

EMPLOYMENT EQUALITY ACT,1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE.22/1998

PARTIES

MS. MAUREEN BROWNE
{Represented by the Psychiatric Nurses
Association}

AND

MIDLAND HEALTH BOARD

File No: 38/1997

1. Dispute

1.1 This dispute concerns a claim by Ms Maureen Browne that the Midland Health Board discriminated against her on the grounds of her sex in terms of Section 2(a) and (c) and victimised in terms of Section 2(d) of the Employment Equality Act, 1977 and in breach of Section 3 in relation to her conditions of employment.

2 Background

2.1 Ms. Browne is employed as an Assistant Chief Nursing Officer by the Midland Health board. She acted as Chief Nursing Officer from November, 1993 to July, 1994 when a new Chief Nursing Officer, Mr Ward was appointed. In October/November 1994 two new Assistant Chief Nursing Officers were appointed bringing the complement of Assistant Chief Nursing Officers up one to five. Around this time it was deemed by the Board that this was an opportune time to review the nurse

management arrangements in the Longford/Westmeath catchment area. In March, 1995 the Chief Nursing Officer outlined his proposals and these included that Ms. Browne would remain responsible for the Longford Sector and that the Mullingar Sector, which also fell within her area of responsibility, should be given to one of the recently appointed Assistant Chief Nursing Officers. As there some misgivings expressed on the proposals on the organisation of the work there implementation was deferred.

2.2 In the period from March 1995 to May 1997, the Board maintains that various meetings and discussions took place with the claimant in an effort to resolve her reservations with the proposals. In early 1997 Ms. Browne made a complaint to the Employment Equality Agency regarding alleged discriminatory treatment by her employer. In May, 1997 Ms Browne was informed that the proposal on her work assignment was being implemented. In June 1997 the Personnel Officer replied to the Agency denying the allegations of discrimination against Ms Browne made in its letter of March, 1997. Ms. Browne believes that she was discriminated against by the Board, on the grounds of her sex and as a consequence of her complaint to the Agency she has been victimised.

2.3 In November, 1997 the claimant through her Union referred her complaint under Section 2 (a), (b), (c) and (d) to the Labour Court. The Labour Court referred the case to an Equality Officer for investigation and recommendation. In the course of the Equality Officer's investigation of this case a joint hearing with the parties was held on the 7th April, 1998. The claim of discrimination on the grounds of marital status was withdrawn at this hearing. Subsequent to the hearing a further detailed submission was received on behalf of Ms Browne. Arising from this submission further submissions were received from the parties to the case. The last correspondence from the Union in the matter was received in November, 1998.

3 Summary of the Claimant's Case

3.1 Ms. Browne, an Assistant Chief Nursing Officer with the Midland Health Board, submits that she was discriminated against by the Board on grounds of her sex within the meaning of Section 2(a) and (c) of the Act and in contravention of Section 3 of the Act. The claimant also believes that she was victimised, within the meaning of Section 2(d)(iv) of the Act, as a result of making a complaint to the Employment Equality Agency

regarding alleged discriminatory treatment. She submits that she was discriminated, both on the grounds of her sex and victimised, by the respondent when it assigned her to the Longford Sector only and the duties of the Mullingar sector, which had formed part of her work, were taken from her without consultation.

3.2 The claimant maintains that the matters, raised with the Employment Equality Agency, amounted to discrimination on the grounds of her sex in that she was treated less favourably than male colleagues and these include:

excluded from meetings and discussions relating to her area of responsibility

when acting as temporary replacement to the Chief Nursing Officer she was also expected to do her own job, males in her grade acting up have been replaced by nursing officers

intimidation and victimisation by the Chief Nursing Officer as a result of a complaint of discrimination to the Union

she raised complaints of discrimination to the Personnel Manager but has received no response.

The Employment Equality Agency raised Ms Browne's complaints with the respondent by letter of 10 March 1997, copy at Appendix 1

3.3 The claimant's representative submits that it is the claimant's belief that she was victimised as a result of making a complaint to the Employment Equality Agency regarding discriminatory treatment. The Union specifies the main complaint of victimisation as occurring on the 16th May 1997 on which date the Union alleges that Ms Browne was compulsory re-assigned with responsibility for the Longford Sector only and the duties of the Mullingar Sector were taken away without her agreement.

