

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE2/1999

PARTIES

MS SHEENAGH NIX
(Represented by the I.N.T.O.)

AND

BOARD OF MANAGEMENT, OOLA NATIONAL SCHOOL
(REPRESENTED BY MARGUERITE BOLGER, B.L.)
(INSTRUCTED BY ARTHUR O'HAGAN, SOLICITORS)
DEPARTMENT OF EDUCATION
MINISTER FOR EDUCATION

FILE NO: EE 05/1997

- 1.1** This dispute concerns a claim by Ms. Sheenagh Nix that the Board of Management of Oola National School, the Department of Education and the Minister for Education discriminated against her in denying her promotion to the principalship of Oola National School contrary to the Employment Equality Act, 1977.

2. Background

- 2.1** A vacancy arose in Oola National School due to the retirement of the principal. The position of principal was advertised on 18 April 1996. Ms. Nix, the claimant, applied for the position and was called for interview on 25 May 1996. She was verbally notified of the interview on 22 May 1996. This was in breach of regulations which provide that candidates are entitled to one weeks notice. She attended for interview on 25 May 1996 and was advised on 26 May 1996 that she was not successful. The INTO subsequently objected to the breach of procedures regarding notification for interview and raised the matter with the Department of Education who requested the Board of Management to re-interview for the position giving adequate notice to all interviewees. The second interviews were held on 5 November 1996.

- 2.2** On 11 November 1996 Ms.Nix received official notification she was not successful. On 20 November 1996 the INTO, on behalf of the claimant, referred the case to the Labour Court under the Employment Equality Act, 1977 that the claimant had been discriminated against circa 25 May 1996 and 5 November 1996. The Labour Court, on 10 February, 1997, referred the case to an Equality Officer for investigation and recommendation. Submissions were received from all parties. On 10 July 1997 the INTO requested a postponement of

this investigation as it was submitting to the Labour Court a further claim of

discrimination on behalf of the claimant and it wished both claims to be heard together. This latter claim was subsequently referred by the Labour Court for investigation and recommendation by an Equality Officer and submissions were received from all parties. The Equality Officer originally assigned to investigate these claims was transferred from the Equality Service in May 1998 and the claims were reassigned. Joint hearings of the cases were held on September 1998, following which further submissions were made. This Recommendation deals with the claim that the claimant was discriminated against circa 25 May 1996 and 5 November 1996.

3. Summary of Claimant's Case

3.1 The claimant originally submitted that she suffered discrimination on grounds of her sex and marital status contrary to Section 3 of the 1977 Act, in terms of Section 2 of that Act. At the joint hearing the Union on her behalf withdrew the claim that she had suffered discrimination on grounds of her marital status contrary to the 1977 Act.

3.2 The claimant contends that she is better qualified and more experienced for the position than the successful candidate. She has an honours degree, a certificate in remedial education and sixteen years teaching experience as an Assistant Teacher I in Oola National School which is currently a four teacher school. The successful candidate had only nine years experience. In the absence of the Principal on sick leave during the school year, 1995-96, the claimant took responsibility for 5th and 6th class. The vice principal carried out all the administrative duties of the Principal during his absence. However she relied heavily on the claimant regarding school discipline and the implementation of school policies.

3.3 The claimant states that during the school year 1986-87, she took part in a project in development education jointly organised by Mary Immaculate College and Trocaire. Upon completion of the course she was seconded by Mary Immaculate College and Trocaire for the calendar year 1988 to collate all the information and to compile a teaching pack for use in Primary Schools. This pack was entitled “Ar Scath a Cheile “and was formally launched in 1989. The claimant was involved in promotion of this pack during inservice courses in 1989. The INTO contends that her management and leadership skills have been developed and enhanced as a result of her year’s secondment, and during the year in which she assumed additional responsibilities during her Principal’s absence on sick leave. She believes that this experience would more than match the successful candidate’s one year experience as a principal in a four teacher school.

3.4 The claimant submits that she has an excellent track record in the school. She has taught combinations of second, third, fourth, fifth and sixth classes. She has been responsible for the teaching of music to fifth and sixth classes since her initial appointment and has demonstrated her commitment to the school through her choir work by returning on many occasions to assist the school as Musical Director during her maternity leave and during her year of secondment to Mary Immaculate College. She has developed an excellent relationship with the parents of the school, the broader school community and has worked very well with the staff. It contends that she was not given a fair opportunity to present her case as the chairperson said at both interviews that he did not need to ask her questions he had written down as he already knew her track record. The claimant believes that the other interviewers would not have been as familiar with her track record in the school.

