

Teresa Mitchell (appellant) v Southern Health Board (Cork University Hospital) (respondent)

AEE/99/8

Labour Court

15 February 2001

[2001] 12 E.L.R. 201

(15 February **2001**)

*Employment equality—Discrimination—Access to employment—Whether claimant had established prima facie case of discrimination on grounds of sex—Onus of proof—Gender imbalance on interview **board**, although undesirable, not of itself sufficient to amount to discrimination—Employment Equality Act 1977 (No. 16), sections 2(a), 3 and **12**—Council Directive 97/80 on the Burden of Proof in Cases of Discrimination Based on Sex, Article 4*

Facts

The claimant, a locum physician employed by the respondent since 1990, applied for a full-time position in 1994. She was unsuccessful and a male candidate was appointed to the post. She brought a claim to the Equality Officer who found that the respondent did not discriminate against the appellant contrary to the provisions of the Employment Equality Act 1977. The appellant appealed that recommendation to the Labour Court. In her submissions, which were denied by the respondent, the claimant alleged, *inter alia*, that she had greater experience than the successful candidate, was better qualified than the successful candidate, that discriminatory remarks were made prior to the interview and that her previous experience and academic achievements were ignored at the interview. As a preliminary point, the Labour Court had to determine whether it had jurisdiction to proceed with the substantive complaint or refer the matter back to an Equality Officer who had initially determined that he had no jurisdiction to investigate the substantive complaint according to section **12** of the 1977 Act since the disputed appointment had been made by the Local Appointments Commission.

Determined in dismissing the appeal:

(1) The Court has no statutory authority to refer a complaint back to an Equality Officer when an Equality Officer had made a prior recommendation to the Court and had previously determined that he had no

jurisdiction to investigate the substantive complaint under section **12** of the 1977 Act. Accordingly, the Court would proceed to investigate the substantive complaint.

(2) A claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

(3) Only if these primary facts are established to the satisfaction of the Court, and they are regarded as being of sufficient significance to raise a presumption of discrimination, does the onus shift to the respondent to prove that there was no infringement of the principle of equal treatment. *Wallace v. South Eastern Education and Library Board* [1980] NI 38; [1980] IRLR 193 followed.

(4) Gender imbalance in an interview **board**, although highly undesirable, does not, in itself, lead to a prima facie finding of discrimination in every case. Nonetheless, such a practice is potentially discriminatory and can form part of the evidential chain on which a claim of discrimination could be made out. *Gleeson v. Rotunda Hospital* [2000] **ELR** 206 considered.

(5) The appellant had not discharged the evidential burden which she carried and the appeal should accordingly be dismissed.

Cases referred to in recommendation

- *Gleeson v. Rotunda Hospital and Mater Misericordiae Hospital* [2000] **ELR** 206
- *Wallace v. South Eastern Education and Library Board* [1980] NI 38; [1980] IRLR 193

Full text of Labour Court determination:

Background

The full background of the case is set out in the Equality Officer's Recommendation No. EE16/1998.

The appellant was employed as a locum consultant physician in general medicine, diabetes and endocrinology at Cork University Hospital from July 1990 to December 1995. In December 1994, the post she occupied was advertised in a permanent capacity. The appellant applied for the post but was unsuccessful, with a male candidate being appointed to the post.

The Equality Officer in his recommendation found that the **Southern Health Board** did not discriminate against the appellant, contrary to the provisions of the Employment Equality Act 1977.

The appellant appealed the recommendation to the Labour Court on 23 September 1998, on the following grounds:

(i) the Equality Officer erred in law and in fact in finding that the **Southern Health Board** did not discriminate against the appellant contrary to section 3 of the 1977 Act;

- (ii) the Equality Officer erred in law and in fact in finding that the **Southern Health Board** was not responsible for the appointment given that the **board's** chief executive made the appointment following a recommendation from the Local Appointments Commission;
- (iii) the Equality Officer erred in law and in fact in not awarding an appropriate remedy to the appellant for the discrimination experienced by her and the consequent distress to her;
- (iv) on all grounds submitted during the Equality Officer's investigation and such grounds as may arise during the course of the appeal.

