

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: DEC-E 2000/02

Ms. Maura Fitzgerald
(Represented by the I.N.O.)

AND

Mid-Western Health Board
(Represented by the H.S.E.A.)

File No: EE 13/1999

1. DISPUTE

- 1.1** This dispute concerns a claim by the Irish Nurses Organisation (I.N.O.), on behalf of Ms. Maura Fitzgerald, that the Mid Western Health Board discriminated against her on the basis of her sex in terms of Section 2(a) of the Employment Equality Act, 1977 when it did not appoint her to the post of Acting Matron of the Limerick Regional Hospital Complex.

2. BACKGROUND

- 2.1** The position of Matron at the Limerick Regional Hospital Complex was becoming vacant for a period of six months as the present incumbent of the position was taking leave of absence. On all previous occasions the claimant had acted in the Matron's position when the Matron was absent. On this occasion the Health Board decided to appoint an Acting Matron by way of confined competition.
- 2.2** The Unions (I.N.O. and S.I.P.T.U.) objected to this competition. Having listened to their objections the Health Board decided to proceed with the competition and the claimant applied. Her application was unsuccessful and a male applicant was appointed to the position.
- 2.3** The I.N.O., on behalf of the claimant referred a claim, on 12th March, 1999 to the Labour Court. The Labour Court referred the claim to an Equality Officer for investigation and recommendation.

3. SUMMARY OF THE UNION'S CASE

- 3.1** According to the Union the claimant was discriminated against in contravention of the Employment Equality Act, 1977 when a male was appointed Acting Matron for the Limerick Regional Hospital complex. The claimant filled the post of Acting Deputy Matron and had, on all previous occasions, acted Matron in the absence of the post holder.

3.2 The Union says that the post of temporary Deputy Matron for Limerick Regional Hospital was first created in 1989. At that time the Board had not fully committed itself to the creation of an ongoing Deputy position and thus it held a competition to fill the post on a temporary basis. This particular competition was conducted by the Board itself. However, had the post been a permanent post it would have required a Local Appointments Commission competition. According to the Union the claimant successfully competed for the post at that time and was appointed to it on 26th March, 1989. She filled that post continuously until 8th May, 1993 when a decision was made to regularise the post on a permanent basis and to fill it through a Local Appointments competition. The claimant competed for this competition but was unsuccessful and the position of Deputy Matron on a permanent basis was awarded to Ms. Nora Fitzpatrick. The claimant was offered a position as Acting Matron, Ennis General Hospital but she declined it because of its temporary nature. The Union says that the Deputy Matron post is precisely what its title implies and Ms. Nora Fitzpatrick was in all senses Deputy Matron filling in for the Matron and working as part of that management pairing. The claimant replaced Ms. Fitzpatrick and acted as Deputy again from 27th August, 1995 to 9th February, 1996.

3.3 The Union says that the Matron retired in June, 1996 and Ms. Fitzpatrick replaced her pending the filling of the Matron/Director of Nursing post. The Health Board, at that time, held a competition for an Acting Deputy to replace Ms. Fitzpatrick and the claimant was successful in the competition and appointed Acting Deputy Matron on 28th July, 1996. The claimant still holds this position. Ms. Fitzpatrick was then appointed to the position of Director of Nursing (the new title for Matron) for the Limerick Regional Hospital complex. Although the Director of Nursing post was filled and the Deputy post was now vacant the Health Board authorities did not fill the Deputy position on a permanent basis. The claimant lobbied both the Health Board and the Department of Health in this regard as she considered it an injustice that she was required to act in the position for a second period on a long term temporary basis.

3.4 The Union says that on 11th May, 1998 the Director of Personnel Management and Development in the Department of Health wrote to Mr. John Byrne, Personnel Officer in the respondent organisation specifically stating the Department's approval to the claimant filling the post of "Deputy Matron" on an ongoing basis. In his letter he makes it clear that this is in the special circumstances of her having filled the post for a second period of long-term acting and that the arrangement should be on a personal basis. The clear implication of this is that no further competition was required for her to fill the substantive post of Deputy Matron but that any future vacancy should be filled in the normal competitive process. According to the Union the respondent did not act on the letter from the Department of Health.