3.5 The claimant states that she was told by the Chairperson of the Board that “it was very close between you but they said it was a question of balance, they wanted balance”. The claimant understood this to mean that the interview board decided to offer the post to a man in order to ensure a gender balance on staff thereby discriminating against her. She states that had she been offered the position the staff would have become an all female staff. She further contends that the school has always had a male Principal teacher since its amalgamation with the local girls’ school in the nineteen fifties and the assistant teachers have all been female.

4. Summary of Department of Education’s Case

4.1 The Department states that Rule 15 (1) of the Rules for National Schools states that the Board of Management of a school is charged with the direct management of the school including the appointment of teachers. All appointments are made by the Board of Management and as such, the contract of employment is made between the Board of Management of the school, as employer and the teacher. All appointments are subject to the approval of the patron and of the Minister for Education. The Minister’s function in this regard is to sanction the appointment made by the Board of Management provided the person is suitably qualified and that the appointment is in accordance with the Rules for National Schools.

4.2 The Department contends that it has no function, other than that, in the actual appointment or dismissal of primary teachers and that the initiation of legal proceedings is a matter for the attention of the Board of Management.

5 Summary of Board of Management's Case

- 5.1** The Board of Management of the National School rejects the claimant's allegation that she was discriminated against in terms of the Employment Equality Act, 1977.
- 5.2** The Board states that the reason for two interviews being held in relation to the initial appointment was due to its inadvertent non-compliance with interview regulations laid down by the Department of Education. This was rectified by the holding of a second interview on 5 November 1996. The Board submits that, in relation to this claim pursuant to the Employment Equality Act 1977, nothing turns on its non compliance with the regulations.
- 5.3** The Board states in relation to this interview process a decision was made to appoint Richard Bowles to the position of principal having interviewed two male candidates and two female candidates. The successful applicant had clearly superior experience to the claimant in that he had experience as a principal teacher whereas the claimant had no such experience. This fact is acknowledged in the claimant's own submission where she seeks to rely on the assistance which she provided to the vice-principal during the principal's absence on sick leave as comparable to Mr. Bowles' experience as a principal.
- 5.4** The Board argues that an employer is entitled to appoint an applicant of one sex to a position over an applicant of the opposite sex where the experience is superior and that experience is not in any way limited to the members of one sex, as in the case with the appointment of Mr. Bowles. It denies the claimant's suggestion that it was seeking to appoint a man to the position of principal in order to prevent the creation of an all-female staff in the school. The Board denies that there was any such policy or intention on its part and further denies

that any statement was made by any representative of it which could have given the claimant the impression of the existence of any such policy. It submits that any interpretation on the use of the word “balance” to indicate the existence of a gender bias is incorrect and without basis.

5.5 The Board further contends that the claimant’s recollection of the Chairperson’s statement following her initial interview is incorrect and has been misinterpreted by the claimant. It also contends that she is incorrect in the recollection of the interview of 5 November 1996 that he did not ask her any questions. It states that any suggestion that any of its representatives had any agenda based on achieving a certain, or any, gender balance on the staff is completely unfounded and incorrect.

5.6 The Board submits for the reasons outlined that the claimant has failed to discharge her burden of proving that her non-appointment to the position of principal constitutes less favourable treatment on grounds of her sex. It further submits that she has failed to show that she was subjected to any discriminatory treatment in relation to the interview or the selection processes carried out.

6 CONCLUSIONS OF EQUALITY OFFICER

6.1 In making my recommendation, I have taken into account all the submissions made to me by the parties.

6.2 The Department of Education argues that the contract of employment is made between the Board of Management of the school, as employer and the teacher. The Minister’s function in this regard is to sanction the appointment made by the Board of Management provided the person is suitably qualified and that the appointment is in accordance with the Rules for National Schools. It contends that the Department has no

function other than that, in the actual appointment or dismissal of primary teachers and that the initiation of legal proceedings is a matter for the attention of the Board of Management. The INTO does not accept this argument.