The appellant claims that she:

- • had greater experience in general medicine, diabetes, endocrinology and metabolism than the successful candidate (details supplied to the Court);
- • was better qualified than the successful candidate;
- • had more publications, more first authorship, more supervisory authorship, more publications in diabetes than the successful candidate;
- • the successful candidate submitted additional data to update his CV on the day of interview;
- • there was no correlation between remarks made about candidates at interview and final ranking of these candidates;
- • the interviewers did not appear to refer to referees re candidates.

The appellant also claims that she was the subject of discriminatory remarks before the interview. She believes that her experience and academic achievements were ignored at the interview.

The **board** denies that any discriminatory remarks were made to the appellant, either before or during the interview, or that any sexual discrimination took place. While it accepts that the appellant was sufficiently suitable/experienced/qualified for the post, it asserts that the successful candidate was more suitable/experienced/qualified and that this has been borne out since the appointment.

A Labour Court hearing took place on 28 November 2000. The following is the Court's determination.

Determination

The appellant claims to have suffered discrimination on grounds of her sex in not being appointed to the post of consultant physician in general medicine, diabetes and endocrinology with the **Southern Health Board** (Cork University Hospital). The selection for the post was carried out by the Local Appointment Commission pursuant to section 14 of the **Health Act** 1970. The disputed appointment was made in April 1995. The appellant had held the post for the previous five years in a locum capacity.

The appellant made a complaint to the Court pursuant to section 19 of the Employment Equality Act 1977 (the Act) in June 1996. The Court referred the dispute to an Equality Officer for investigation and recommendation.

The Equality Officer concluded that section **12** of the Act precluded him from investigating the substance of the complaint, since the disputed appointment had been made on foot of a recommendation made by the Local Appointments Commission. The Equality Officer found that the named respondent, the **Southern Health Board**, did not discriminate against appellant as it had not made the selection which formed the subject of the complaint. It was against that finding that the appellant appealed to the Court.

The appeal opened before the Court on 24 March 1999. Having received submissions from both parties, the Court issued Determination DEE 992, dated 2 July 1999. In that determination, the Court held that section 22 of the Act did not preclude an investigation of the appellant's complaint under the Act. The Court adjourned the hearing on the substantive complaint, so as to allow the parties to make submissions on how the Court should proceed with the investigation in the light of its findings on the issue of jurisdiction.

The **Southern Health Board** then appealed the Determination of the Court to the High Court on a point of law. That appeal came on for hearing before Barr J on 25 February 2000. In an *ex tempore* judgment, the court struck out the proceedings, holding that they were premature since this Court had not made any finding on whether or not the appellant had been discriminated against.

Following the judgment of the High Court, this Court invited the parties to make written submissions on how it should proceed in the investigation of the substantive complaint. Solicitors for the appellant submitted that the Court should refer the dispute back to an Equality Officer for investigation. They claimed that the appellant was entitled to a hearing of all the evidence at first instance before an Equality Officer, with the possibility of a full appeal to the Labour Court. The **Southern Health Board** did not make any submission on this point.

Having considered the submission received, the Court concluded that it had no statutory authority to refer the case back to an Equality Officer, and was obliged to make a definitive determination on the complaint of discrimination. The Court's reasoning was formulated by way of a preliminary conclusion and was conveyed to the parties by letter dated 21 July 2000. The parties were again invited to make submissions on the view taken by the Court. Neither party demurred from that view.

The substantive case

The submissions of the parties

The appellant's claim is grounded on a number of assertions, namely:

- (i) That prior to the interview for the post, a named member of the interview **board** subjected her to discriminatory remarks.

- (ii) That she was better qualified for the post and more experienced than the successful candidate.
- (iii) That the interview was not fairly conducted.

Full particulars in relation to each of these assertions were provided to the Court.

The respondent made its submission to the Court without prejudice to its contention that it was not a proper party to the proceedings, as it had not exercised any discretion in the selection or appointment to the disputed post.

