced slogan 'support gay marriage'. The original decision in favour

of the claimant was upheld and the respondents' appeal dismissed by the NI Court of Appeal. The case attracted consideration media attention, locally, nationally and internationally. The below link is a summary of the case and the issues by the Senior Legal Officer.¹

5.4 [Gary McClean –v- Waterside Neighbourhood Partnership Ltd](#)

A claim of unlawful discrimination on the grounds of **political opinion** under the Fair Employment and Treatment Order 1998 in a recruitment and selection exercise for the post of Community Development Officer. The case was upheld and £10,734 compensation awarded.

5.5 [Kristopher Banks –v- ABC Borough Council](#)

A claim of unlawful discrimination under the Fair Employment and Treatment Order 1998 in respect of shift allowance pay. The discrimination case was dismissed; but £2,489 was awarded for unlawful deduction of wages.

5.6 [Maria McKeith –v- Ardoyne Association](#)

A claim of **associative disability discrimination** arising out of the dismissal of an employee who was the mother and primary carer of a disabled child. The original decision in favour of the claimant was upheld & respondents' appeal dismissed by the NI Court of Appeal. The matter was remitted to the Tribunal and damages totalling £18,886.31 was awarded.

5.7 [Marie-Claire McLoughlin –v- Charles Hurst Ltd](#)

A claim of disability discrimination in the failure to make reasonable adjustments for **mental health disability** for a woman employed as a customer sales advisor in car sales was upheld at Tribunal. A remedies hearing was convened on 13 March 2017 to determine the appropriate compensation. The claimant was later awarded £11,840 by Tribunal remedies decision.

5.8 [Paulina Paczkowska & Agnieszka Golygowska –v- Avoca Handweavers \(NI\) Ltd](#)

¹ As published in PILA (Public Interest Litigation Association) Bulletin 18 Jan 2017
<https://www.pila.ie/resources/bulletin/2017/01/18/guest-piece-by-lisa-taggart-of-ecni-on-the-ashers-baking-case>

An **equal pay** claim taken by two women baristas in a Belfast cafe was upheld. Damages will include a rate of pay equal to their male comparator, backdated to May 2013.

5.9 In addition – the following cases were heard in tribunal during this business year and we are still awaiting the outcomes.

Bernard Barlow –v- JTI Tobacco – heard in Sept 2016. Decision awaited in this age discrimination claim

Helen Scott –v- Stevenson & Reid – heard in June & Sept 2016. Decision awaited in this hybrid - sectarian harassment, sex discrimination & constructive dismissal claim

5.10 Case statistics (as yet unpublished) provided to the Commission by the Office of Industrial Tribunals and Fair Employment Tribunal (OITFET) are attached at **Appendix 2**.

5.11 Discrimination claims in the *Industrial Tribunal* account for only 9.8% of all claims registered. The discrimination claims include freestanding part-time working claims that are not with the Commission's remit. Cases are concluded by being allowed/upheld at hearing; dismissed after hearing; withdrawn; conciliated; or settled; with a small number being stayed. Not all cases will be concluded in the year in which they are lodged.

5.12 Page 7 of the appendix shows the outcomes for equal pay cases concluded this year. The two claims supported by the Commission (see para 4.8 above) were the only two heard and upheld out 107 such cases concluded in 2016-17. Similarly the disability claim supported (see para 4.7 above) was one of only two disability claims heard and upheld out of 187 cases concluded. Page 3 of the Appendix 2 shows the outcome of complaints to the *Fair Employment Tribunal (FET)* and of the 96 cases concluded only 3 were successful at hearing including a Commission assisted case (see para 4.4 above).

6. Performance Measures and Trends

6.1 With regard to enquiries received by the Discrimination Advice Helpline, there has been upward trend in the last 5 years. Proportionately there has been a bigger increase in calls relating to disability discrimination, which now represents over 40% of all calls to the helpline. Customer feedback is obtained via an electronic survey and/or email. Satisfaction levels are very high with a number

of clients advising that due to the advice received they were able to satisfactorily resolve their problems without the need for legal action. Work will be undertaken in the coming year to improve the volume of feedback and overcome the limitations of a self-selecting survey.

6.2 With regard to applications for assistance with a legal case, there has been a downward trend over the last few years. While historically, 10% of enquirers made a formal application for assistance, during 2016-17 this was 7.4% of the total enquiries. This may be reflective of potential claimants considering other options, including informal resolution. While Northern Ireland was not subject to the Tribunal fees which saw a very significant drop in this type of litigation in England and Wales, there was never-the-less a drop in the number of claims lodged overall. The LFC grant of assistance in 2016-17 was 23% of all applications considered.

6.3 The Commission is committed to measuring performance and developing data collection to ensure that excellence in the delivery of legal and advisory services for individuals is demonstrable; that rights are enforced in practise; and the overall impact of strategic litigation in challenging and eliminating discrimination is maximised.

<http://www.equalityni.org/cases>

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