3.4 The Union suggests that the letter of the 21st April 1995, from the respondent's Personnel Officer to the National Union Officials, wherein it makes reference to the appointment of an additional Assistant Chief Nursing Officers (A.C.N.O.s) over the services requirements gave rise to the review of assignments

among the A.C.N.Os. The Union quotes the following extract from the letter:

"to secure agreement on an agreement when all the A.C.N.O's would have areas of responsibility and roster assigned to them on a basis which would be acceptable to all".

A copy of the letter referred to is at Appendix 2.

3.5 It was not possible, the Union points out, to reach agreement and the Chief Nursing Officer decided the assignments. In relation to the assignments the Union maintains that Ms. Browne was treated less favourably than her male colleagues in four major respects:

The C.N.O's claim, in his letter of 21st October, 1997 to Ms. Browne, Appendix 3, that "no A.C.N.O. has been given a choice" is clearly not true in that Mr Harrington was "offered the option", Personnel Officer's letter of 21st April 1995 (Appendix 2) refers.

In the case of Mr McConnell he refused his initial appointment and was allowed to retain his present assignment.

Male A.C.N.O's, Mr McConnell and Mr Harrington, apparently had the right to refuse an assignment

No male A.C.N.O. appears to have been issued with the type of sinister letter from the C.N.O. (Appendix 3) received by Ms. Browne

No male A.C.N.O. has been re-assigned forcibly and against his will

3.6 The Union contends that as a consequence of Ms. Browne's complaint of alleged discrimination to the Employment Equality Agency the catalogue of victimisation increased in intensity. A copy of the Agency's letter of 10th March 1997 wherein it raised the issue with Board is at Appendix 1. The Union lists the occurrences of victimisation as follows:

On the 16th May, 1997 Ms. Browne was informed she was responsible for the Longford Sector only.

13th June, 1997, Ms. Browne alleges the C.N.O. threatened her with suspension.

3rd July, 1997, Ms Browne alleges the C.N.O. threatened to reduce Premium Pay.

14th October, 1997 Ms. Browne states the C.N.O. demanded the return of all keys to the Mullingar Sector H.Q. and allegedly told her "you are not to be seen there again" as she was undermining another A.C.N.O.

14th October, 1997 letter from C.N.O. (Appendix 4) refers to a discussion document relating to the proposed changes in the delivery of Mental Health Services for the Midland Health Board area but then goes on to assign Sectors without any discussion or negotiations.

Ms. Browne believes the wording of the letter of the 21st October, 1997, (Appendix 3), from the C.N.O. could constitute further victimisation e.g. "I now wish to formally advise you" "require you to surrender your keys".

Ms. Browne alleges that on the 9th November, 1997, C.N.O. threatened to withdraw rights to work Premium hours, no Bank Holidays, reduced Sunday working thereby considerably reducing earning power and substantial loss in future Pensions entitlements.

4. Summary of respondent's Case

4.1 The Board categorically denies that Ms. Browne has been discriminated against because of her sex or victimised in any way because of the fact that she complained of alleged discrimination to the Employment Equality Agency. The respondent does not dispute that the complainant had been responsible for both the Longford and Mullingar Sectors but points out that the redistribution of work arose from a review of the work assignments.

4.2 The respondent maintains that it has an ongoing responsibility to continuously monitor and review the effectiveness of service delivery arrangements to its client population. It points out that following the appointment of a new Chief Nursing Officer and two new A.C.N.O.'s the Board deemed it opportune to review the nurse management arrangement for delivery of Mental

Health services in the Longford/Westmeath catchment area.

4.3 In its reply to the complaints contained in the Employment Equality Agency letter of March 1997 the respondent's Personnel Officer denied that there was any discrimination against the claimant or that she was victimised. The Personnel Officer maintains that he enquired into the complaints and in summary he submits that Ms. Browne:

was never deliberately or intentionally excluded from meetings or discussions in relation to her area of responsibility.

was not replaced in respect of one week when she acting as cover for the C.N.O. but that this was not unreasonable having regard to the short duration of the absence.

the complaint of intimidation and victimisation by the C.N.O. is without foundation - any staff member has the right to have any grievance processed through the grievance procedures

the Personnel Officer met the claimant in relation to her complaints of discrimination and investigated same.