3.5 The Union says that the respondent advertised for an Acting Matron for Limerick Regional Hospital, Dooradoyle in August, 1998. The reason for the vacancy at Director of Nursing/Matron level was that the existing post holder, Ms. Nora Fitzpatrick, was about to take a period of leave from work. The Union objected in writing to the holding of this competition. S.I.P.T.U. also made an objection. The Union says that the General Manager met with the two Unions on Friday, 28th August, 1998 and informed the Unions that the decision to advertise for an Acting Matron/Director of Nursing was justified by the fact that:

- (a) The period of Acting was going to be for a lengthy period of time. The post holder would be on six-months leave and there would be additional time required prior to the taking of leave for the newly appointed Acting Director to familiarise themselves with the post;
- (b) That the Acting appointment was for the Regional Hospital complex and not just the Regional Hospital; and
- (c) That previous absences by the Matron were not comparable and that, therefore, any precedent quoted by the Union for the filling of the post during temporary absences were not relevant.

3.6 The Union responded to the respondent on 1st September, 1998 restating the Union's position to the actions of the respondent in this case. In its response the Union argued:

- (a) That the Acting Deputy Matron took the role and responsibilities of the Matron whenever she was on leave and for whatever reason. Those responsibilities included Croom Orthopaedic, St. Munchins, etc. even though each of those institutions had their own nurse management team as well;
- (b) That the fact that the vacancy would be for a longer period did not justify the advertising of the post and depriving the existing Deputy from filling it;
- (c) That all precedent throughout the Health Service supported the position that the Deputy should fill-in for the Matron/Director of Nursing during their absence. To reinforce the point the Union outlined that there are only four such positions in the State and that in all other cases the Deputy acts in the absence of the post holder.

The Union asked the respondent to agree to a Rights Commissioner's investigation of the issue before proceeding further. The General Manager responded on 8th September, 1998 rejecting the Union's arguments and refused to attend a Rights Commissioner's investigation.

3.7 The claimant applied for the competition and was unsuccessful in her application. The successful applicant was male and had held the position of Director of Nursing at Croom Orthopaedic Hospital. Following the competition two of the interviewers provided the claimant with feedback on her interview. The Union says that the claimant made representations to the Programme Manager, the Chief Executive Officer and the Director of Personnel Management and Development in the Department of Health but none of these representations provided a satisfactory outcome. Having examined the matter carefully the Union has formed the view that:

- (a) The decision to hold a competition for the Acting Matron position was not justified by the reasons put forward by the General Manager in his letter of 8th September, 1998;
- (b) That based on the title of the post she held and the fact that the Department of Health had endorsed her permanent assignment to it the substantive role of Deputy and the job description itself there was no need or justification for filling the post with anyone else. Indeed all precedent available with regard to

positions of Deputy Matron/Director of Nursing would uphold this point of view.

- (c) That the General Manager, for whatever reason, had totally ignored the considered objections of both nursing representative bodies in the Health Board area and had proceeded with a decision which had effectively removed the claimant from one of the primary roles of Deputy Matron/ Director of Nursing.
- (d) That as a male had now been appointed to the position, which had on all previous times been carried out by the claimant, there were grounds to believe that sex discrimination might have occurred.

3.8 The Union argues that the claimant has on two separate occasions for lengthy periods following competition filled the post of Acting Deputy Director of Nursing/Matron at Limerick Regional Hospital. The Matron/Director of Nursing at that hospital has in recent years always had responsibility for Croom Orthopaedic and St. Munchins along with Dooradoyle hospital itself. Each of these hospitals has its own nurse management structure headed up with Divisional Nurse Managers paid at Assistant Matron grade. The Union says that the claimant is the only one at the next level of Deputy. The fact that she is described as Acting Deputy is no fault of her own and indeed the Department of Health has approved her substantive appointment. According to the Union there are six other posts in the Limerick Regional Hospital complex at Assistant Matron level which are also vacant and filled on an acting basis. No significance should be drawn from the fact that the post is described as Acting Deputy and, in that context, there is no objectively justified reason for holding a competition in order to appoint someone to deputise in the absence of the Matron when in fact the Board already have a Deputy Matron for the complex.

