

**OFFICE OF THE DIRECTOR OF EQUALITY  
INVESTIGATIONS**

**EMPLOYMENT EQUALITY ACT, 1998**

**EQUALITY OFFICER'S DECISION DEC-E2002-047**

**PARTIES**

**Sheehan  
(Represented by Cornelius Sheehan & Co, Solicitors)**

**AND**

**Director of Public Prosecutions  
(Represented by Arthur Cox, Solicitors)**

File reference: EE/2001/075  
Date of issue: 30 October 2002

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## **1. DISPUTE**

**1.1** This dispute concerns a claim by Mr Robert Sheehan that he was discriminated against by the Director of Public Prosecutions (DPP) on the grounds of gender and age contrary to the provisions of the Employment Equality Act, 1998 when he was unsuccessful in a competition for appointment to the position of Solicitor to the DPP.

**1.2** On behalf of the complainant, Cornelius Sheehan & Co Solicitors referred a claim to the Director of Equality Investigations on 6 April 2001 under the Employment Equality Act, 1998. In accordance with her powers under section 75 of that Act, the Director then delegated the case on 18 April 2001 to Anne-Marie Lynch, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. Submissions were sought from both parties and a joint hearing was held on 21 March 2002. Subsequent correspondence with the parties concluded on 30 May 2002.

## **2. SUMMARY OF THE COMPLAINANT'S CASE**

**2.1** The complainant said he was born in 1955, and had over twenty years' experience in the legal profession in both the private and public sectors. Since 1996, the complainant had been employed in the Office of the Director of Public Prosecutions as a Professional Officer, which involved him considering Garda investigation files and directing prosecutions in relation to them. The complainant said that in 1995, while working in the Chief State Solicitor's Office, he conceived the idea of amalgamating the criminal sections of the Chief State Solicitor's Office with the Office of the Director of Public Prosecutions, and that this proposal led to the creation of a new post of Solicitor to the DPP.

**2.2** In December 1999 a draft job specification was drawn up for the position of Solicitor to the DPP which provided that an applicant would require at least ten years' post-qualification experience as a solicitor in the State. The complainant said that such experience was appropriate for the position given the level of responsibility and proven

achievement that would reasonably be required of the successful candidate. The complainant said he had indicated his interest in the position prior to it being advertised, but that he had explained to the Deputy DPP that he objected to his presence on the Interview Board. He said his objection was based on what he described as a close friendship between the Deputy and another intended applicant and also because the complainant felt the Deputy harboured an “unjustified personal grievance against him”.

**2.3** The complainant alleged that prior to December 1999 the DPP informed him that the post of Solicitor would have to go to a mid-ranking person in the Office of the Chief State Solicitor. This comment appeared to the complainant to suggest that a decision had been made about the background of the person who would be appointed prior to any selection process taking place. It also appeared to him to suggest that a decision had been made prior to the short-listing or interview process of the approximate age and level of experience that was being sought of the successful candidate.

**2.4** The position of Solicitor was eventually advertised on 27 July 2000 and the final job specification required post-qualification experience of only seven years, compared to the ten years specified in the draft. This reduction in years was made subsequent to the complainant's objection to the Deputy sitting on the Interview Board. The complainant asserted that it was strange for a number of reasons, including the fact that the post of Solicitor was a very senior position, higher in rank and salary than that of Assistant Secretary in the civil service. The complainant was of the view that post-qualification experience of seven years was an unreasonably short period of time taking into account the seniority of the post. He also expressed surprise that the respondent would seek to widen the pool of potential candidates, unless it had already decided that he, the outstanding candidate, should not get the position.

**2.5** The complainant applied for the position and was short listed for interview on 7 November 2000. Prior to this interview, he was invited by the DPP to discuss his objections to the presence of the Deputy DPP on the Interview Board. The complainant told the DPP that he believed the DPP would vote in accordance with the wishes of the Deputy DPP, thus ensuring the complainant did not get the job. The complainant said the DPP offered no argument to the contrary.

