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THE EQUALITY TRIBUNAL

EQUAL STATUS ACTS 2000 - 2008

Decision No: DEC-S2009-029

William Hennessey
(represented by Michael Farrell, Solicitor, FLAC)

-V-

Network Catering / Iarnród Éireann
(represented by Colm Costello, Solicitor)

File ref: ES/2001/439
Date of Issue: 7th May, 2009

Unlawful Discriminatory Grounds
Gender, Marital Status, Family Status,
Sexual Orientation, Religion, Age,
Disability, Race, Membership of the
Traveller Community

Decision

DEC-S2009-029

William Hennessy
(represented by Michael Farrell, solicitor FLAC)

v.

Network Catering / Iarnród Éireann
(represented by Colm Costello Solicitor)

Key words

Equal Status Act, 2000 - Direct discrimination, Section 3(1) - Disability, Section 2 (1) and 3(2)(g) - special treatment or facilities to accommodate the needs of a person with a disability - Section 4(1), Section 4(2) - nominal cost, Section 3(1)(j) – victimisation, Section 11 – harassment, Section 42(1) - vicarious liability, Section 27(1) – redress for the effect of harassment, Section 27(2) – specific course of action - respondent ordered to put up notice.

Delegation under Equal Status Acts, 2000-2004

The complainants referred claims to the Director of the Equality Tribunal under the Equal Status Acts, 2000 to 2004. On the 17th July 2008, in accordance with her powers under section 75 of the Employment Equality Act, 1998 and under the Equal Status Acts, 2000-2004 the Director delegated the case to me, Marian Duffy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Acts, 2000-2004 on which date my investigation commenced. As required by Section 25(1) and as part of my investigation, I proceeded to hearing on the on 30th October 2008 and 21st January 2009. The final submissions were received on 9th February 2009.

1. Dispute

- 1.1** The dispute concerns a claim by the complainant that he was discriminated against on the gender, age, disability and victimisation grounds. The complainant alleges that the respondent discriminated against him in terms of Sections 3(1)(a), and 3(2)(a), 3(2)(f), 3(2)(g) and 3(2)(j) of the Equal Status Acts, 2000 contrary to

Section 5(1) of that Act. The complainant also alleges that he was harassed contrary to section 11 of the Acts. During the course of the investigation the complainant alleged that the respondent failed to provide him with reasonable accommodation in accordance with section 4(1) of the Acts. At the commencement of the hearing, the complainant withdrew his complaints on the gender and age grounds.

2. Summary of Complainant's case

2.1 The complainant is a wheelchair user and is a regular user of the train services particularly the trains between Thurles and Dublin or Thurles and Cork. He said that he had no difficulty in accessing the trains up until the new rules were introduced sometime during 1999. Because the complainant cannot propel himself, he cannot use a manual wheelchair. He has a motorised wheelchair, which is much larger than a standard wheelchair. He could park it in the baggage area on some trains and in the vestibule of other trains. In 1999, the station manager in Thurles informed him of new rules in relation to travel. He told him that he would have to travel in the dining car in a designated wheelchair area. His motorised wheelchair was too large to fit in the dining car and on a number of occasions, he was refused permission to travel. The procedures, which were in operation since 1999, were communicated the station managers. The procedures were outlined to the complainant in letters from Ms. Melanie McDonagh of the Mobility Impaired Liaison Office dated 3rd, 17th and 30th June 1999.

The procedures were again notified by an internal memorandum dated 28th May 2001, issued by the manager of Intercity, Iarnród Éireann to all station managers. The notification stated that wheelchair users would no longer be carried in the guards van or the vestibule on the train. From now on wheelchair users would be accommodated in the dining carriage in a designated area.

2.2 From mid 1999 onwards, the complainant was required to travel in the dining car in a manual wheelchair. The respondent offered him the use of a manual wheelchair, but it was not suitable to his needs, as he needed to elevate his legs while travelling. In or around February 2000 the complainant purchased a manual wheelchair suitable for use in the dining car and his motorised wheelchair was stored in the guards van. The complainant had to get on the train at the guards van in the motorised wheelchair,

change into the manual wheelchair. He was then assisted by staff to leave the train in the manual wheelchair, wheeled up the platform to the dining car carriage, and wheeled into the designate area for wheelchairs. The reverse procedure applied when the complainant was exiting the train. The manual wheelchair was stored in the customer service area of the train station where he exited. From the middle of 1999, until he purchased the manual wheel chair in February 2000, the complainant said that he was not allowed to travel.