A copy of the Personnel Officer's letter of 16 June 1997 to the Agency is at Appendix 5.

4.4 In March, 1995, when the C.N.O. outlined his proposals for redistribution of areas of responsibility and assignments, Ms. Browne expressed reservations with the proposals. The respondent explains that the decision that the Mullingar Sector should be managed by an A.C.N.O. other than the claimant had nothing whatsoever to do with the fact that she was a women. The decision was based on the following:

an assessment of the service needs

the deployment of an A.C.N.O. to each sector

best utilisation and deployment of available resources

4.5 The Board states that the allegation that the Mr. Harrington or Mr. McConnell refused the assignments

proposed by the C.N.O. is incorrect. It maintains that both these A.C.N.O.'s were "prepared to accept the proposed assignments, albeit, that they would prefer that it would be on the basis that Ms. Browne's difficulties would be properly processed in advance."

In relation to the Union's allegation that Mr. Harrington, unlike the claimant, was given an option in relation to assignments the respondent contends that both these officers were given the same options:

- (a) continue full-time in the Community, or
- (b) return full-time to the Hospital

The letter of the 21st. October, 1997 was issued in the context of Ms. Browne's refusal to co-operate with the hand over of the Mullingar Sector to her colleague Mr. Jones. The Board adds that exactly the same approach would have been, and has been adopted by the Board in circumstances where a male refused to obey legitimate instructions.

4.6 In May, 1997 Ms. Browne was advised that that she was now required to comply with the instructions of the C.N.O. In regard to the Union's claim that the victimisation of the claimant increased after the Employment Equality Agency wrote to the Personnel on the claimant's allegations the Board points out that the period in question May, 1997 to October, 1997 the C.N.O. was attempting to implement his decision on Ms. Browne's assignment. The Board states that when Ms. Browne indicated that she was unhappy with the decision and wished to have this matter pursued by her union representative the C.N.O. had no difficulty with this course of action and deferred the implementation of the decision. It further states that during the period March, 1995 to May, 1997, a series of meetings and discussions had taken place between the unions and management at which it did not prove possible to resolve this issue.

5 Conclusions of the Equality officer

5.1 The claimant's case in essence is that she was discriminated against on the grounds of her sex in relation to the re-organisation of work, and as a result of a complaint to the Employment Equality Agency of alleged discriminatory treatment by the respondent, she was discriminated against on the grounds of victimisation by the Midland Health Board. The respondent denies that there was any unlawful

discrimination against Ms. Browne either on grounds of sex or on grounds of victimisation.

5.2 In relation to her claim of unlawful discrimination Ms. Browne relies on sub section (a), (c) and (d)(iv) of Section 2 of the 1977 Act, wherein it is stated

"For the purposes of this Act, discrimination shall be taken to occur in any of the following cases :-

"(a) where by reason of his sex a person is treated less favourably than a person of the other sex

(c) where because of his sex or marital status a person is obliged to comply with a requirement relating to employment or membership of a body referred to in section 5, which is not an essential requirement for such employment or membership and in respect of which the proportion of persons of the other sex or (as the case may be) of a different marital status but of the same sex able to comply is substantially higher,"

(d) where a person is penalised for having in good faith:

(i) made a reference under section 19 or under section 7 of the Act of 1974

(ii) opposed by lawful means an act which is unlawful under this Act or the Act of 1974

(iii) given evidence in any proceedings under this Act or the Act of 1974, or

(iv) given notice of an intention to do anything referred to in subparagraph (I) to (iii) "

5.3 I note that the Union in its referral of this dispute to the Labour Court refers to the discriminatory acts as victimisation. I am satisfied that victimisation, and intimidation which is another

word used by the Union to describe the complainant's treatment, falls for consideration under Section 2(a) of the Act, provided that this treatment is because of a person's sex. Accordingly my consideration of the claimant's case of discrimination on the grounds of sex will include the allegations of victimisation/intimidation by the respondent.

