

THE CIRCUIT COURT

DUBLIN CIRCUIT

COUNTY OF DUBLIN

NOTICE OF MOTION

IN THE MATTER OF SECTION 28 OF THE EQUAL STATUS ACT 2000

BETWEEN

PATRICK KELLY

PLAINTIFF

AND

NATIONAL UNIVERSITY OF IRELAND, DUBLIN
AKA UNIVERSITY COLLEGE DUBLIN (UCD)

DEFENDANT

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL

NOTICE PARTY

TAKE NOTICE that application will be made to the Court on _____ the
_____ day of _____ at _____ or the next opportunity
thereafter for the following reliefs:

RELIEFS SOUGHT

- A. An “order for compensation” under Section 27(1)(a) of the Equal Status Act 2000 equivalent to “the maximum amount that could be awarded by the District Court in civil cases in contract”.
- B. An order under Section 27(1)(b) of the Equal Status Act 2000 requiring the Defendant to provide course applicants with “...detailed criteria for admission to courses, with an explanation of admission processes. This should indicate the likely weight given to prior academic achievement and potential demonstrated by other means, how applications may

demonstrate potential and relevant capability, whether such potential and relevant capability will be considered on top of a set level of examination results or is a means of earning credit alongside a flexible level of examination results”.

- C. An order under Section 27(1)(b) of the Equal Status Act 2000 requiring the Defendant to provide all course applicants with “clearly signposted procedures for complaints and appeals”.
- D. An order under Section 27(1)(b) of the Equal Status Act 2000 requiring the Defendant to “provide feedback on request to unsuccessful [course] applicants. In the first instance, ‘feedback’ means explaining why an applicant was unsuccessful”.
- E. An order under Section 27(1)(b) of the Equal Status Act 2000 requiring the Defendant to introduce and adhere to a Policy on Positive Action for the purpose of complying with its statutory object “to promote gender balance and equality of opportunity among students...of the university” (Section 12(k) of the Universities Act 1997). The Policy on Positive Action should be modeled on the Policy on Positive Action of Nottinghamshire Police in England. According to the Equal Opportunities Commission for England (2006): “The term 'positive action' refers to a variety of measures designed to counteract the effects of past [gender] discrimination and to help eliminate sex stereotyping”. The Policy should include a list of non-exhaustive Positive Action Measures arranged under 3 categories: Advertising (targeted advertising; placing encouraging statements in course advertisements; placing advertisements in particular media; ensuring appropriate illustrations of men in recruitment student literature pertaining to courses in which men are underrepresented; ensuring appropriate illustrations of women in student recruitment literature pertaining to courses in which women are underrepresented); Student Recruitment (targeted recruitment/familiarization events; liaison with schools, further education colleges and appropriate community groups; provision of feedback to unsuccessful applicants; traineeship posts, provision of work experience/work shadowing; bursaries); and, Student Retention (tracking applicants through the selection process; provision of feedback and encouragement to unsuccessful applicants; mentoring scheme; encouraging development of support networks; provision of appropriate training to staff). The Policy on Positive Action should be held to apply to all courses run by or for the Defendant and be reviewed every 3 years. Section 14(b)(i) The Equal Status Act 2000 specifically permits Positive Action (“Nothing in this Act shall be construed as prohibiting...preferential treatment or the taking of positive measures which are *bona fide* intended to...promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons...”).

- F. An order under Section 27(1)(b) of the Equal Status Act 2000 requiring the Defendant to write to Patrick Kelly formally acknowledging the discrimination and apologizing for the discrimination.

AND FURTHER TAKE NOTICE that the said application will be grounded on the affidavit of the Plaintiff, Patrick Kelly, filed on _____ (and the exhibits annexed thereto), a copy of which is served herewith.

Section 28(1) of the Equal Status Act 2000 provides that: “Not later than 42 days from the date of a decision of the Director under *section 25* [of the Act], the complainant or respondent involved in the claim may appeal against the decision to the Circuit Court by notice in writing specifying the grounds of the appeal”. This is an appeal *de novo* under Section 28(1) of the Equal Status Act 2000.

The Plaintiff is Patrick Kelly, aged 28, of 11 Deansrath Avenue, Clondalkin, Dublin 22. The Plaintiff was the complainant in a gender discrimination complaint referred to the Director of the Equality Tribunal in April 2002 (ES/2002/0314). The respondent was the National University of Ireland, Dublin AKA University College Dublin (UCD). The decision against which the Plaintiff is appealing is Decision DEC-S2006-076. Decision DEC-S2006-076 is dated November 2, 2006.