**2.6** Despite this conversation, the complainant attended for interview on the basis that he believed no other candidate could match his experience and achievement in the context of the advertised post. The Deputy DPP did sit on the Interview Board, and the complainant asserted that the questions he asked were of an “anodyne” nature.

**2.7** During the course of the interview, an observation was made by a Board member that she had known the complainant for a long time and was of the opinion that he had a “very short fuse”. The complainant asserted that this Board member, a practising solicitor for many years and a member of many legal and employment bodies, had known the Deputy DPP for many years. He said her observation was deliberate, measured and intended, and the only result would have been to sabotage the prospects of the complainant being appointed to the Solicitor post.

**2.8** The complainant said that to suggest that someone has a “short fuse” equated to an assertion that they are hotheaded and incapable of controlling themselves in a professional and proper manner. The complainant believed that the comment caused him irreparable harm in front of other members of the Interview Board, one of whom he did not know at all and with others of whom he only had a passing professional relationship. He stated that nonetheless he determined to proceed with the interview in a calm and controlled manner, and he attempted to refute the allegation by highlighting actual events which demonstrated his qualities of control, management and diplomacy. He said that the Board member interrupted to say she had heard enough during the course of his response, which forced him to insist on being permitted to conclude his answer to her allegation.

**2.9** The complainant said that he was informed on 14 November by the DPP that he had been unsuccessful, but that the competition between the successful candidate and himself had been extremely close and that she had succeeded by a very narrow margin. The successful candidate was then aged thirty-four years, with approximately eight years’ post-qualification experience. If the ten-year requirement had remained, she would not have been eligible. The complainant asserted that the DPP assured him that promotional opportunities at some future date would be open to him and stated that the Deputy DPP would not necessarily always get in his way.

**2.10** The complainant expressed his concern to the DPP about the observation made by the female Board member during the course of the interview. He stated that the DPP said he had had no idea what she was referring to but during the Board deliberations she had expressed satisfaction with the complainant's response and indicated that he appeared to be "a more mature person now". The complainant contended that this observation simply aggravated the damage that must have been caused to the complainant's candidacy by the inappropriate and unsupported "short fuse" allegation made at the interview.

**2.11** The complainant said that he informed the DPP that he had known the Board member on a superficial basis for some years, as they lived in close proximity to each other. He pointed out that he had been a teetotaler for many years, had been married for fifteen years, spent most of his free time with his wife and family, had never experienced any psychological problems and led a very settled mature existence. Accordingly the Board member's observations were perplexing to say the least and the complainant speculated that the comment may have been made at the instigation of another Board member. The DPP responded by instantly denying that there was any basis for such a suggestion, and the complainant pointed out that the response was not based on any enquiry made by him at that time.

**2.12** The complainant subsequently requested disclosure of information from the DPP pursuant to the Freedom of Information Act, 1997. He received a reply in December 2000 informing him that the provisional marking sheets and notes of the Board had been discarded at the conclusion of the board's deliberations in accordance with normal practice. The complainant was furnished with a form containing the marks he was allocated under each heading but with no indication as to how the marks were reached despite appropriate space being provided on the form for such comment.

**2.13** The complainant said that despite the assertion that no notes had been retained, the form he received had appended at the end, in the handwriting of the Deputy DPP, a note which read: "General. We regard him as an outstanding candidate in terms of his knowledge, experience, undoubted commitment and strong sense of justice but we felt he

did not demonstrate as strong management and communication skills as the successful candidate”.

**2.14** The complainant said that he had sought a copy of the successful candidate’s curriculum vitae under the Freedom of Information Act but this was refused. Nonetheless, to the best of his knowledge, at the time of the interview she had never held a substantive management post and her experience of practice in the criminal field was limited. By contrast, the complainant claimed that he had demonstrated his management, professional and advocacy abilities over a long career in both the private and public sectors. He was qualified for approximately fifteen years longer than the successful candidate and due to age and experience was very much more experienced than she in terms of proven management and organisational ability, innovation, management of change, motivation of staff, direction of prosecution and practice in the field of criminal law.