The respondent's defence was essentially a contradiction of the appellant's claims. They denied that the named member of the interview **board** had subjected the appellant to discriminatory remarks, either before the interview or at all. They said that six candidates were interviewed for the post; they were all excellent candidates and each of them was qualified and suitable for appointment. The successful candidate was, however, considered to be outstanding, and for that reason was recommended for appointment.

Onus of Proof

Counsel for both parties made submissions to the Court on how the evidential burden should be applied in this case. Counsel for the appellant submitted that, once the appellant makes out a prima facie case, the onus falls on the respondent to rebut the presumption of discrimination. He relied on the decision of the Northern Ireland Court of Appeal in *Wallace v. South Eastern Education and Library Board* [1980] NI 38; [1980] IRLR 193.

Counsel for the **Health Board** submitted that the onus is on the claimant to prove, on the balance of probabilities, that she did suffer discrimination.

Council Directive 97/80 of 15 December 1997, on the Burden of Proof in Cases of Discrimination Based on Sex, sets out the procedural rules to be followed in applying the evidential burden in discrimination cases. Article 4.1 of the Directive provides that, where a plaintiff in discrimination proceedings establishes facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

This Directive has not yet been transposed into Irish law. The date for implementation is 1 January **2001**, and it cannot have direct effect before that date. However, in the preamble to the Directive, it is expressly stated that its provisions are derived from the case law of the ECJ. It would appear, therefore, that the aim of the Directive is to formalise in legislation the case law of the ECJ as it presently stands, rather than to introduce a new procedural requirement.

With regard to the Wallace case, this decision of the Northern Ireland Court of Appeal is of persuasive rather than binding authority. It was, however, followed by this Court in *Gleeson v. Rotunda Hospital and Mater Misericordiae Hospital* [2000] ELR 206.

Wallace is authority for the proposition that, where it is established that a person suffered discrimination in the filling of a post, the onus shifts to the employer to establish that the discrimination did not arise from the gender of the unsuccessful candidate. To that extent, it is consistent with Article 4 of the Onus of Proof Directive and the case law of the ECJ on which it is based.

On that basis, the Court accepts that the principles set out in Wallace and Article 4 of the Directive provide the appropriate procedural rule to be applied in the present case.

It is necessary, however, to consider the extent of the evidential burden which a claimant must discharge before a prima facie case of discrimination on grounds of sex can be made out. The first requirement of Article 4 of the Directive is that the claimant must 'establish facts' from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.

Applied to the present case, this approach means that the appellant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A prima facie case of discrimination can only arise if the appellant succeeds in discharging that evidential burden. If she does, the respondent must prove that she was not discriminated against on grounds of her sex. If she does not, her case cannot succeed.

The evidence

The original defence made by the respondent was that section 12(3) of the Act precluded an investigation by the Court into the selection by the Local Appointments Commissioners of a person to an office or position. In interpreting the Act in conformity with European law, the Court held in DEE 992 that the Local Appointments Commissioners are immune from liability in a claim of discrimination, but that no such immunity can be extended to the respondent as the prospective employer.

Having so decided, the Court expressed the view that by virtue of section 12(3) of the Act, evidence in relation to the selection process of the Local Appointments Commission might not be compellable in relation to the

substantive case. In the event, the Local Appointments Commission co-operated fully with the Court in its investigation of this case and provided the Court (and the parties) with a complete file of all documents in its possession relating to the filling of *207 the disputed post.

These included the curricula vitae of all candidates interviewed for the post, the notes of the interview, and the marking sheet on which the results were recorded. This file also contained a copy of the report of the interview **board** to the Local Appointments Commission. This report set out the attributes that the **board** considered necessary for the post, and the reasons for its decision to nominate the successful candidate for appointment.