- 2.3** The complainant submitted that he had difficulties travelling in the dining car as the space for the wheelchair was too small and his chair jutted into the aisle. He said that the staff in the dining car resented his presence there because he was taking up a dining space and he did not purchase any food. He submitted that the dining staffs got commission and his presence there affected the commission they could earn because he was taking up a space, which would be occupied by passengers purchasing food. On some occasions, the food trolley was deliberately rammed up against his wheelchair and he was thrown up against the side of the train. He said the staff would call on him to get out of the way in full knowledge that he required assistance to move the manual wheelchair. He said that the staff would gather in a group and would point over and refer to him. He said that it was very unpleasant to travel and he felt as if he was running the gauntlet every time he got on the train. He said that the procedure put in place by the respondent to allow him travel by wheelchair delayed the train and the train staff was not pleased about the delay. He also felt it was very undignified way for him to have to access the train service
- 2.4** On the 27th April 2000, the complainant travelled from Cork to Thurles in the dining car. He said that after leaving the train in his motorised wheelchair an egg was thrown at him from the dining car. The egg landed on the platform and did not hit him. The complainant said that he reported the matter to the station manager Mr. Moroney. He said that Mr. Moroney and other staff of the respondent saw the egg on the ground. On 4th May 2000, he received a letter from Mr. Ciaran Masterson, Manager Train Catering who said that they interviewed all the staff but they were unable to substantiate the incident or verify the perpetrator but he conveyed his apologies to the complainant for the experience. The complainant again raised this complaint with the

respondent following the introduction of the Equal Status Act on 25th October 2000 and he received no response.

2.5 The complainant submitted that on 24th April 2001 he accompanied his personal assistant, Ms Marina Proseckina, to Clonard Road in Crumlin, Dublin to view a house she hoped to rent. He remained outside while Ms. Proseckina viewed the house and a man (hereinafter called Mr. A) approached him in an aggressive and threatening manner. The complainant said Mr. A identified himself as working for the respondent. He told the complainant that he had been put off the trains because of the complaint about the egg throwing incident. He was also alleged to have said that he wished that he had thrown a four-inch block at the complainant. The complainant said that initially when he was approached he did not recognise Mr. A, but then he recognised him from the train. He said that he was very frightened and alarmed by Mr. A's behaviour. As soon as Ms. Proseckina reappeared and another man appeared on the other side of the road the abuse stopped and Mr. A went into a house on Durrow Road. The complainant noted the address and provided it in his subsequent complaint to the respondent. The complainant said that he left the area quickly and reported the incident to two Garda he met on patrol.

2.6 The complainant complained about the incident to the respondent but he received no response. He said that he was fearful about travelling on the train after that and only travelled a few occasions and only when it was absolutely necessary. He said that he subsequently saw Mr. A in the dining car but he did not approach him. He submitted that other staff in the dining car continued to verbally abuse him.

3 Respondent's Case

3.1 Mr. Nicholas Moroney, Station Manager Thurles, said that he knew the complainant well as he was a regular user of the train service between Thurles and Dublin. He said that he is a station manager for 12 years and during this time, the company has improved its facilities for disabled customers. He said that the older trains on the route were not designed to carry wheelchair passengers. However, the respondent allowed wheelchair passengers to travel either in the guards van on the Craven trains and the guards van or in the vestibule of Mark 3 trains. The complainant has a large motorised wheelchair and if it was parked in the vestibule, it obstructed the doors for

other passengers. Mr. Moroney said that he tried to accommodate the complainant as best as he could, but there were occasions on which the complainant was not permitted to travel on a particular train because the guards van was full of parcels and the complainant would have to wait for the next train. The respondent decided in or around 1997/1998 to accommodate wheelchair users in the dining car and some seats were removed to accommodate standard manual wheelchairs. The motorised wheelchair was too large for the dining car and he allowed the complainant to travel in the vestibule until late 1999 or early 2000. The rule about travelling in the dining car was then enforced.