The grounds upon which the Plaintiff is relying in support of this appeal under Section 28(1) of the Equal Status Act 2000 and for the reliefs sought are as follows:

GROUNDINGS

1. The Tribunal ignored evidence on a selective basis and failed properly to take account of the evidence provided to the Tribunal by the Plaintiff.
2. At Paragraph 2.1, Paragraph 5.1, Paragraph 5.5, Paragraph 5.16, Paragraph 5.20, Paragraph 5.21, Paragraph 6.11, Paragraph 6.12, and Paragraph 7.7 of Decision DEC-S2006-076 the Tribunal deliberately distorted and misrepresented the Plaintiff's evidence.
3. The Tribunal failed to deal with and resolve the contradictions and inconsistencies in the evidence of and for the Defendant.
4. Decision DEC-S2006-076 contains a false proposition of law *ex facie*. At Paragraph 7.1 of Decision DEC-S2006-076 the Tribunal stated: “It is the established practice of this tribunal in relation to the burden of proof in gender discrimination complaints under the [Equal Status] Act to shift the burden of proof to the respondent where the complainant has established facts

from which discrimination may be inferred". At Paragraph 7.2 of Decision DEC-S2006-076 the Tribunal stated: "...it is for the complainant in the first instance to establish as facts the assertions on which the complaint is based..." [emphasis added]; a "prima facie case", according to Decision DEC-S2006-076, is "thus established". At Paragraph 7.5 of Decision DEC-S2006-076 the Tribunal stated that the Plaintiff "must show" that the "treatment" he received was "less favourable than the way someone who is not covered by the relevant discriminatory ground is, has been or would be treated"; the Plaintiff, according to the Decision, "must show" this "before any inferences can be drawn from the facts". The correct elucidation of the law in relation to the burden of proof in gender discrimination cases was set out by the Employment Appeal Tribunal for England in *Barton v. Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 EAT. The Employment Appeal Tribunal prefaced its elucidation with the following observation at paragraph 17: "The Courts have always acknowledged that it was rare for an applicant complaining of discrimination to have evidence of overtly discriminatory words or actions, therefore the affirmative evidence of discrimination will normally consist of inferences to be drawn from the primary facts". At paragraph 25 the Employment Appeal Tribunal then explained: "...it is for the Applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents have committed an act of discrimination against the Applicant which is unlawful...". "It is important to bear in mind in deciding whether the Applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves". "In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal". The Employment Appeal Tribunal emphasized: "It is important to note the word is 'could'. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts proved by the Applicant to see what inferences of secondary fact could be drawn from them". "Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the Applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question. Since the

facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof”.

5. At Paragraph 2.3 of Decision DEC-S2006-076 the Tribunal stated: “...Mr Kelly...filed a 12-page submission which he contended fully set out his case. A copy of this submission is contained at appendix A of this decision. All the points raised by Mr Kelly in this submission have been fully considered when [*sic*] arriving at this decision”. It is however, evident from Decision DEC-S2006-076 that “this submission” was not “fully considered”.
6. At Paragraph 7.8 of Decision DEC-S2006-076 the Tribunal stated: “...the attitude of the interviewers towards him was not in my view based on his gender. Their absence at the hearing would [*sic*] not affect this finding”. This was a statement of a conclusion, rather than an explanation of the reasons which led the Tribunal to it. Merely to state a conclusion without stating the basis on which this conclusion was reached is not regarded as a sufficient explanation. The obligation to give reasons for the Decision imports a requirement to do more than simply state conclusions.
7. The Tribunal did not explain why it accepted unreservedly “the evidence given by the University that it did all in its power to ensure that it’s [*sic*] social science course attracted a better gender balance” (Paragraph 7.15 Decision DEC-S2006-076). This was a statement of a conclusion, rather than an explanation of the reasons which led the Tribunal to it. Merely to state a conclusion without stating the basis on which this conclusion was reached is not regarded as a sufficient explanation. The obligation to give reasons for the Decision imports a requirement to do more than simply state conclusions.
8. At Paragraph 6.10 of Decision DEC-S2006-076 the Tribunal stated: “In her cross-examination [Valerie Richardson], when queried about the fact that the [*sic*] Professor Clancy had stated in his response to Mr Kelly’s Freedom of Information request that the only documentation available at the selection meeting was the score sheets and ranking list, she was unable to explain this discrepancy [she had claimed that the application forms and CVs had also been “available”]”. There was no finding in fact as to the “discrepancy” and the Tribunal refused to draw any inferences.
9. The Tribunal failed to exclude from its consideration matters which were irrelevant to what it had to consider. At Paragraph 6.11 of Decision DEC-S2006-076 the Tribunal stated: “It also emerged...that Mr Kelly’s own undergraduate course had a gender bias of 55% to 45% in favour of females...”. That was and is irrelevant. It “emerged” because of the Tribunal’s dogged persistence in pursuing this ‘line’ of questioning. The Plaintiff’s “own undergraduate course” was in Social Policy – not social work. The Plaintiff’s “own undergraduate course” was not a social work course. The gender discrimination complaint related to the postgraduate