Oral evidence was given by the appellant and by four witnesses called by the respondent. All of this oral and documentary evidence, together with the demeanour of the witnesses, has been taken into account by the Court in reaching its conclusions,

The appellant gave her evidence with conviction and clarity. She told the Court that some time before the interview a named member of the interview **board** told her that she had two disadvantages — she is a locum and a woman. In his evidence to the Court, which was given with equal conviction and clarity, the person named strenuously denied having made this or any similar comment. The appellant also told the Court of having mentioned the offending remark to a medical colleague after the result of the competition became known, and of having raised it at a meeting with the hospital administrator some time later. Both persons gave evidence for the respondent, and neither had any recollection of being told of this remark.

The appellant also told the Court of her professional qualifications and experience, including research and publications, which she claimed were superior to that of the successful candidate. She also told the Court that, in her opinion, all but one of the other candidates for the post were unsuitable for appointment.

Medical witnesses called by the respondent, who had participated in the interview **board**, said that the appellant had different qualifications and experience to that of the successful candidate, but they did not accept that it was of superior quality. These witnesses accepted that the appellant was an excellent candidate. However, they told the Court that the interview **board** was unanimous in the view that the doctor recommended for appointment was an outstanding candidate.

It was common case that, once it became known that the appellant was not successful in her application for the disputed post, the hospital management sought to retain her valued services. To this end, management attempted to create a restructured post, at a similar level as the locum post that the appellant had occupied,

and to which the appellant could be appointed. Whilst this initiative was being actively pursued for some time, it was discontinued when the appellant commenced the present proceedings.

With regard to the interview, the appellant said in evidence that she felt that she was being hurried and that the **board** seemed uninterested in her work and experience. The members of the **board** who gave evidence said that the appellant's interview was conducted no differently to that of other candidates.

Conclusions of the Court

The onus of proving the factual basis on which unlawful discrimination may be presumed rests with the appellant.

The Court found the appellant to be an impressive witness. She appeared to have a clear recollection of the disputed events to which she averred. She was also firm in her opinion as to the superiority of her own qualifications and experience relative to that of the successful candidate. These recollections and opinions were, however, unsupported by any evidence beyond that of the appellant herself. They were also hotly contradicted by equally impressive witnesses called by the respondent.

The Court fully accepts that the appellant had provided five years satisfactory service as a locum in the disputed post. The Court also accepts that the appellant might reasonably have expected that her past service and clinical experience would have been a decisive factor in her favour. However, in the Courts view, these considerations could not of themselves establish that the, selection made was so irrational or unfair as to raise a presumption of unlawful discrimination.

Taking the evidence as a whole, the Court has concluded, with some hesitation, that the appellant has not discharged the evidential burden which she carries. Accordingly, her claim cannot succeed.

There is, however, one further aspect of this case on which the court considers it appropriate to comment. The interview **board** established by the Local Appointments Commission comprised five members, all of whom were men. There was no evidence to indicate that the Commissioners made any effort to secure the services of a suitably qualified woman to serve on the **board**.

Relying on the determination of this Court in the Gleeson case, counsel for the appellant submitted that such a gender imbalance in the composition of the interview **board** is sufficient to establish a prima facie case of discrimination. The relevant statement by the Court in Gleeson must, however, be read in context. In that case, the Court found five instances of unfairness in the selection process, the cumulative effect of which resulted in a prima facie finding of discrimination. The composition of the **board** was but one of these instances.

The Court considers it highly undesirable to constitute an interview **board** made up entirely of men. This is particularly the case where, as in the medical profession, there is a dominance of men at the most senior professional level. Gleeson cannot be regarded as authority for the proposition that gender imbalance in an interview **board** must, in itself, lead to a prima facie finding of discrimination in every case. Nonetheless, the Court considers that such a practice is potentially discriminatory and can form part of the evidential chain on which a claim of discrimination could be made out.

The Court would strongly urge all appropriate parties to have full regard to the now accepted need to ensure gender balance at all levels in the process of selection for appointment.

Determination

It is the determination of the Court that the complaint before it is not well founded, and that the appellant did not suffer discrimination within the meaning of section 2(a) of the Employment Equality Act 1977. The complaint herein is dismissed.

Deputy Chairman: *Kevin Duffy*

Representation

- For the respondent: Conway Kelleher Tobin Solicitors
- For the appellant: O'Mara Geraghty McCourt Solicitors