- 3.2 Mr. Moroney said that he offered the complainant a manual wheelchair to use in the dining car and the motorised one would be stored in the guards van for the duration of the journey. The complainant told the company that the wheelchair was not suitable to his needs and that he would purchase a more suitable one.
- 3.3 Mr. Moroney said that the complainant was well known to him and on occasions, he had to refuse him permission to travel. He said that on a number of occasions he had some heated arguments with him about travel arrangements. In accordance with the respondent's Guide for Mobility Impaired Passengers, the complainant should give notice of his intention to travel so that the respondent could ensure that the space was available. On occasions, the complainant turned up and he could not travel either because the spaces in the dining car were full or because there was a Craven train on the route. The respondent also provided a ramp and assistance for the complainant to enter and leave the train and on occasions, difficulties arose either because he had not notified them he was travelling or staff from one station forgot to communicate the complainant's arrival at the station where he was leaving the train.
- 3.4 He said that he was on duty the day the egg was thrown. His staff noticed the complainant stopped on the platform after the train had exited. A broken egg was on the platform near where the complainant was parked. After investigating the matter with the complainant, he submitted a report of the incident to management.
- 3.5 Ms. Melanie McDonagh, Accessibility Officer with Irish Rail, said that the respondent company had been improving facilities for customers with disabilities

since the mid nineties. The trains in service were Cravens and Mark 3 trains and both of these trains had no facilities for wheelchairs. As the respondent purchased new trains, they ensured they were accessible for wheelchair users, the first were the trains on the Dublin Belfast line. They followed the UK legislation standards, the Rail Vehicle Accessibility Regulations (1998). In relation to the Craven carriages, they could not provide any accessibility but they decided to make the Mark 3 wheelchair accessible. It was decided that the dining car was the most suitable place to make designated accommodation for wheelchairs as there was always a dining car on these trains and there was a danger that other carriages could have been taken out of service. The dining car was also considered suitable, because there was always staff there that would assist a person in a wheelchair if required. Seats were removed to accommodate two standard size wheelchairs.

- 3.6** In the middle of 1999, the manager of the respondent's infrastructure, Mr. Gerry Dalton, met the complainant on board a train and subsequently he requested Ms. McDonagh to write to him. Ms. McDonagh wrote to the complainant on 3rd 17th and 30th June 1999. She explained that he could no longer use his motorised wheelchair in the vestibule of the train because it obstructed the area and caused safety concerns for other passengers and in particular in relation to the emergency evacuation of trains. In addition, his wheelchair could not get to the designated area because it was too wide to travel the aisle of the train. She advised him that the company would provide a conventional wheelchair for use on board in the designated area and his motorised wheelchair would be carried in the guards van. It is company policy to have wheelchairs available at train stations for customer use. The policy would be implemented from 28th June 1999. She also requested the complainant to contact her to discuss the proposals together with Mr. Moroney, but he did not do so. He continued to travel in his motorised wheelchair, on a number of occasions he was refused permission because the staff could not accommodate the complainant in his motorised wheelchair.

4. Conclusion of Equality Officer

- 4.1** The matter referred for investigation turns upon whether or not the complainant was discriminated against contrary to Section 3(1)(a) and 3(2)(g) and 3(2)(j) of the Equal Status Act and in terms of Section 5 (1) of that Act. The complainant also alleges that

he was harassed contrary to Section 11 of the Act. The complainant also alleged that the respondent failed to provide reasonable accommodation for him contrary to Section 4(1) of the Act.

In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint.

Section 3(1)(a) provides, inter alia, that discrimination shall be taken to occur where: "*On any of the grounds specified... (in this case the disability ground)... A person is treated less favourably than another person is, has been or would be treated.* Section 3(2)(g) provides that: *as between any two persons, the discriminatory grounds ... are ... that one is a person with a disability and the other either is not or is a person with a different disability,*"

- 4.2** A person making an allegation of discrimination under the Equal Status Act, 2000 must first establish a *prima facie* case of discrimination treatment. Once a *prima facie* case of discrimination has been established by the complainant, the burden of proof then shifts to the respondent to rebut the presumption of discrimination.

The complainant has a disability and is covered by the Acts. The complainant submits that he was subjected to specific discriminatory treatment in that an egg was thrown at him, that the staff in the dining car were hostile towards him, and that they subjected him to abuse and ridicule. They deliberately drove the dining trolley up against his wheelchair. He submits he was approached by Mr. A, a member of staff in the dining car, in Durrow Road, Crumlin and he was verbally abused and threatened by him.