5.4 Having considered the totality of the evidence in this case it is clear that Ms. Browne's claim under Section 2(a) is that she alleges that she was treated less favourably in regard to work assignments than her male colleagues in the grade of Assistant Chief Nursing Officer (A.C.N.O.). I note that the complainant gives the date of discrimination as the "16th. May 1997 and subsequently". However, as she asserts, as outlined at paragraph 3.2, that the matters she raised with the Employment Equality Agency amounted to discrimination on the grounds of her sex, I propose firstly to consider whether or these allegations indicate or suggest that the Board in the past acted in a discriminatory manner towards the claimant.

5.5 The Health Board responded to the allegations raised by the Agency by way of letter dated 16th June, 1997, copy at Appendix 5.

The Board response to the claimant's first complaint of sex discrimination, that she was excluded from meetings or discussions relating to her area of responsibility, is that this was never done deliberately or intentionally. I note that the respondent states that many meetings with unions take place at short notice and as Ms Browne is not normally at St Loman's Hospital, the administrative headquarters, her availability to attend would have been limited. I further note, at the hearing held, that the claimant highlighted her complaint that she was not informed of the Programme Manager's visit to St Elizabeth's hostel. The Health Board maintains in this instance that the Programme Manager requested the visit at short notice and that the C.N.O. was unable to contact Ms Browne to inform her of the visit.

I have given the various allegations here careful consideration and I cannot find any real evidence that the claimant's exclusion from meetings, discussions and interview boards or the failure to notify her of the Programme Manager's visit to St Elizabeth's was because of her sex.

5.6 The second complaint raised by the Agency is that the complainant, unlike male A.C.N.Os., did not get cover when she acted up as C.N.O. I note that the claimant has not refuted the respondent's assertion that it was only in respect of one week when the C.N.O. was absent that she did not get cover. I further note that the C.N.O. claims because the other A.C.N.O's are hospital based cover must be provided when they act up and as Ms Browne is community based cover is not essential. While I accept the distinction the respondent draws between the needs of hospital cover and community care I am not in a position to accept or reject this explanation. However, the evidence available to me is not such that I can hold that there is an inference of sex discrimination here.

5.7 The next complaint here is that she was subjected to intimidation and victimisation by the C.N.O. as result of making a complaint to the union about alleged discriminatory treatment she experienced. Even if the complainant considered that she was intimidated and/or victimised by the C.N.O. there is no evidence that this treatment was related to her sex. The evidence available to me does not establish or infer that there was discrimination against the complainant by the C.N.O., on grounds of sex, prior to her complaint of unlawful discrimination to the Agency

5.8 The final allegation by the Agency concerns the Personnel Officer's lack of response to Ms Browne's complainants. I am not satisfied, on the evidence available, that the Personnel Officer made it clear to the complainant that he carried out an investigation of her complaints of discrimination to him and the outcome of same. I do not consider, however, that this failure of itself points to unlawful discrimination.

5.9 Having given careful consideration to the case cited by the Union and the respondent in support of their respective cases, on the allegations of discrimination contained in the Employment Equality Agency letter, the evidence is such that I cannot hold that the respondent in the period under scrutiny acted in a sex bias manner towards the claimant.

5.10 As I have considered Ms Browne's complaints of sex discrimination made to the Employment Equality Agency I will now consider whether or not the Midland Health Board discriminated against the claimant on the grounds of sex on "16th May 1997 and subsequently". As already stated I note that the Union, in its referral to the

Labour Court, describes the alleged discriminatory acts as victimisation.

5.11 I note that the alleged victimisation occurred on various dates and having regard to details of these occurrences, as contained in paragraph 3.6, it appears to me that they go to the C.N.O.'s decision to re-distribute the work of the service. I therefore propose, in the first instance, to consider the re-organisation of the work of the A.C.N.O.s, which grade I note is made up of 4 males and the complainant.

5.12 It seems to me that as additional A.C.N.O.s became available to the C.N.O. there is no discrimination attached to the decision to redistribute areas of responsibility and assignments to accommodate the appointees into the requirements of the services.

5.13 I am satisfied that the matters, which the Union complains amount to discrimination on 16 May 1997 and subsequently, have their origins in the C.N.O's proposals in March 1995 on assignments. I have already found in the previous paragraph, that the respondent's decision to re-organise work assignments was free from sex bias. I will now consider whether the methods adopted and the way in which the work load was re-distributed by the respondent amounts to or infers sex discrimination against Ms Browne.