**2.15** The complainant asserted that the DPP had said that for the purpose of control it was essential that the Office of the Solicitor be located in the same building as the Office of the DPP. The complainant claimed that this desire to “control” the Solicitor had contributed to the appointment of a young and relatively inexperienced person. The complainant said that if he had been appointed he would have acted on a professional basis without fear or favour. He said that both the DPP and the Deputy DPP know that throughout his career he had stood against injustice regardless of consequence. He contended that a strong sense of justice founded upon a great depth of experience should be a much sought after quality for a position such as Solicitor to the DPP. He suggested that a person possessing such a quality would not be as controllable as a person less experienced, but that there would be less need for tribunals and fewer miscarriages of justice if persons of the former type were appointed to senior positions within the public service.

**2.16** The complainant stated that, following the appointment of the successful candidate to the position of Solicitor, the Deputy DPP has referred to her appointment as an example of the positive attitude of the Office to the advancement of women. However, he claimed he was the victim of unfair and discriminatory treatment as she was far less qualified for the position. He said that his treatment was in breach of natural justice

because of the behaviour on the part of the respondent prior to the interview process, the manner in which the interview was conducted, the make-up of the Board, improper observations by a member of the Board and unfair deliberation by the Board in the context of the “short fuse” and “maturity” observations.

**2.17** The complainant said it was clear that his reputation and future career prospects had been severely damaged as a result of the unlawful manner in which he was treated in the course of the selection process, and in his non-selection for the post of Solicitor. He said he was confident that upon a full consideration of all the facts of the case the Equality Officer would conclude that he had been the victim of unfair and unlawful discrimination on the grounds of sex and age contrary to the Employment Equality Act, 1998.

### **3. SUMMARY OF THE RESPONDENT’S CASE**

**3.1** The respondent said that it was decided to establish a new post of Solicitor to the DPP following a 1999 proposal to merge the criminal sections of the Office of the Chief State Solicitor with the Office of the DPP. The post was to be filled by confined competition and a letter dated 24 July 2000 from the Deputy DPP invited eligible applicants to complete an application form. Eligibility was confined to applicants serving in a legal grade in the civil service equivalent to the rank of Principal Officer or higher, who had practised as solicitors in the State for at least seven years. Besides the eligibility criteria, the following essential requirements were listed for applicants: that they had exceptional managerial and organisational ability; that they be active and innovative and have demonstrated an ability to lead and manage change; that they had the ability to manage and motivate staff undertaking the full range of legal services demanded by the prosecution system; and that they had the requisite knowledge and ability to be able to discharge all the duties of the position.

**3.2** Following discussions between the Office of the DPP, the Department of Finance and the Top Level Appointments Commission (TLAC), it was decided that the Office of the DPP would form a Board to conduct the interviews. The Interview Board



consisted of five members: the DPP, the Deputy DPP, two solicitors in independent practice and a senior civil servant nominated by TLAC. Nine candidates were interviewed on 7 and 8 November 2000.

**3.3** The respondent said that the interviews were conducted by way of each member of the Board asking questions of the candidates and thereafter a discussion involving the members took place for the purpose of assessing the replies. It was agreed by the members that at the conclusion of the interviews and discussions the Board would mark each candidate, out of 100 potential marks, under the headings set out in the Interview Ratings Form: Knowledge and experience of value, Ability to provide leadership and management skills, Vision and ability to think strategically and Personal skills (judgement, ability to communicate, handle pressure etc). The candidate with the highest marks, assuming he or she reached the minimum of fifty marks in each heading, would be recommended to the Department of An Taoiseach for appointment.

**3.4** The respondent noted that the complainant made a number of complaints regarding the fairness of the selection process which related to matters prior to, during and after the selection of the successful candidate. These included alleged comments made by the DPP prior to December 1999, a remark made by a member of the Interview Board, and “control” of the appointed person. The respondent said it strenuously denied *seriatim* each and every allegation of unfairness in relation to these matters. However, it submitted that these allegations did not have any bearing on the grounds of gender and age under the 1998 Act. It submitted that these allegations did not fall to be investigated by the Equality Officer. Notwithstanding this, the respondent did in fact provide witnesses at the hearing to deal with these allegations by the complainant, including every member of the Interview Board.

