

**OFFICE OF THE DIRECTOR OF EQUALITY
INVESTIGATIONS**

EMPLOYMENT EQUALITY ACT, 1998

EQUALITY OFFICER'S DECISION DEC-E2002-017

PARTIES

**A Complainant
(Represented by the Equality Authority)**

AND

**A Department Store
(Represented by William Fry, Solicitors)**

File Ref: EE/2000/083

Date of issue: 13 March 2002

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1. DISPUTE

1.1 This dispute concerns a claim by a complainant that she was penalised by a department store in circumstances amounting to victimisation, occasioned by her having, in good faith, sought redress under the Employment Equality Act, 1998 for alleged discrimination on the grounds of disability contrary to the Act. As the complainant insists that she does not have a disability, I have decided that the parties should not be identified in this decision.

1.2 The complainant, represented by the Equality Authority, referred a claim to the Director of Equality Investigations on 8 August 2000 under the Employment Equality Act, 1998. In accordance with her powers under section 75 of that Act, the Director then delegated the case 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 in November 2001.

2. SUMMARY OF THE COMPLAINANT'S CASE

2.1 In May 1999 the complainant applied unsuccessfully for a position with the respondent. She contacted the Equality Authority in December 1999 to seek advice on her allegation that the respondent had discriminated against her on the ground of disability, because of the fact that she attended a school for children with learning disabilities, in rejecting her application. She was informed that the Employment Equality Act, 1998 had come into effect on 18 October 1999 and that complaints of discrimination on the ground of disability, relating to events alleged to have occurred prior to that date, were outside the scope of the Act.

2.2 The complainant sought further advice from the Equality Authority in January 2000, this time relating to an alleged conversation with the respondent's Personnel Officer on

17 December 1999. The Authority wrote to the respondent on the complainant's behalf on 18 January 2000, and received a reply on 21 February 2000 which denied that the alleged conversation had taken place.

2.3 The complainant continued to make applications to the respondent as she was having difficulty obtaining employment. She received a letter dated 29 March 2000 from the Store Manager of the respondent's branch in west Dublin stating that "in view of the untrue and unfounded allegations that you have made to the Employment Equality Authority...we are not for the foreseeable future going to accept any application from you for employment in our store or indeed any other branch of [the department store]".

2.4 As the complainant was unsure about the number of applications she made to the respondent, the Equality Authority advised her to make a request under the Freedom of Information Act, 1997 for copies of all documentation submitted by her to the respondent. In response, the respondent repeated that she should desist from corresponding further and refused to search its records for the material requested. The Equality Authority accepted subsequently that the obligations of the Freedom of Information Act did not apply to the private sector respondent, but argued that the refusal to facilitate her request nonetheless constituted further penalisation.

2.5 The complainant said she has been penalised by the respondent for having contacted the Equality Authority and the Office of the Director of Equality Investigations in that it will not for the foreseeable future accept any application from her for employment in any branch of the department store and will not furnish her with copies of correspondence and job applications. She has been penalised by the respondent for having sought redress under the Employment Equality Act, 1998 and for having opposed by lawful means an act which is unlawful under the Act or for having given notice of an intention to do anything within paragraphs (a) to (c) of section 74 (2) of the Act. The respondent has behaved in a wholly inappropriate manner given that it is such a large employer throughout the State.

2.6 The complainant said she is extremely distressed by the actions of the respondent. She has found it very difficult to obtain employment and suffers considerable financial hardship as a result. The actions of the respondent have undermined her confidence in herself and her ability to obtain employment. As redress, the complainant seeks compensation, an apology and employment with the respondent.

3. SUMMARY OF THE RESPONDENT'S CASE

3.1 The respondent said that on receipt of the letter of 18 January 2000 from the Equality Authority, it investigated the alleged conversation with the Personnel Manager. The Personnel Manager was adamant she did not have any conversation with the complainant on that day, and furthermore said that as a person with over fourteen years' experience in personnel management she would never make such a hurtful and unprofessional comment to a prospective employee. She took grave exception to the complainant making what she regarded as a false allegation against her. The respondent rejected the complainant's allegation in its letter of 16 February 2000.

3.2 The respondent accepts that the complainant continued to send a number of applications for employment. Its view was that having interviewed the Personnel Manager, it was satisfied that the allegations made by the complainant were untrue and unfounded, and it deliberately ignored the applications. Under the circumstances, it was not prepared to consider the complainant, or anyone who might make untrue or unfounded allegations, for a position.

3.3 As the complainant continued to make applications, the respondent wrote to her on 29 March 2000, and advised her that her applications would not be considered because of the untrue and unfounded allegation she had made to the Employment Equality Authority. At this stage, it was open to the complainant to withdraw the allegations, but she did not take this opportunity.

3.4 The respondent suggests that the motive of the complainant must be examined. It is apparent that she was aggrieved at the outcome of her failed application for employment in May 1999. It is the respondent's view that because she was unable to make a claim arising out of this incident, due to the commencement date of the Act, she subsequently set about trying to entrap the respondent so she could make a claim under the 1998 Act. The respondent subsequently withdrew the reference to entrapment, accepting that the complainant had not tried to entice the respondent into committing a crime.

3.5 The respondent says that the claim that the complainant was penalised for having contacted the Equality Authority and the Office of the Director of Equality Investigations is missing the point. The respondent's case is that a prospective employee claimed to have had a meeting with the Personnel Manager in January 2000 when the Personnel Manager claims no such meeting took place. It so happened that the complainant made this untrue and unfounded allegation to the Equality Authority. She could just have easily made this allegation directly to the respondent. The outcome would have been the same: the respondent would not and will not employ any person who, directly or indirectly, makes untrue and/or unfounded allegations against it. This had nothing to do with the fact that a claim was made under the Act. The respondent submitted that the claim should be withdrawn by the complainant or should be dismissed by the Director of Equality Investigations.