3.9 The Union says that the General Manager has, on all occasions, been the advocate of the decision to hold a competition for this particular vacancy. It says that he apparently decided that the post should be advertised and that it required no prior consultation with the claimant who was the existing Acting Deputy Matron or with the representative bodies. The Union states that the General Manager dismissed its objections and blatantly disregarded precedents quoted with the statement *“we could not expect that the Southern Health Board or any other Health Agency would have management decisions determined by*

events or practices in this area and vice versa". According to the Union the reality is quite different with national grades throughout the Health Services being determined and filled in accordance with national policies and agreements. The Union, therefore, contends that what occurs in other Health Boards is highly relevant and rather than one Health Board determining another's policy they both should be consistent with national policy on the filling of senior posts.

3.10 Given the General Manager's decision to proceed with the competition the Union argues that he may have held the view that the claimant should not replace the Matron/Director of Nursing on this occasion. The Union contends that, if indeed he held this view, he should not have been a member of the interview panel. The successful candidate was the only male applicant for the position. He was the only male occupying a post of Assistant Director of Nursing in the relevant area. The Union says that in excess of 95% of nurses in all grades in the Mid-Western Health Board are female. Yet in spite of their minority in terms of the total number of nurses, males occupy two of the Director of Nursing posts (inclusive of this post). It is the Union's contention that it would not be unreasonable to form the view that males are favoured when it comes to the senior posts where they emerge in a competition. The Union says that the fact that a male has been chosen to do what a female has previously done means that the decision is open to scrutiny under the Employment Equality Act, 1977. The Union argues that the claimant had already been determined the most suitably qualified person for the post of Deputy on two occasions. As an interview panel has deemed another candidate more suitable the Union contends that the respondent must demonstrate the weighting given to the various qualifications of the successful candidate and how they compare with those given to the claimant and, in particular, the weighting given to her vast experience operating in the role of Deputy.

3.11 According to the Union it is now well established in European Equality Judgements that the outcome or effect is what matters in cases of discrimination whether or not there was a motive or intention to discriminate. In other words, where the consequences of an employer's actions favour a male or group of males over females and where those actions

having been examined and did not pass the test of being objectively justified on factors unrelated to any discrimination on grounds of sex, then indirect discrimination will have occurred (*Bilka Kaufhaus GMBH -v- Webber Von Harts*¹). The Union believes that the justifications put forward by the respondent for proceeding to fill the vacancy created by the absence of the Matron/Director of Nursing at the Limerick Regional Hospital on this occasion in a manner different to that which they have done in the past and that which other Boards always do has not been justified. In the circumstances the Union contends that indirect discrimination has occurred.

- 3.12** In conclusion the Union contends that a prima facie case of discrimination exists and the respondent has on onus to demonstrate beyond doubt that the claimant has not suffered any discrimination. The Union suggests that no such justification has been put forward and asks the Equality Officer to determine that the claimant has been discriminated against and to award compensation in terms of pay for the full period of absence of the Matron/Director of Nursing. The Union asks the Equality Officer to confirm that the Deputy Director of Nursing post should in all future situations replace the Matron/Director for periods of absence regardless of the length of time.

4. SUMMARY OF THE RESPONDENT'S SUBMISSION

- 4.1** According to the respondent the claimant is employed by it in a permanent capacity as an Assistant Matron in the Regional Hospital, Dooradoyle and is acting-up in the post of Deputy Matron in that hospital. The respondent says that Ms. Nora Fitzpatrick is Matron of the Regional Hospital Complex, which consists of the Regional Hospital, Dooradoyle; St. Munchin's Maternity Hospital and Croom Orthopaedic Hospital. Each hospital in the complex has its own nursing management structure, which is under the overall management of the Matron of the Complex.
- 4.2** The respondent says that Ms. Fitzpatrick was due to go on leave in October, 1998 for approximately six months. As a result the respondent decided to appoint an Acting Matron