- 4.3** The first matter for consideration is whether the complainant was harassed. Section 11 of the Equal Status Acts provides:
- "—(1) A person shall not sexually harass or harass (within the meaning of subsection (4) or (5)) another person ("the victim") where the victim—*

(a) avails or seeks to avail himself or herself of any service provided by the person or purchases or seeks to purchase any goods being disposed of by the person,

(b) is the proposed or actual recipient from the person of any premises or of any accommodation or services or amenities related to accommodation,

(5) Harassment takes place where a person subjects another person ("the victim") to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the victim is based on any discriminatory ground and which could reasonably be regarded as offensive, humiliating or intimidating to him or her."

- 4.4 It is an undisputed fact that an egg was thrown after the complainant exited the train on 27th April 2000, that the matter was subject to an investigation following a complaint, that the respondent interviewed all the staff in the catering department, that they denied responsibility and that the complainant received a written apology. The respondent disputed that the egg came from dining car of the train but they accepted in the course of the hearing it was the most likely place the egg came from was the dining car of the train.
- 4.5 The complainant complained again about the egg-throwing incident in October 2000 and he got no response. He also submitted that he had no problem travelling by train up until he was obliged by the respondent to travel in a designated wheelchair area in the dining car. He submitted that the procedure for him to enter and exit the train whereby he had to change from the motorised wheelchair to the manual chair caused a delay and the staff particularly in the dining car did not like it. He submitted in evidence that they subjected him to both verbal and physical abuse and ridiculed him by asking him to get out of the way when they were well aware that because of his disability he could not operate a manual wheelchair. He submitted that his disability caused the staff inconvenience and because he was taking up a space in the dining car, it resulted in a decrease in commission from the sale of food for the staff. He submitted that the egg-throwing incident was related to the incident in Durrow Road in Crumlin, which took place on 24th May 2001. He submitted that he was victimised and harassed by Mr. A because he complained about the incident to management. He

submitted that the respondent failed to take steps to prevent him being victimised and harassed.

- 4.6** The respondent submitted that the egg throwing incident took place on 28th April 2000 incident and before the Act came into operation on 25th of October 2000 and consequently it cannot be taken into account as an act of discrimination or harassment. They submitted that they investigated the egg-throwing incident and none of the staff admitted responsibility. The complainant failed to identify the person responsible. In relation to the incident on 24th May 2001, the respondent stated that they could not investigate this incident as it did not occur on the respondents premises, the complainant did not identify the person and that the incident with Mr. A took place outside the workplace and the respondent cannot be held to be vicariously liable. The respondent accepted that the staff in the dining car was in receipt of commission. They submitted that the accommodation for wheelchairs would have little impact on the commission.
- 4.7** Having considered the totality of the evidence, I am satisfied, on the balance of probabilities, that a change took place in the treatment of the complainant as a customer of the respondent once he was accommodated in the dining car. In relation to the egg-throwing incident, it is clear from the internal e-mails submitted in evidence by the respondent that they considered the matter very serious. I can only consider this incident as background to the complaint as it occurred before the Act came into operation. The complainant was a regular user of the train service and because he required assistance to board and exit the train he was well known to all the staff both on and off the train. Consequently, because of the necessity for interaction with staff a number of differences of opinion arose. Mr. Moroney stated that he had a number of heated exchanges with the complainant about his travel arrangements. He also agreed that at times the train might be delayed because the ramps may not have been in place. This happened on the day of the egg-throwing incident.
- 4.8** The complainant's evidence in relation to his treatment in the dining car was not contradicted; the respondent did not call any member of the dining car staff. I have concluded from the evidence, which is supported by the egg-throwing incident, that the staff in the dining car made the complainant feel unwelcome there, because he

was in a wheelchair and they considered that he was in their way. They were aware that because of his disability it was impossible for him to move out of their way without assistance. I have come to the conclusion from the complainant's evidence that the dining trolley was banged up against his chair, that he was subject to ridicule and abuse by some members of the staff in the dining car including Mr. A. Likewise I am satisfied that the complainant was subject to abusive and threatening behaviour by Mr. A, a member of the dining car staff, on Durrow Road in Crumlin on 24th May 2001. I am supported in this conclusion by the fact that the complainant produced evidence that a member of staff who was interviewed in relation to the egg-throwing incident lived at the address on Durrow Road where the complainant saw Mr. A enter after he encountered him. The harassment in my view commenced in or around February 2000 when the complainant started travelling in the dining car. It was ongoing and continuous after 25 October 2000, when the Equal Status Act 2000 came into operation, and it continued up until mid 2001 when the complainant decided to use the train less frequently because of the harassment. I am satisfied that the complainant has established a prima facie case of discriminatory treatment on the disability ground, which the respondent has failed to rebut. I find therefore that the complainant was harassed contrary to section 11 of the Act.