In my opinion it is not the function of an Equality Officer to decide or pass judgement on how an employer goes about the organisation or management of staff unless in so doing the employer adopts methods that are discriminatory or the outcome of the methods adopted are discriminatory, in the context of equality legislation.

5.14 It is accepted that in March 1995 Ms. Browne was advised that she would have responsibility for the Longford Sector and that the Mullingar Sector, which heretofore had also been her responsibility, was being assigned to Mr McConnell one of the newly appointed A.C.N.O's. I am satisfied on the evidence available because of misgivings from some of the A.C.N.Os., including the complainant, at that time in relation to the proposals they were deferred. I am further satisfied that the C.N.O. in early May 1997 indicated to Ms Browne that he proposed to assign one of her sectors to another A.C.N.O.

5.15 The kernel of Ms. Browne's case, under Section 2(a) of the Act, is that unlike two of her colleagues Mr Harrington and Mr McConnell she was not given any choice in the matter of her assignment. I note the C.N.O. maintains that, in December, 1994/January, 1995, he invited all the A.C.N.O.s to bring to his notice any preference they had on assignments and that in March, 1995 he outlined his proposals on deployment. I further note that the evidence before me is that none of the A.C.N.Os. expressed any preferences in relation to assignments, until the complainant did so by letter dated 30th June, 1997.

5.16 In support of its case that Mr Harrington, unlike the claimant, was given a choice, the Union refers to the Personnel Officer's letter of 21 April, 1995 (Appendix 2) wherein it states that he, Mr Harrington, was offered the option of either work in the community or in the hospital. I note that the letter is silent in relation to the availability of options to the complainant and the other male A.C.N.Os.

5.17 In regard to Mr McConnell, who was initially assigned (March 1995) the Mullingar sector, the Union contends that he refused the assignment and was allowed to remain in the hospital. The respondent maintains that Mr McConnell's only misgivings with the assignment to the Mullingar sector, at the time, was if the complainant had no objections to it he was happy to take up the assignment. The evidence of the C.N.O. at the joint hearing held with the parties was that as he got to know the A.C.N.Os. he considered, in the interest of the service, that Mr Jones should be assigned the Mullingar Sector rather than Mr McConnell.

I note that Mr Ward became the C.N.O. in or around July, 1994 and that later that same year Mr McConnell and Mr Jones began service as A.N.C.Os..

5.18 The Union points out it appears that none of the male A.C.N.Os. were issued "with the type of sinister letter" of 21st October, 1997 issued to Ms Browne, as further evidence of less favourable treatment of her than of her male colleagues. I note the contents of this letter, Appendix 3, deals, inter alia, with the question of assignments and that Ms Browne considers the wording which she highlights e.g. "I now wish to formally advise you" - "require you to surrender your keys" could also constitute victimisation. In my view this letter does not demonstrate or indicate, taking into account the circumstances pertaining when it was

written, a bias by the writer against the claimant on grounds of sex. The letter in the first instance appears to be in response to a letter of 20 October, 1997 from the complainant in regard to the assignments and at a time when the C.N.O. had assigned, some months earlier, the Mullingar sector to Mr Jones.

5.19 In relation to the claims of the Union that Ms Browne was subjected to victimisation/intimidation I note in the first instance that none of her male colleagues found themselves in the same or similar position to her. I therefore cannot find that she was treated less favourably than a person of the opposite sex.

5.20 I have given careful consideration to the evidence available to me on the assignments and redistribution of work, as outlined in paragraphs 5.12 to 5.18, and I cannot hold that it shows or infers that the claimant was treated less favourably than her male colleagues. Indeed, I note that the Union singles out two of the four males as getting options in relation to work assignments. Even if the Union is correct in its allegations here there is no evidence that Ms Browne's other two colleagues, both males, Mr Jones and Mr McManamon were treated any differently than her. Accordingly the evidence here does not support a claim that Ms Browne was "treated less favourably" because of her sex.

5.21 I note the Union claims that the complainant was indirectly discriminated against by the Board on the basis of her sex. I further note that the Union has made no case to support a claim of indirect discrimination. I am satisfied that the evidence available to me does not establish or infer that the Board exercised indirect discrimination against the complainant contrary to the terms of Section 2(c) of the Act.