¹ European Court of Justice 1986 [ECR 1609] (Case 170/84)

for the Regional Complex by way of a confined competition. Objections were raised by the I.N.O. and S.I.P.T.U. Unions on the grounds that it was a departure from the normal practice, whereby during short periods of leave taken by the Matron, nursing management was provided from within each hospital and no Acting Matron for the Complex was appointed. The respondent explained to the Unions that the decision to hold a competition for an Acting Matron was based on the unprecedented length of the acting-up period and the wish to afford all suitably qualified staff an equal opportunity to compete for this temporary position.

4.3 The post was advertised and applications were invited from suitably qualified permanent staff. The claimant applied for the post and was called for interview. Interviews were held on Friday, 11th September, 1998 and three candidates were interviewed. The three candidates were:

- the claimant who was Acting Deputy Matron, Regional Hospital, Dooradoyle;
- a female candidate who was Deputy Director of Nursing, St. Munchin's Maternity Hospital;
- a male candidate who was Divisional Nurse Manager, Croom Orthopaedic Hospital.

The interview board comprised the following:

- Ms. Nora Fitzpatrick, Matron, Regional Hospital Complex
- Mr. Tom Hourigan, General Manager, Regional Hospital Complex (*Chairperson*)
- Ms. Elizabeth Kelly, former Matron of Cork University Hospital.

According to the respondent each member of the interview board had an equal say in the selection process.

4.4 The respondent says that the interview board used the following assessment criteria and marking system:

Education/Qualifications	50 marks
Relevant Experience	100 marks
Managerial & Administrative capacity,	

Personality and General Suitability

350 marks

Total

400 marks

The respondent says that a candidate was required to score at least 50% of the overall marks in order to be eligible for selection. The male candidate was placed first in the interview competition, the claimant was placed second while the other female candidate failed to qualify.

- 4.5** The respondent says that, following the interviews Ms. Fitzpatrick and Mr. Hourigan, General Manager invited the claimant to a meeting and gave her a comprehensive feedback on her interview. By letter dated 14th September, 1998 the claimant was advised that her name had been included on a panel from which vacancies during the life of the panel may be filled.
- 4.6** The respondent is committed to equal opportunities and denies that it discriminated against the claimant contrary to the provisions of the Employment Equality Act, 1977 and contends that the selection process was conducted without regard to the gender of the candidates. The respondent states that the interview board for the position of Acting Matron of the Regional Complex comprised two females and one male. It says that the composition of the interview board was in line with the respondent's equal opportunities and positive action plan that "*recruitment boards will contain at least one member of each sex, where possible*". The respondent says that each member of the interview board was given a copy of the Board's "Notes for members of interview boards", which includes a section on "Equality of Opportunity". According to the respondent the interviews were conducted in a fair, objective and impartial manner. Each candidate was marked on the skills and competencies evidenced by their responses to the questions relating to the job criteria. No question was asked of the claimant which would have indicated bias on the grounds of gender.
- 4.7** The respondent says that the claimant's gender was not a deciding factor in any of the marks she received. It says that it did not, therefore, discriminate against the claimant contrary to

Section 2(a) of the Employment Equality Act, 1977. The respondent asks the Equality Officer to find in its favour.

5. CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1** In this case the claimant alleges that she was directly discriminated against by the respondent organisation in terms of Section 2(a) of the Employment Equality Act, 1977 when she was not appointed to the post of Acting Matron of the Limerick Regional Hospital Complex. In making my decision in this claim I have taken into account all of the information (both written and oral) which I received from the parties.
- 5.2** In this claim it is necessary to examine why the respondent held a competition for the position of Acting Matron for a period of six months when there was, in place, an Acting Deputy Matron. It is the respondent's contention that the Matron was responsible for the Limerick Regional Hospital Complex (i.e. Limerick Regional Hospital, St. Munchin's Maternity Hospital and the Croom Orthopaedic Hospital), not just the Limerick Regional Hospital. According to the respondent the claimant was in the position of Acting Deputy Matron in the Limerick Regional Hospital and when she deputised for the Matron she did so only in relation to the Regional Hospital, Dooradoyle. In relation to the other two hospitals Senior Nurse Managers deputised for the Matron of the Complex in her absence. The respondent argues that a six months leave of absence by the Matron is a long period of time and it decided to hold a competition to appoint one person to replace her for the period as opposed to having her functions spread over three persons in three different hospitals.
- 5.3** I am satisfied that a period of six months absence is a lengthy period of absence from work and it is understandable why the respondent would want the Matron to be replaced by one person as opposed to three people, if one accepts that three people deputised for her. However the claimant was always of the view that she, and she alone, deputised for the Matron in the Matron's absence. In this regard the claimant was in receipt of an annual allowance for acting Deputy Matron for the Regional Hospital, Dooradoyle. The Senior

Nurse Managers in the other two hospitals were paid the same as the claimant but were not in receipt of an allowance for deputising for the Matron.

5.4 I note that the Matron when she applied for her position, applied for the position of Matron, Mid-Western Health Board, Regional Hospital, Dooradoyle, Limerick. Her letter offering her the position read *“I am pleased to inform you that I have received a letter from the Local Appointments Commission .. recommending you for appointment as **Matron, Regional Hospital, Dooradoyle, Limerick, Mid-Western Health Board**”*. At the hearing of this claim the Matron said that, on applying for the position of the Regional Hospital Dooradoyle, she was given a job description which described the post as *“**Matron/Director of Nursing**”* and assigned to *“**the Regional Hospital Complex which consists of the Regional Hospital, Dooradoyle, the Regional Maternity Hospital, Limerick and the Regional Orthopaedic Hospital, Croom**”*. It is alleged that this job description was sent to the Matron along with the application form for the position. The respondent has not provided evidence to support this allegation. I note, however, that the job description is not dated and, therefore, begs the question as to when it was drawn up. According to the respondent the Matron, on appointment, assumed responsibility for the three hospitals in the Limerick Regional Hospital Complex. The respondent initially said that the staff had been notified of the fact that the Matron was over the Limerick Regional Hospital Complex, but later denied this and said that this fact had only been alluded to in an article in an organisation wide magazine/newsletter. I find it difficult to understand why the respondent did not rectify the alleged anomaly in the Matron’s job title and it is even more difficult to understand why the Matron herself did not seek to have her position properly designated especially given that, at the hearing of this claim, she was adamant that she is the Matron over the Regional Hospital Complex and not just the Regional Hospital, Dooradoyle.

5.5 I note that the respondent accepts that the claimant deputised for the Matron when the latter was absent on annual leave, sick leave, attending courses, etc. Since the Matron’s appointment in March, 1997 the claimant deputised for her at various times and for durations ranging from one to five weeks. It is illogical to say that the Matron was

appointed as Matron of the Regional Hospital Dooradoyle but had responsibility for the Regional Hospital Complex, while the Acting Deputy Matron was appointed to the position in the Regional Hospital but did not have responsibility for the Complex when she deputised for the Matron. Rather the respondent alleges that the Matron was replaced by three people but only one of these three people was in receipt of an allowance for undertaking these deputising functions.

5.6 The respondent indicated that it did not undertake assessments of staff. Nowhere in the written submissions or in the oral evidence at hearings did the respondent give any indication that it had a problem with the claimant's work and, for that reason, did not want her to deputise for the Matron while she was on her six months leave of absence. I can, therefore, only conclude that the respondent, for whatever reason, did not want the claimant to deputise for the Matron and, therefore, decided to hold an internal competition for the position.