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 victimised her contrary to the provisions of the Employment Equality Act, 1998. Section 77 (1) (d) of the Act provides that

a person who claims to have been penalised in circumstances amounting to victimisation may seek redress by referring a complaint to the Director of Equality Investigations. Section 74 (2) provides that

For the purposes of this Act, victimisation occurs where the dismissal or other penalisation of the complainant was solely or mainly occasioned by the complainant having, in good faith-

- (a) sought redress under this Act...for discrimination...,*
- (b) opposed by lawful means an act which is unlawful under this Act...,*
- (c) given evidence in any criminal or other proceedings under this Act..., or*
- (d) given notice of an intention to do anything within paragraphs (a) to (c).*

4.3 The complainant referred an initial complaint to the Office of the Director of Equality Investigations in April 2000 alleging discrimination by the respondent against her on the grounds of disability, relating to the alleged conversation with the Personnel Officer in December 1999. This complaint was not upheld (Decision No DEC-E2002-016 refers).

Burden of proof

4.4 The traditional approach taken to complaints of discrimination on the original grounds of gender and marital status in the case law of the European Court of Justice and the Labour Court has been that once a complainant makes out 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.*

4.5 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, and I intend to apply it in this complaint.

4.6 The first requirement is for the complainant to establish facts from which it may be presumed that the principle of equal treatment has not been applied to 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 [the relevant ground]. If she does not, her case cannot succeed."

Victimisation

4.7 The consequence of applying the approach to this case is that the complainant must demonstrate both that the behaviour complained of is capable of constituting victimisation and also that it arose as a consequence of her having done one or more of the things envisaged in section 74 (1). It is frequently the case that the Labour Court or an Equality Officer has no choice but to draw inferences of discrimination or victimisation from facts presented. In this case, however, the respondent unquestionably sent a letter to the complainant saying that she would not be considered for future employment because she had made allegations to the Equality Authority. To that extent, the matter is quite clear. The complainant was refused consideration for employment because she made contact with the Equality Authority regarding an allegation of discrimination under the 1998 Act.

4.8 The respondent's position in relation to the matter is that the legislation provides that the complaint must be made in good faith. As the respondent was satisfied that the subject matter of the complaint, the alleged conversation with the Personnel Officer, did not

occur, it was of the opinion that the complaint was not made in good faith and it considers it had no obligations to the complainant in terms of the 1998 Act.

Good faith requirement

4.9 The Act is silent on the appropriate person to decide whether a complainant is acting in good faith. However, I cannot logically accept that the decision can be made by the respondent, that is the person alleged to have discriminated. It is a fact that the vast majority of discrimination cases referred under the 1998 Act are vigorously defended by the respondents. Many of the complaints are not upheld. This means that in practically all cases the respondent believes that the complaint is unfounded and this belief is frequently correct. A respondent cannot, however, have the right to decide itself that because it disputes the complaint, the complainant is by definition acting in bad faith.

4.10 If the opinion of the respondent were to be the final arbitration in the matter, there would be no necessity for an Equality Officer investigation. It is apparent that the legislation envisages claim, counter-claim and impartial adjudication, as in all civil matters before the courts. I am satisfied therefore that the opinion of the respondent, while relevant, cannot be the determining factor in establishing whether a complainant was acting in good faith.

4.11 By extension, I am persuaded that the success or otherwise of the complainant's case is not relevant in the determination of good faith. If it were, complainants would have to be strongly advised that a possible consequence of unsuccessfully referring a complaint to the Director would be victimisation, perhaps in the form of dismissal or demotion, without any protection. It is apparent that the provisions of section 74 (1) are designed to reassure complainants that they have a right to seek redress for perceived discrimination. The fact that the complaint is not upheld is not pertinent.

4.12 In accordance with this, I am satisfied that it is a matter for the investigating Equality Officer to decide if the complainant was acting in good faith. On the basis of my

investigation of this complaint, having considered the material provided to me and having heard the complainant's evidence at the hearing, I am persuaded that the complainant believed that she had a genuine grievance and that she therefore acted in good faith. As a consequence, I find that the behaviour of the respondent constituted victimisation of the complainant in terms of the 1998 Act.

Consequences of victimisation

4.13 I would like to emphasise here that victimisation is a matter that must be considered very seriously. To allow victimisation of complainants for making complaints under the Act would be to subvert the legislation. The purpose of section 74 (1) is to protect those who consider they have been the victims of discrimination. If this protection is not supported in Equality Officer decisions, the legislation will be ineffective and the rights of the individuals involved will be compromised. As stated earlier, the complaint of discrimination on the ground of disability taken by the complainant was not upheld. If the respondent had not acted as it did, this matter would have concluded with it having successfully vindicated its position in relation to the allegation of discrimination.

4.12 As a demonstration of how seriously I consider the consequences of such victimisation, I am satisfied that the complainant should be awarded significant compensation for the actions of the respondent. Section 82 (4) of the Act provides that the maximum amount that may be awarded to a successful complainant, not in receipt of remuneration at the date of the referral of the case, shall be €12,7000, and I am satisfied that it is an appropriate level of compensation for the complainant in this matter. I note that the complainant sought a position in the respondent's employment, but I am not convinced that this is something that should be brought about by compulsion. Therefore, I do not intend to make any order in relation to this.

5. DECISION

5.1 Based on the foregoing, I find that the department store penalised the complainant in circumstances amounting to victimisation, contrary to the provisions of section 74 (1) of the Employment Equality Act, 1998, and I order that the respondent pay a sum of €12,700 to the complainant in compensation for the victimisation suffered by her.

Anne-Marie Lynch
Equality Officer

14 March 2002