5.22 I note that the Union submits that the complainant's case of victimisation falls within the scope of Section 2(d)(iv) of the Act. It seems to me that in order to establish a claim of penalisation under Section 2(d)(iv) a complainant must show that s/he was treated in a manner she would not have been treated if s/he had not, in good faith, given notice that s/he intended to take an action protected by Section 2(d). In the present case the complainant relies on letter of 10 March, 1997 (copy at Appendix 1)

from the Employment Equality Agency as evidence of her case under section 2(d)(iv) of the Act.

5.23 The Union in its first written submission lists the occurrences of victimisation, as at paragraph 3.6. I note that of the seven incidents listed all but two arise directly from the complainant's assignment. I note that the C.N.O. in discussions with the complainant in May, 1997 indicated that one of her sectors would be assigned to a colleague and that at a meeting later that same month he informed her that the Mullingar sector would be assigned to Mr Jones. The C.N.O. maintains that at this meeting the complainant gave the first indication that she was unhappy about the Mullingar sector. The complainant, at the joint hearing, took no real issue with the C.N.O.'s recollection of these particular events.

5.24 It seems to me that it was not unreasonable, having regard to the fact that it was over two years after he put his proposals on assignments, that in May, 1997 the C.N.O. should attempt to further progress the matter.

On the evidence available to me I cannot hold that on the 16 May, 1997, on which date the C.N.O. informed the complainant about her work assignment or the matters, which I am satisfied arose from his decisions on assignments, i.e. threat of suspension, return of keys and the contents of letter of 21 October, 1997, would have been handled any differently by the C.N.O. in the absence of letter of 10 March, 1997 from the Employment Equality Agency.

I should add here that the evidence available to me is that Ms Browne did not express any preferences on assignments, until her letter of 30 June, 1997, over years after the issue was first raised by the C.N.O.

5.25 The other two incidents of victimisation alleged by the Union, at paragraph 3.6, concern the threat to reduce premium payments and the threat to withdraw the right to work premium hours. The evidence of the Board on these matters is that following a complaint from Ms Browne that she was being discriminated against in the context of her potential premium payment earnings vis a vis her male colleagues a review of the premium payments was carried out. The Board maintains that the review revealed two significant facts (1) her level of access to premium payments had increased since the arrival of the C.N.O. and (2) her level of earnings of

premium payments compared favourably with her male colleagues. On the evidence available to me I cannot hold that the alleged incidents of victimisation of the complainant in relation to premium payments are in anyway related to the letter of 10 March, 1997 from the Agency.

5.26 As I found that Ms. Browne was not victimised there is no need for me to consider whether or not the fact that the Employment Equality Agency wrote to the Board regarding an allegation of unlawful discrimination is in itself sufficient grounds for a legitimate complaint under section 2(d)(iv) of the Act.

5.27 It may be useful to point out that subsequent to the hearing I received a number of submissions from the parties to the case. In reaching my conclusions in this case I have taken into account all the submissions both oral and written.

I note from the submissions received after the hearing that the complainant wrote in August, 1987 to the then C.N.O. and again in June, 1993 to the E.O. Personnel regarding matters not unsimilar to those arising in this case, including her assignment, appendices 6 and 7 refer. Having regard to these communications I am of the view that they do not support a case that the complainant was victimised in 1997 when the C.N.O. addressed the question of assignments, which he first mentioned after his appointment in July, 1994.

5.28 In summary, I have found that the evidence available to me does not establish or infer that:

there a background of unlawful discrimination prior to the date of discrimination of 16 May, 1997

there was sex discrimination against the complainant on 16th May, 1997 or subsequently

there was any indirect discrimination against the complainant

the allegations of victimisation on 16th May, 1997 or subsequently are in anyway related to the letter of March, 1997 from the Employment Equality Agency to the Board

Accordingly, I find that the complainant has not been discriminated in terms of Section 2(a), (c) or (d)(iv) of the Act of 1977.

6. Recommendation

6.1 In view of my conclusions in the preceding paragraphs, I find that the Midland Health Board did not discriminate against Ms. M. Browne contrary to the terms of the Employment Equality Act, 1977.

Jim Clerkin,
Equality Officer,
23rd December, 1998