**3.5** Regarding the 1999 comment attributed to him, the DPP said that he had made an observation that the interest in the Chief State Solicitor’s Office was likely to be at mid-ranking level. He pointed out that if he had wished to manipulate the competition in any way, it had been open to him to decide to hold a more confined competition, but his aim had been to widen the pool of prospective candidates.

**3.6** The Board member who made the reference to the complainant's "short fuse" explained that she had raised the matter in the context of the establishment of a new office and a new administration. She had visualised that this could bring about a good deal of stress and organisational problems, in addition to work as a lawyer. She knew the complainant as a vital person who worked hard and she thought he would have expected the same commitment from his staff. She had no doubts about his abilities as a lawyer but was unsure about his patience and "people skills". She therefore gave him an opportunity to address the issue and said she was very satisfied with his answer. This satisfaction was confirmed at the hearing by the other Board members.

**3.7** Regarding "control" of the Solicitor by the DPP, it was pointed out that the decision to introduce the grade of Solicitor was based on the Nally report, which had envisaged the DPP having control over what happened in court. The DPP agreed that it was possible that the complainant had been the genesis of the proposal, and pointed out that the complainant's 1995 paper on the matter had used the word "control" on at least six occasions. The DPP insisted however that he had no interest in someone being appointed to the position who could be manipulated as such a person would be of no use.

**3.8** The respondent said that the difficulty faced by it in relation to the claim was the absence of any factual evidence or any arguments in support of the claim that the complainant had been discriminated against under the provisions of the 1998 Act on the ground of age and/or gender. As the complainant had failed to supply the factual evidence necessary to support his claim, the respondent submitted that the claim should be dismissed.

**3.9** Without prejudice to this, the respondent said that its response to the complaint, insofar as the complaint is made out, was as follows: the decision to select another candidate ahead of the complainant was not due to any discriminatory treatment on the grounds of gender and age but instead resulted from the interview board's *bona fide* assessment of the relative merits of the complainant and other candidates, based on its consideration of the candidates' ability to meet the criteria for the position in accordance with the job specification and essential requirements referred to, their curriculum vitae and their performances at interview. It was acknowledged by the

respondent that no formal record of the individual interviews or of the subsequent discussions existed, but this was said to be in accordance with normal practice for positions at that level. The Board member who was a member of TLAC gave evidence at the hearing that agreement on the introduction of structured interviews had not yet been reached between management and staff interests.

**3.10** The selection of the successful candidate was ultimately based on the marks that were awarded to each candidate under the Interview Rating Scheme. Marks were not awarded on an individual basis by each Board member but following the discussions between the members. The complainant had been the leading candidate at the end of the first day of interviews, but the successful candidate had performed excellently at her interview.

**3.11** Neither the age nor the gender of the candidates was a factor in the selection process. Of the nine candidates who were interviewed, seven were male and two were female. The age of candidates was not requested on the application forms or at the interview. The members of the Interview Board were therefore not unaware of the ages of the interviewees other than where candidates proffered this information in their applications.

**3.12** Regarding the stipulation in the job specification that an applicant should have seven years' post-qualification experience as opposed to the ten years in the draft specification, the respondent said the precise nature of the complainant's complaint was not clear. It said the purpose and effect of reducing the minimum required was to widen the pool of potential candidates. It did not affect the complainant's eligibility for the post. The respondent said that a seven-year requirement was by no means insignificant and was considered by the DPP to be appropriate for the post concerned. In his considered opinion, a ten-year requirement would have had the potential to exclude good candidates, and the respondent said that this was demonstrated by the fact that the candidate ultimately selected by the Interview Board had less than ten years' experience. The respondent said the seven-year requirement is not unusual for legal positions in the public sector, and pointed to the position of vice-chair of the Employment Appeals Tribunal as an example.