social work course at the University. The Plaintiff's "undergraduate course" is not analogous. The Tribunal knew that the Plaintiff's "undergraduate course" is not analogous.

10. At Paragraph 7.14 of Decision DEC-S2006-076 the Tribunal stated: "For the purposes of clarity...I should state that even had I accepted that Mr Kelly had established sufficient facts from which discrimination could have been inferred, having heard the evidence in its totality, I have come to the view that the University would have discharged the onus of proof placed upon it". The evidence of and for the Defendant was not of such character, quality or strength to justify this "view".
11. The Tribunal failed to advance adequate reasons for "finding" that the Plaintiff "was treated at the Selection board meeting no less favourably or more favourably than other candidates [sic]" and failed to explain why "the universities [sic] failure to take notes in this particular case does not affect this particular finding". These are statements of conclusions, rather than explanations of the reasons which led the Tribunal to them. Merely to state a conclusion without stating the basis on which this conclusion was reached is not regarded as a sufficient explanation. The obligation to give reasons for the Decision imports a requirement to do more than simply state conclusions.
12. At Paragraph 7.11 of Decision DEC-S2006-076 the Tribunal stated: "Mr Kelly also asked this Tribunal to find that the superior marks he obtained at his Trinity interview showed that the marks he received at the University interview were somehow imbued by a spirit of discrimination. In my view they merely show that he did an extremely good interview when applying for the course at Trinity". This was a statement of a conclusion, rather than an explanation of the reasons which led the Tribunal to it. Merely to state a conclusion without stating the basis on which this conclusion was reached is not regarded as a sufficient explanation. The obligation to give reasons for the Decision imports a requirement to do more than simply state conclusions.
13. At Paragraph 7.13 of Decision DEC-S2006-076 the Tribunal stated: "...for the reasons outlined above [i.e. earlier in the Decision], I take the view that Mr Kelly's case falls at the first hurdle and that he has not established facts from which discrimination must be inferred [sic]". The Tribunal's 'reasoning' on this issue is defective and unintelligible.
14. The Tribunal failed to have regard to Section 12(k) of the Universities Act 1997. At Paragraph 7.15 Decision DEC-S2006-076 the Tribunal asserted: "...there is no obligation in law on the provider of any course...to encourage persons of a particular gender to join that course". Section 12(k) of the Universities Act 1997 states that one of the statutory "objects" of the National University of Ireland, Dublin AKA University College Dublin (UCD) is "to

promote gender balance and equality of opportunity among students...of the university". The noun 'object' is defined in the Concise Oxford Dictionary (11th edition) as "a goal or purpose".

15. The Tribunal did not give reasons in sufficient detail or with sufficient clarity to enable the Plaintiff to understand why specific contentions or evidence on material points were rejected.

16. The Tribunal erred in finding that the Plaintiff "failed to establish a prima facie case of discrimination on the gender ground" (Paragraph 8 of Decision DEC-S2006-076).

Dated the _____ day of _____ 2006

Signed: _____

Patrick Kelly, Plaintiff

To: The Chief Executive Officer,
National University of Ireland, Dublin AKA University College Dublin (UCD), Belfield,
Dublin 4
FOR THE DEFENDANT

And

To: Eugene O'Sullivan,
John J. McDonald & Co. Solicitors, 13 Priory Hall, Stillorgan, County Dublin
SOLICITOR FOR THE DEFENDANT

And

To: The Director of the Equality Tribunal, 3 Clonmel Street, Dublin 2
NOTICE PARTY

And

To: The County Registrar