6.3 With regard to this argument I refer to Equality Officer's Recommendation EEI2/1 990 (Board of Management, Rahugh National School; The Patron, Rahugh National; the Minister for Education and Ms. Margaret Egan - represented by the INTO) which addressed the question of "the employer" in the case of national school teachers in some detail, and ruled that, for the purposes of employment, the Manager (or the Board of Management) of the school was the employer. I am satisfied that the Board of Management is "the employer" for the purposes of this case.

6.4 The claimant has alleged discrimination in relation to her failure to be appointed as Principal Teacher of the National School. I note that the grounds put forward by the claimant as supportive evidence of discrimination are as follows:

- She is better qualified and more experienced for the position on the basis that she has an honours degree, a certificate in remedial education and sixteen years teaching experience in Oola national school. The successful candidate had only nine years teaching experience.
- Her management and leadership skills which were developed and enhanced as a result of her year's secondment and her assumption of additional responsibilities during her Principal's absence on sick leave more than matched the successful candidate's one year experience as a principal teacher.
- She was not given a fair opportunity to present her case at interview.
- The interview board had decided to offer the post to a man in order to ensure a gender balance on staff thereby discriminating against her.

- 6.5** The Board of Management, Oola National School rejects the claimant's allegation that she was discriminated against in terms of the Employment Equality Act, 1977, I am satisfied that the issue which I must consider is whether the claimant has sustained her allegation that the interview board discriminated against her on the basis of her sex.
- 6.6** There is a direct conflict of evidence between the parties concerning the comment the Chairperson of both the Board of Management and Interview Board is alleged to have made to the claimant. The claimant states that the Chairperson phoned her to tell her she was unsuccessful and that he said during this conversation "it was very close between you but they said it was a question of balance they wanted balance". The claimant contends that the word balance referred to "gender balance". The Chairperson at the joint hearing explained that he rang the claimant to tell her the outcome of the interview. He stated that he expressed his disappointment for her but did not indicate in any way that the successful candidate was chosen because he was a man. He could not recall using the word "balance" in the conversation. It is not a word he would use in this context. Having given careful consideration to this matter, I consider that it is not possible to infer from the evidence that the comment as alleged was made.
- 6.7** In a situation where a successful candidate is selected on the basis of performance at interview the questions I must consider are whether the interview was conducted in a non discriminatory manner, whether there are significant reasons why the claimant should have been selected and whether the selection board had credible and non discriminatory reasons for not selecting the claimant. I questioned the members of the interview board on the criteria that they used to select the successful candidate.

6.8 The interview board informed me at the joint hearing that they did not follow the guidelines for the appointment of a School Principal as set down in the “Board of Management of National Schools - Constitution of Boards and Rules of Procedures”. Para 23 (a) (iii) states, inter alia,

“..The Selection Board shall meet within a reasonable period after the closing date for the receipt of applications. It shall establish criteria for the assessment of the applications, having regard to the Rules for National Schools and requirements of the particular post and shall decide upon the applicants to be called for interview. Records of the criteria for assessment of applications and of the interviews shall be kept by the Chairperson...”

6.9 The interview board also informed me that they did not comply with the Guidelines for Boards in regard to the procedures for selecting teaching staff which were drawn up by a Working Party representative of the Patrons, the INTO and the Department of Education to assist Board in the implementation of paragraph 23. These guidelines are specifically designed to help promote equality of opportunity for men and women candidates having regard to the provisions of the Employment Equality Act 1977 and the Code of Practice of the Employment Equality Agency (1983). Para. 3 of these guidelines states inter alia

“..The Selection Board shall establish criteria for the assessment of applications and decide upon the applicants to be called for interview. In establishing these criteria the Board must take account of the provisions of the Employment Equality Act, 1977 and should have regard to the Code of Practice of the Employment Equality Agency (1983). Care must be taken to ensure that the criteria do not lead to discrimination against men

or women applicants. The Chairperson of the Selection Board shall keep a record of the criteria used.

The following factors should be taken into account, having regard to the requirements of the particular post, and the Rules for National Schools, though not exclusively nor necessarily in this order.

- professional qualifications*
- teaching experience and reports on competence*
- other relevant experience*
- references.*

Records of the interviews shall be kept by the Chairperson of the Selection Board.”