- 4.9 It is a defence for the respondent if he can show that he took reasonable steps to prevent the harassment. Section 11(3) provides that:

“ It shall be a defence for the responsible person to prove that he or she took such steps as are reasonably practicable to prevent the sexual harassment or harassment, as the case may be, of the other person referred to in subsection (2) or of a category of persons of which that other person is a member. ”

Both the respondent and complainant agree that the complainant complained again about the egg-throwing incident in October 2000 after the Equal Status Act 2000 came into operation. The complainant also said that he reminded the respondent about their responsibilities under the Equal Status Act. The respondent said that they did not issue any specific instructions or warning to the staff following the initial complaint or the further complaint in October 2000 following the introduction of the Equal Status Act. The respondent provided no evidence that any staff received specific training in relation to the provisions of the Equal Status Act. In relation to

the complaint on 24th May 2001, the respondent said that they did not investigate the incident, speak to any staff, or issue any general warning or code of conduct to staff following this incident as it took place outside the workplace. I note that the staff have been issued with a booklet entitled “*How May I Assist you*” which gives staff specific guidance about assisting customers with disabilities. However, there are no specific warnings in relation to the conduct of staff towards people with disabilities.

The respondent further submitted that it was too late to investigate the complaint as the complainant had referred the case for investigation. I note that the complainant sent the statutory notification under section 21 2(a) of the Act to the respondent on 28th May 2001 and he received no response. He referred his complaint to the tribunal on 24th July 2001. It should be noted that the serving of the statutory notification on the respondent is not referring the case for investigation. It provides the respondent with an opportunity to respond to the complaint. The respondent was well aware that the complainant was a regular customer who required assistance. It is surprising that the matter was not investigated and that measures were not put in place to ensure that staff was made aware that any inappropriate behaviour or harassment of the complainant or any other customer with a disability was not acceptable. I find that the respondent has not satisfied the defence available under section 11(3).

4.10 The next matter for consideration is whether the complainant was victimised contrary to Section 3(2)(j).

Section 3(2)(j) provides “that one—

(i) has in good faith applied for any determination or redress provided for in Part II or III,

(ii) has attended as a witness before the Authority, the Director or a court in connection with any inquiry or proceedings under this Act,

(iii) has given evidence in any criminal proceedings under this Act,

(iv) has opposed by lawful means an act which is unlawful under this Act, or

(v) has given notice of an intention to take any of the actions specified in subparagraphs (i) to (iv),

and the other has not (the “victimisation ground”).

The complainant submitted that he was victimised by Mr A because he reported the egg-throwing incident. The complainant said that Mr. A approached him on 24th May 2001 on Durrow Road in Crumlin in an abusive and threatening manner because he was disciplined following the complainants report to management about the egg-throwing incident. The respondent submitted that the encounter could not have taken place as no staff member was disciplined about the egg-throwing incident. They also submitted that the incident could not be construed as victimisation in accordance with the Act.

4.11 I note that under Section 3(2)(iv) above provides that the act, which is opposed, must be unlawful under the Equal Status Acts. The *act*, the egg-throwing incident, which was the basis of the complaint to the respondent, was not covered by The Equal Status Act, because the Act was not in operation at the time the incident occurred or the complaint was made. While the egg-throwing incident may have been unlawful and covered by other statutes, it was not unlawful under the Equal Status Act at the time in question. Therefore, I cannot hold that the incident of 24th May 2001 was victimisation in accordance with the Act, as the act on which it was founded was not unlawful when the complainant complained. I find therefore that the complainant has failed to establish a prima facie case of discrimination on the victimisation ground.

4.12 I note that the complainant made a number of referrals to the Equality Tribunal in relation to other alleged acts of discrimination. The complainant did not pursue these complaints and the Director dismissed them for non-pursuit under section 38 of the Act. It should be noted that the specifics incidents of alleged discrimination formed no part of my investigation of the complaint herein. I considered information in relation to these complaints only in the context of the victimisation complaint herein. I am satisfied that there is no connection or evidence to support a complaint of victimisation arising from these complaints. I find therefore that the complainant has not established a prima facie complaint of discrimination on the victimisation ground.