**3.13** The respondent concluded that, in terms of the complaint made, there were no grounds disclosed which suggested, still less established, any discrimination against the complainant on the grounds of gender or age and it submitted that his claim should be dismissed accordingly.

#### **4. INVESTIGATION AND CONCLUSIONS OF THE EQUALITY OFFICER**

**4.1** In reaching my conclusions in this case I have taken into account all of the submissions, both oral and written, made to me by the parties.

**4.2** The complainant alleged that the respondent discriminated against him on the grounds of gender and age contrary to the provisions of the Employment Equality Act, 1998. Section 6 of the Act provides that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, on one of the discriminatory grounds, which include gender and age. Section 8 provides that

*(1) In relation to-*

*(a) access to employment...*

*(d) promotion or re-grading...*

*an employer shall not discriminate against an employee or prospective employee...*

*(8) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee in relation to promotion if, on any of the discriminatory grounds-*

*(a) the employer refuses or deliberately omits to offer or afford the employee access to opportunities for promotion in circumstances in which another eligible and qualified person is offered or afforded such access, or*

*(b) the employer does not in those circumstances offer or afford the employee access in the same way to those opportunities.*

#### **Burden of proof**

**4.3** The traditional approach taken to complaints of discrimination on the original ground of sex in the case law of the European Court of Justice, and sex and marital status in the caselaw of the Labour Court and Equality Officers, has been that once a complainant establishes a *prima facie* case of discrimination, the onus then moves to the respondent to rebut the presumption of discrimination. This common law approach has become the statutory requirement in complaints of gender discrimination in employment following the transposition of Council Directive 97/80/EC into Irish law on 18 July 2001 by means of the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001 (SI 337 of 2001). The Regulations provide that

*[w]here in any proceedings facts are established by or on behalf of a person from which it may be presumed that there has been direct or indirect discrimination in relation to him or her, it shall be for the other party concerned to prove the contrary.*

**4.4** The Employment Equality Act, 1998 introduced seven new grounds of discrimination, not drawn directly from European Union Directives or European Court of Justice case law. The Council Directive and the Regulations mentioned above are not directly applicable to grounds other than gender, but this approach appears to me to be fully consistent with the development of discrimination case law. It has become the standard approach of Equality Officers in deciding cases under the 1998 Act, such as on the disability ground in *Harrington v East Coast Area Health Board* (DEC-E2002-001) and on the race ground in *Eng v St James's Hospital* (DEC-E2001-041), and I intend to apply it to the age aspect of this complaint.

**4.5** The first requirement, therefore, is for the complainant to establish facts from which it may be presumed that the principle of equal treatment has not been applied to him or her. In the case of *Teresa Mitchell v Southern Health Board (Cork University Hospital)* (AEE/99/8), the Labour Court said "...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 this evidential burden. If she does, the respondent must prove she was not discriminated against on grounds of her gender. If she does not, her case cannot succeed."

**4.6** In support of his claim of discriminatory treatment, the complainant submitted that the DPP's comment prior to the interview, the reduction in the post-qualification experience requirement, the wish to "control" the Solicitor, the make-up of the Board, the improper observations of a Board member regarding his "short fuse" and "maturity", and the unfair deliberation by the Board in the context of these observations, together provided both direct and circumstantial evidence of the alleged discrimination. I will deal with each of these beneath.

#### **The comment of the DPP regarding the ranking of the post**

**4.7** The complainant alleged that the DPP had said the post would have to go to a mid-ranking person in the Office of the Chief State Solicitor, and that this indicated that the approximate age and level of experience being sought had already been determined. The DPP on the other hand said that he had made a comment that the interest in that Office was likely to be at mid-ranking level. He said that if he had wished to manipulate the competition in any way, it had been open to him to decide to hold a more confined competition, but his aim had been to widen the pool of prospective candidates.