6.10 At the joint hearing I asked the Chairperson of the Selection Board for both the records of the criteria for assessment of applications and of the interviews. I was informed that none had been kept. I asked each of the board members to indicate how they reached their decision. The interview board members confirmed that there were no predetermined criteria set by or for them. No pre-interview discussion took place regarding criteria for assessment. Two of the interviewers indicated that they each use their own criteria when conducting interviews. Each of them explained that they were experienced interviewers and these were criteria that either or both would normally use when conducting interviews i.e. general suitability, ability to cope, management skills, classroom management, leadership, working with parents and with staff, extra curricular activities, discipline. The Chairperson explained that he had taken a back seat role and that the driving role in the interview would have been left to the other two members of the interview board due

to their interviewing experience. I consider that the manner of assessing the candidates should have been recorded and been available. I note that while the interview board members said that they had a brief discussion after each candidate at both interviews it kept no record of how it reached its conclusion. Their recollections of the interviews were extremely limited. They had forgotten details but explained that Ms. Nix and Mr. Bowles were the two candidates who stood out at the interviews.

6.11 I consider that in situations where guidelines, such as these, for interviews boards are not complied with, I am not in a position to decide that the interview was conducted in a non discriminatory manner and I consider that an inference of discrimination is raised. In this regard I note that when another section of these guidelines on notification for interview was breached in the first interview, the Department of Education requested the Board of Management to reinterview for the position giving adequate notice to all interviewees. I also note that the Department of Education at the joint hearing advised me that the Board of Management had certified compliance with the Rules of National Schools when the successful candidate's appointment was sanctioned by the Minister. It is widely recognised that a subjective decision not based on any pre-determined criteria can facilitate unintentional discrimination. Its failure to base its selection on an assessment of the candidates on the basis of predetermined criteria and to keep records of such an assessment makes it more difficult for the interview board to show that its decision not to select Ms. Nix was not related to her sex. However the subjective assessment of candidates does not in itself constitute evidence of discrimination based on sex. I consider that there should be other evidence in the case which would intimate that there was discrimination on the basis of sex.

6.12 I was furnished with a copy of the successful candidate's application and curriculum vitae. I have examined this and the claimant's

curriculum vitae in relation to the factors which should have been taken into account, in accordance with the guidelines referred to at Para. 6.9

- professional qualifications
- teaching experience and reports on competence
- other relevant experience
- references.

6.13 Professional qualifications - The successful candidate did not provide details of his professional qualifications on his c.v. I note that he stated that he attended Mary Immaculate College of Education, Limerick, from which I assume he obtained a B.Ed degree. He completed courses on the use of computers in the classroom. Ms. Nix has an honours B.Ed degree from Mary Immaculate College, Limerick. She completed a course project in development education jointly organised by Mary Immaculate College of Education and Trocaire in the school year 1986- 1987. She also holds a certificate in Remedial Education. She had completed a number of inservice courses on various subjects. I consider that in terms of her professional qualification the claimant should have received a higher rating than the successful candidate.

6.14 Teaching experience and reports on competence - The successful candidate had nine years teaching experience. He had taught for a year in a Dublin school during which the District Inspector reported that his probation had been completed successfully. He subbed in various schools from 1988 to 1989 and was a permanent teacher from 1989 to 1995, a letter of reference from his Principal there was enclosed with his application. He had been appointed Principal in another school in September 1995. No written reference or reports of competence were in relation to this appointment.

The claimant had sixteen teaching experience. She had been employed as an assistant teacher in Oola National School since 1980.

Upon completed of the course in development education she was seconded for 1988 to collate all the information and compile a Teaching Pack for use in Primary Schools. This pack was launched in 1989 and she was involved in the promotion of this during in-service courses in 1989. The respondent stated that the claimant is an excellent classroom teacher.

6.15 Other relevant experience - The successful candidate had completed the Munster Council's Foundation level tutor's course which enables him to tutor coaches in both Football and Hurling. He had been employed by Limerick County GAA board as a coach in coaching camps for primary school children for a number of summers. He had completed a course in Community Development. He was chairman of an organisation which organises primary school hurling and football activities in the Galway area. He prepared school teams for various quizzes. The claimant was the choir and musical director in the school. She conducted the choirs and organised the music for all school events, such as First Communion, Confirmation and Concerts. She had been responsible for the teaching of music to fifth and sixth classes.