4.13 The next matter for consideration is whether the respondent is vicariously liable for the harassment of the complainant. Section 42(1) provides:

42.—(1) Anything done by a person in the course of his or her

employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval.

The question is whether a person in the course of his or her employment carried out the harassment, which I have found above, and if so, can the respondent be held vicariously liable for their actions. I am satisfied that all the staff in the dining car worked for the respondent and that a number of incidents of harassment took place when they were on duty there. I have found above that the harassment against the complainant was ongoing and continuous when the complainant travelled in the dining car. I am satisfied that these incidents occurred during the course of the employment of the staff and having regard to section 42 (1) I find that the respondent is vicariously liable for the incidents of harassment that took place there.

4.14 The next matter for consideration is whether the respondent is vicariously liable for the harassment that did not occur in the course of the employment of Mr. A. The incident of the 24th May 2001 which was directly related to the egg-throwing incident took place outside the employment of Mr. A. The complainant's representative referred me to a number of English cases, (*Lister v Hesley Hall Ltd* [2001] UKHL 22, *Mattis v. Pollock* [2003] EWCA civ 887 and *Majrowski v. Guy's and Thomas' NHS Trust* [2006] UKHL 34) and he asked me to follow the principle set down in these judgments. The Courts held in these cases that if an incident is so closely connected with the employment it should be regarded as having happened in the course of the employment.

I accept that the incident of the 24th of May 2001 was closely connected with the employment of Mr. A. The complainant and Mr. A did not know each other except through the train service provided by the respondent, Mr A's employer. However, given my finding that the respondent is already vicariously liable for acts, which occurred at the place of employment, it is not necessary for me to decide on vicariously liability in relation to the incident that occurred outside the employment.

- 4.15 The complainant also complained during the course of the investigation about the facilities provided by the respondent for a person in a wheelchair.

Section 4 of the Equal Status Act provides that, inter alia:

“(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

In considering reasonable accommodation, I note that the section of the Act requires the respondent to do “*all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities*”. This means that the Act requires the respondent to show that it did **everything** it could reasonably do to accommodate the needs of the complainant.

- 4.16 The complainant submitted that he had no difficulty in using his motorised wheelchair as a passenger on the train until the new rules were introduced and he was obliged to travel in the dining car in a manual wheelchair. He submitted that he was subjected to harassment in the dining car and this made it difficult to avail of the train service. His representative submitted that the respondent failed to provide reasonable accommodation for him in accordance with the Act. He said that they should have provided a wheelchair accessible space in a carriage other than the dining carriage and in a place where the wheelchair was not getting in the way of the staff. He further submitted that the respondent, who indicated that they had followed the UK Regulations (S.I 1998 No. 2456 The Rail Vehicle Accessibility Regulations 1998), when they provided the spaces in the dining car for wheelchair use, adopted a narrower width for a wheelchair than that mentioned in the said regulations. He said that if they had provided the width provided for in the regulations it would have been possible for the complainant’s motorised wheelchair to fit in a carriage other than the dining carriage.
- 4.17 The respondent witnesses said that they were improving facilities for wheelchair users on an ongoing basis. The older trains had no designated wheelchair area and they decided to create two spaces in the dining car as they were of the opinion that it was

the safest place to accommodate customers in wheelchairs. The dining car was always in use on trains and there was a danger that if other carriages were used they could be taken off the route at any time. Furthermore, the dining car was always staffed and they would be of assistance to a person in a wheelchair if the need arose. It was further submitted that because of limited space on the older trains, the respondent could not accommodate the motorised wheelchair in the dining car or in any other carriage because the wheelchair was too wide for the corridors of the older trains. All new trains are wheelchair accessible but they still cannot accommodate large motorised wheelchairs such as the complainant's in the designated wheelchair area.

4.18 The respondent said that they were continually improving their facilities for people with disabilities since the mid nineties. They appointed an accessibility officer. In March 1999, Ms. Melanie McDonagh took up duty. In 1998, the respondent issued a Guide for Mobility Impaired Passengers and it has been regularly updated. It gives useful information for passengers about facilities available at train stations for people with disabilities. It also advises passengers with disabilities to contact the station at least 24 hours before travel so that arrangements could be put in place, for example, a staff member would meet the person and assists them to board the train and that the ramps are in place for wheelchair users. The respondent also issues leaflets to staff entitled *How May I Assist You?* It is a guide for all staff who provides assistance. It also instructs staff to inform the staff at the station where the customer is exiting so that facilities are put in place there. This guide is updated on a regular basis through staff notices.