**4.8** There is a contradiction between the words and the sense reported by the two parties to this conversation. The complainant's version of the comment would indeed suggest that the filling of the post was pre-determined to an extent. With regard to the DPP's version, it would not be unreasonable for an employer to speculate that candidates are likely to come from a particular cohort. In the absence of any further information which could indicate which version is actually correct, I am unable to consider that the DPP's comment provides evidence of discrimination.

#### **The reduction in the post-qualification experience requirement**

**4.9** The complainant was satisfied that ten years' post-qualification experience was appropriate given the seniority of the post of Solicitor, and claimed that his candidacy was so obviously the superior one that any widening of the pool of potential candidates could only have come about because it was decided he would not be successful. The respondent pointed out that the reduction in the requirement did not disadvantage the

complainant in any way and that the decision had been taken by the DPP in the interest of widening the pool of potential candidates.

**4.10** Eligibility criteria for posts are a matter for an employer to establish. They are only of relevance to an investigation under the Act where evidence can be adduced that such criteria are discriminatory. In this instance, the post-qualification experience decided upon was a minimum, and the complainant was not excluded by virtue of the number of years specified. I also note that the post-qualification experience normally required for the post of DPP itself is ten years, and it is reasonable for the Solicitor post to have a lesser post-qualification experience requirement. I cannot find that the reduction in the experience requirement provides evidence of discrimination.

#### **“Control” of the Solicitor**

**4.11** The complainant’s own paper on the proposal to introduce the position of Solicitor to the DPP stated that one of the advantages of the move would be that “the DPP would be able to ensure direct control of his prosecutions from beginning to end”. It is apparent that the matter of such control was considered by all interested parties, including the complainant, to be a desirable outcome. The complainant’s subsequent assertion that it would necessarily involve the selection of a person of less experience and relative youth, to permit manipulation, is unsupported by the evidence presented.

#### **The presence of the Deputy DPP on the Interview Board**

**4.12** The reasons given by the complainant for objecting to the presence of the Deputy DPP on the Interview Board were what he described as the Deputy DPP’s “close friendship” with another candidate (who was unsuccessful in the competition), and an assertion that the Deputy DPP “harboured an unjustified personal grievance” against the complainant. No evidence was provided that these matters had any connection with the age or gender of the complainant, and I cannot therefore consider them further.

#### **The comment of the Board member that the complainant had a “short fuse”**

**4.13** It is the complainant’s contention that the comment was deliberate, measured and intended and he speculated that the issue had been raised at the instigation of another Board member. The respondent categorically denied this. The Board member who made the comment explained she raised the matter to allow the complainant an opportunity to

deal with her concerns about his patience and “people skills”, particularly in the context of the establishment of a new office. This he did to her satisfaction and the satisfaction of the remainder of the Board members.

**4.14** It is a matter for a member of an Interview Board to determine what questions will be put to candidates to elicit the information being sought. The questions or comments of a Board member are only of relevance to an investigation under the 1998 Act where it can be demonstrated that they are discriminatory or have a discriminatory intent. The explanation given by the Board member in this instance is reasonable, although the question may have been more elegantly phrased. The complainant's suggestion that the matter was raised at the instigation of another person was a serious allegation, which was unsupported by evidence.

### **The Board's deliberations**

**4.15** The complainant asserted that the effect of the Board member's comment regarding his “short fuse” was exacerbated by her subsequent comment during the Board's deliberations that he appeared to have “matured”. He claimed that he was caused irreparable harm in front of people whom he did not know. On the other hand, all of the Board members agreed that the complainant had dealt with the question extremely well and that he was actually the leading candidate until the successful candidate's interview.

**4.16** Since the Board members were unanimous in agreeing that the comment had no negative impact on the complainant's candidacy, I cannot find that irreparable harm was caused to him by this incident.