6.16 The interview board stated that Mr. Bowles performed better at interview and that his experience as a Principal was a deciding factor. They stated that they had more concrete evidence of his suitability. He had the edge as he had definite experience and was able to speak about what he was already doing. It submitted that he had clearly superior experience to the claimant in that he had experience as a principal teacher whereas the claimant had no such experience. Ms. Nix and Mr. Bowles were the two candidates who stood out at the interviews The INTO contended that the claimant had developed skills and talents relevant to the role of a principal and

had demonstrated her potential and initiative through her curriculum development work and

through her commitment to extra curricular activities. It also argued that the emphasis given to previous experience as a principal, a specific type of experience indirectly discriminates against women, who are less likely to hold such a position.

- 6.17** Section 2(c) of the Employment Equality Act, 1977 states that discrimination shall be taken to occur

“where because of his sex or marital status a person is obliged to comply with a requirement, related to employment which is not an essential requirement for such employment..., and in respect of which the proportion of persons of the other sex able to comply is substantially higher.”

I consider that the Supreme Court Judgement in Nathan v Bailey Gibson, the Irish Print Union and the Minister for Labour (1996), which took into account ECJ case law on indirect discrimination, is pertinent. The Supreme Court set out the procedure to be followed in such claims thus

“it is sufficient to show that the practice complained of bears significantly more heavily on members of the complainant’s sex than on members of the other sex at that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the plaintiff’s sex”

- 6.18** The INTO submitted that, on the day (25 May 1997) the claimant was first interviewed, there were 16400 female teachers and 4652 male teachers, 1783 of the males were Principals and 1534 of the females. Neither of the respondents disputed these figures. I am advised by the Interview Board that two males and four females were interviewed and that none of the candidates other than the successful candidate were Principals. I note that 50% of the male candidates had experience as

Principal and that none of the female candidates had. In a broader context I note that 38% of males in the teaching profession are Principals while 9% of females are. I consider that the emphasis given by the interview board to previous experience as Principal “bears significantly more heavily on members of the complainant’s sex than on members of the opposite sex” and that consequently, a prima facie case of discrimination has been established. Once a prima facie case of discrimination has been established the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the claimant’s sex. I consider that in this instance the board of management has failed to discharge this burden to proof. I am satisfied that it has failed to show objectively why the successful candidate one year’s experience as a Principal rated him more highly than the claimant taking into account the claimant’s higher qualifications and her overall experience. I note that while the board relied on his experience to make a decision it had received no reference or report in relation to this. I also note that It is not an essential requirement for employment as a Principal to have such previous experience. I consider that the criterion used in selection process was discriminatory and was not free of sex bias.

- 6.19** As the Board of Management has failed to discharge the burden of proof I am unable to accept that there were valid objective reasons other than her sex for the non promotion of the claimant. I am satisfied that the claimant was indirectly discriminated against on the basis of her sex. I am also satisfied that but for the discrimination she would have been selected for the position.

7. RECOMMENDATION

- 7.1** I find that Board of Management of Oola National School discriminated against Ms. Nix in terms of Section 2 of the Act and contrary to Section 3 of the Act.

The next question to be addressed is that of remedial action. I note that the claimant subsequently was successful at another competition and has been appointed Principal of another school since September 1998. She has sought as a remedy that she be compensated for the loss she incurred up to September 1998 and for the distress caused by the discrimination.

7.2 I consider that in deciding on a remedy in cases where it has been established that discrimination has occurred, it is appropriate, as far as possible, to place the person affected in the position which they would have enjoyed had discrimination not occurred. In this case I am satisfied that had discrimination not occurred, Ms Nix would have been appointed to the position. I note that Ms. Nix is not seeking to be appointed to the position. Accordingly I recommend that she paid in full the necessary adjustments in salary and any other benefits that applied to the post from the date she would have been appointed to this position up to the date of her actual appointment as Principal in another school. I further recommend that the Board of Management of Oola National School pay her a sum of £3500 in compensation for the distress caused by this discrimination.

Deirdre Sweeney
Equality Officer

4 February 1999.