5.7 In advertising the competition to appoint a person to deputise for the Matron in her six months absence it is interesting that the respondent described the position as "**Locum Matron**" as opposed to Deputy Matron. There were three applicants for the position (one male and two females - one of whom was the claimant). All three applicants were interviewed. The interview board marked the applicants under the three headings as follows:

Education Qualification	-	50 marks
Relevant Experience	-	100 marks
Managerial & Administrative Capacity		
Personality and General Suitability		250 marks

To qualify candidates had to obtain 50% of the marks available under the third heading above. The claimant and the successful male candidate received in excess of the 50% of these marks. The other female candidate did not receive the required 50% and, therefore, did not qualify for the position. The successful male candidate had higher educational qualifications than the claimant but the claimant was awarded higher marks for relevant experience. There is a major difference in the marking of the claimant and the successful

male candidate under the heading of Managerial & Administrative Capacity, Personality and General Suitability. The respondent was unable to clarify as to the manner in which the marks under this heading were determined. It is noteworthy that there were no notes of the interviews and there were no set questions asked of each candidate. The respondent said that a list of topics and issues were covered with each candidate but these were not available. As the respondent was unable to confirm how the marks under the third heading were determined I can only conclude that the respondent wanted a male for the position and in appointing the male candidate discriminated against the claimant on the basis of her sex.

5.8 The Union is critical of the fact that the General Manager (Mr. Hourigan), who had been the advocate of the decision to hold a competition for the post of deputising for the Matron for a period of six months, was also a member of the interview board. It is the Union's contention that Mr. Hourigan decided to advertise the post without prior consultation with the claimant who holds the position of acting Deputy Matron in the Limerick Regional Hospital, Dooradoyle. The Union states that it was Mr. Hourigan who argued that the acting Deputy's responsibilities relate only to the Regional Hospital and not the Hospital Complex and he dismissed the Union's objections to the post being advertised disregarding any precedents cited by it. I accept that it is questionable that Mr. Hourigan was not only a member, but the Chairman, of the interview board given his determination to have this six month posting the subject of a competition even though the claimant had undertaken the tasks associated with this post on numerous occasions previously.

5.9 The Union raised the fact that the claimant held the position of Deputy Matron in an acting capacity. The claimant had been awarded this position following an internal interview. The respondent said that no decision had been taken to make the position permanent but that if such a decision was made the respondent would be obliged to hold an external competition. The Union cited a letter from the Department of Health in which the Director of Personnel Management and Development stated the Department's approval to the claimant filling the post of "Deputy Matron" on an ongoing basis. According to the Union his letter makes it clear that this is in the special circumstances of the claimant having filled the post for a second period of long-term acting and that the arrangement should be on a personal basis.

It is the Union's contention that the clear implication of this is that no further competition was required for the claimant to fill the substantive post of Deputy Matron, but any future vacancy should be filled in the normal competitive process. I have read the letter from the Department and am satisfied that the Department's view is that the claimant, who has filled the post of Deputy Matron in an acting capacity since 1989, should continue to do so and this arrangement should apply only to her. In other words the respondent cannot fill this post in a permanent capacity while it is occupied by the claimant in an acting capacity. I consider that this is a separate issue which is not directly relevant to this claim.

- 5.10** The Union, in its submission, also argued that the respondent is guilty of indirectly discriminating against the claimant. According to the Union there are a greater number of females in the nursing profession than males. However the majority of males are in the senior positions. As I have found that the holding of the competition was directly discriminatory to the claimant it is not necessary to examine the arguments made by the Union in relation to indirect discrimination.

6. CONCLUSIONS OF THE EQUALITY OFFICER

- 6.1** In view of the foregoing I find that the Mid-Western Health Board directly discriminated against Ms. Maura Fitzgerald in terms of Section 2(a) of the Employment Equality Act, 1977 and contrary to the provisions of Section 3 of that Act when it decided to hold a competition for a post which she, because of her position, automatically obtained.

6.2 I recommend that the Health Board reward the claimant in terms of the pay she would have received for the six months period when the Matron was absent from work had she deputised for her. I also recommend that the Health Board pay the claimant the amount of £3,000 in compensation for the distress suffered as a result of the discrimination. In all future cases when the Matron is absent the claimant, while holding the position of acting Deputy Matron, should deputise for her.

Gerardine Coyle
Equality Officer

24th August, 2000