### **The claim of gender discrimination**

**4.17** The only reference made by the complainant to gender discrimination was his statement that one is commended for promoting females in the public service, and his assertion that the Deputy DPP had referred to the appointment of the successful candidate as an example of the positive attitude of the Office towards the advancement of women. In his evidence at the hearing, the Deputy DPP was unable to recall precisely when or where this might have occurred. He suggested that it may have been in the context of a discussion over coffee, when the conversation drifted to “glass ceilings” and someone



remarked there were no women above the grade of Principal Officer in the Office. The Deputy DPP corrected this by saying that the successful candidate's post was above that grade, which he described as an innocent comment.

**4.18** It is a fact that discussion has been ongoing within the public service regarding the potential for discrimination against women attempting to reach senior management level, and indeed the 1998 Act itself states at section 24 that its provisions are

*...without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities..*

However, in this case, the respondent did not claim that it was seeking to remove such inequalities, nor did the complainant adduce any evidence that the Office of the DPP was "commended" for promoting a woman. It should also be noted that a statement that the Office does not operate a discriminatory policy against one gender does not constitute evidence that it has a policy of discrimination against the other gender.

### **Inference of discrimination**

**4.18** The law relating to the issue of a presumption of discrimination or the drawing of an inference of discrimination was considered by Quirke J in *Davis v Dublin Institute of Technology* (High Court, 2000, unreported). That case was an appeal to the High Court on a point of law from a Labour Court determination of a complaint of sex discrimination taken under the Employment Equality Act, 1977. The judge concluded

"In cases where discrimination on grounds of sex is alleged to have occurred contrary to the provisions of section 2 (a) of the 1977 Act the fact that there is a gender difference between the successful and unsuccessful applicants for a post or for promotion does not, by itself, require tribunals such as the Labour Court to look to an employer for an explanation...A primary finding of fact by such a tribunal of discrimination or of a significant difference between the qualifications of the candidates "*together with*" a gender difference may give rise to such a requirement..."

**4.20** In this matter, there was both an age and a gender difference between the complainant and the successful candidate. Regarding the eligibility requirements, both

candidates were employed at the level of Principal Officer in the civil service and both had at least seven years' post-qualification experience. Both candidates had significant legal and managerial experience. The complainant had more years' experience, both as a solicitor and in the practice of criminal law, than did the successful candidate. The other requirements (listed in full at 3.1 above), including managerial and organisational ability, ability to manage change, ability to motivate staff, fell to be determined by the Interview Board, based on the candidates' curriculum vitae and performance at interview.

**4.21** The only interview records which were available for the purposes of my investigation were the Interview Rating Forms. Marks were assigned to the candidates as follows:

	<b>Successful candidate</b>	<b>Complainant</b>
Knowledge and experience of value	<b>75</b>	<b>80</b>
Ability to provide leadership and management skills	<b>80</b>	<b>75</b>
Vision and ability to think strategically	<b>75</b>	<b>75</b>
Personal skills (judgement, ability to communicate, handle pressure etc)	<b>80</b>	<b>75</b>
<b>Total</b>	<b>310</b>	<b>305</b>

It will be noted that the complainant received a higher mark in relation to his experience than did the successful candidate, reflecting his longer service. The higher marks achieved by the successful candidate in the areas of leadership/management and personal skills were explained by the members of the Interview Board as being based on her excellent performance at the interview.

**4.22** In *Dublin Institute of Technology and a Worker* (DEE994), the Labour Court said "It is not the responsibility of the Equality Officer or this court to decide who is the most meritorious candidate for a position. The function of the Court is to determine whether the sex or marital status of the complainant or the appointee influenced the decision of the Board." From the evidence provided to me, the successful candidate was eligible, qualified and had significant experience, and all of the Board members agreed

that she had performed extremely well at the interview. The decision of the most meritorious candidate was theirs to make, and no evidence was provided that the decision was made by reference to age or gender.

## **5. DECISION**

**5.1** Based on the foregoing, I find that the Director of Public Prosecutions did not discriminate against Robert Sheehan on the grounds of age or gender, contrary to the provisions of the Employment Equality Act, 1998, when he was unsuccessful in a competition for appointment to the position of Solicitor to the DPP.

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Anne-Marie Lynch  
Equality Officer

30 October 2002