4.19 In relation to Section 4 of the Act, I note that, in a Circuit Court appeal from a decision of the Equality Tribunal in the case of *Deans v Dublin City Council*, Judge Hunt considered the concept of reasonableness in the context of that Section of the Act. Hunt J. stated: “ *...reasonableness must be judged according to the context of the individual case... .. The City Council is entitled to bear in mind all the extensive and considerable social, legal and policy considerations and they are indeed relevant to the decision as to what is reasonable in the particular case.... The Housing authority is not obliged to submit to every wish expressed by a disabled person in the context of an application for facilities..... All that it is commanded to do*

by the equality legislation is to devise a "reasonable" solution to a problem, not to achieve perfection and not to give in to every demand that is made of it,"

In applying this rationale to the case in hand, and having considered whether the facilities put in place to accommodate the complainant's travel by train were reasonable, I am satisfied that the respondent devised "*a reasonable solution to a problem*". The respondent provided spaces in the dining carriage for passengers in wheelchairs and because the complainant's motorised wheelchair was larger than a standard one and could not traverse the aisle of the older trains, they provided him with facilities to store his own chair and provided assistance for him to travel in the designated area in a manual wheelchair. I find that the special facilities the respondent put in place to enable wheelchair users to travel by train satisfies section 4(1) of the Act. The respondent was unable to accommodate the complainant's motorised wheelchair in the vestibule or other areas of the train, because of the limited space and the need to balance the complainant's needs with the safety of other passengers using their service. I find that this does not constitute discrimination on the disability ground nor is it a failure to provide reasonable accommodation in accordance with Section 4(1) of the Act.

4.20 I am now going to consider nominal cost in accordance with Section 4(2) of the Equal Status Acts which provides:

(2) "A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question".

4.21 The question of nominal cost did not arise and it is not therefore necessary for me to consider this issue in detail. However, the question which would need to be addressed in considering this issue is, would the cost of the provision of accommodation to the complainant for his motorised wheelchair in the designated space on the Mark 3 trains be more than a nominal cost for the respondent. While this issue was not addressed by either the party, and the respondent did not provide any figures on this aspect of the provision of accommodation for the complainant's motorised wheelchair, it seems permissible in the absence of figures to suppose that the cost of doing so would

exceed any cost that could be considered nominal. At a minimum, in my opinion, the respondent would have to widen the corridors, doors, and the designated spaces for wheelchairs on all the older trains to accommodate the complainant's wheelchair. I am satisfied that this would bring the cost of reasonable accommodation beyond nominal.

5. Decision

5.1 I find that the complainant was harassed in terms of Section 11 of the Equal Status Act. Under section 27(1) of that Act redress may be ordered where a finding is in favour of the complainant. Section 27(1) provides that:

“the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:

(a) an order for compensation for the effects of the discrimination;

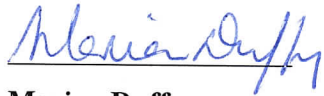
or

(b) an order that a person or persons specified in the order take a course of action which is so specified.”

5.2 Under the above Section the maximum amount of compensation I can award is €6,349. In considering the amount of compensation that I should award I have taken into account the effect of the harassment had on the complainant. The harassment had a great impact on the complainant in that he decided to use the train less frequently because he was afraid of being harassed. Because of the severity of his disability, this greatly limited his ability to travel because the train service was essential to him for mobility. I order the respondent to pay to the complainant the sum of €3,000 (three thousand euro) to compensate him for the distress, humiliation and intimidation experienced by him as well as the loss of the amenity of the train to him.

5.3 Under Section 27(1)(b) of the Act, I order the respondent to display a clearly visible notice, in the dining car or in any other place on the train where there is a designated wheelchair space, stating that customers with disabilities are protected by the Equal Status Acts. The notice should also state that passengers with disabilities are welcome

to travel and enjoy the amenity of the train without interference. This notice should be displayed within 4 weeks of this Decision. All staff should be trained in relation to the provisions of the Equal Status Acts, 2000-2008.



Marian Duffy

Equality Officer

7th May 2009