

Majella McDonald v Clonmel Healthcare Ltd**Dec-E/2000/12****Table of Contents****Section**

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1. Dispute

1.1 This dispute concerns a claim by Ms Majella McDonald that Clonmel Healthcare Ltd discriminated against her in terms of Section 2(a) and Section 2(b) of the Employment Equality Act, 1977. The claim revolves around the claimant's application for a position with the company and her attendance at two interviews on 12 and 19 January 1999.

2. Background

2.1 In January 1999, Clonmel Healthcare Ltd requested two Recruitment Agencies to put forward suitably qualified candidates with appropriate nursing experience for the position of Project Specialist for Britaject, an Apomorphine product related to the treatment of Parkinson's Disease. Ms McDonald was one of seven female candidates called for first interview and one of three candidates called for second interview.

2.2 Ms McDonald claims that she was discriminated against on the grounds of gender and marital status on the basis that she was asked specific questions during both interviews about her marital status, her children and the care of her children.

2.3 The respondent denies that the questions asked were discriminatory and states that the claimant voluntarily provided information about her marital status. The company state that the reason Ms McDonald did not get the position was because her place of residence was in Athy, Co Kildare. As she was living outside Dublin, this was likely to create difficulties for her in meeting the requirements of the job which was located primarily in Dublin.

3. Summary of the Claimant's Case

3.1 On 12 January 1999, the claimant was called for interview before Mr Jack Kinsella (Sales Manager) and Mr Martin Gallagher (Marketing Manager) at the premises of Clonmel Healthcare Ltd, Windsor Place, Dublin 2.

3.2 The claimant alleges that during the course of the interview, Mr Kinsella asked her whether she had children, how old they were and who would care for them if her job required that she stay away overnight?

3.3 On 19 January 1999, Ms McDonald was called for a second interview during which she states that she was again asked about the care of her children and about matters pertaining to her separation.

3.4 Ms McDonald contends that the style of the questions asked were discriminatory and that the information sought was not relevant to the requirements of the job. The complainant states that the style of

questioning made her feel vulnerable and uncomfortable especially when speaking about her separation. She says that she was embarrassed and caught off guard as she was not expecting this line of personal questioning.

3.5 The complainant believes that the conduct of the interviewers was discriminatory as the questions posed were inappropriate and would not have been asked of a man in similar circumstances.

4. Summary of Respondent's Case

4.1 Clonmel Healthcare Ltd state that the position of Product Specialist for Britaject is a 9 am to 5 pm job and involves training nurses and carers as well as familiarising doctors and consultants about the use of the drug. Ninety per cent of the work is based in major Dublin hospitals and involves dealing with GPs, patients, pharmacists and Health Boards. Because of the important nature of the work, the jobholder is required to be "on call" at night and at weekends to provide cover for nurses in the major hospitals.

4.2 The respondents state that the job was eventually offered to a candidate who they felt best met their requirements. The candidate had taken a 4 year Diploma in Applied Science, had an in-depth knowledge of pharmacology, relevant nursing experience and lived in Dublin.

4.3 At the oral hearing, it was confirmed that Clonmel Healthcare only employ one Britaject Project Specialist at any given time. The post was originally filled around 1990 and involved attending to 6/7 patients, all in the Dublin region. The original Specialist left the company at the end of 1998 which resulted in the company seeking a suitably qualified person to fill the vacancy. A Britaject Specialist works from 9am to 5pm but must be available on a 24 hour a day basis to cover emergencies countrywide (the company now have two patients in Galway as well as in St Vincent's Hospital and Beaumont Hospital in Dublin).

In order to fill the vacancy, the company asked several Recruitment Agencies to put forward suitably qualified people for interview. While gender was not a factor, it transpired that all seven candidates put forward were female. The company have confirmed that none of the candidates were made aware of this fact.

4.4 Regarding the first interview on 12 January 1999, the respondents confirm that Mr Kinsella had a brief chat with the claimant while they were waiting for Mr Gallagher. The respondents state that during this conversation, the claimant mentioned that she had recently returned to Ireland from the USA. When Mr Kinsella asked the claimant why she had returned, she said that she had recently separated from her husband and had returned to Ireland with a view to bringing up her children here. A discussion then took place about the claimant's children, their education and their upbringing.

4.5 The respondents maintain that the formal interview only commenced when Mr Gallagher joined Mr Kinsella and the complainant. During the course of the interview the job requirements were outlined and it was stressed that the fact that Ms McDonald was residing in Athy might create problems with regard to call-outs and overnight stays. The respondents deny that any reference to Ms McDonald's children or marital status was made during the formal interview.

4.6 The claimant was called for a second interview on 19 January 1999. The respondents state that the difficulties of meeting the requirements of the job were again discussed but that the claimant's place of residence continued to be a problem and no satisfactory arrangement could be agreed. This was the primary reason the claimant was not offered the job.

The respondents confirm that interview notes were taken by Mr Gallagher at all interviews but state that these were destroyed some 5/6 months afterwards. It is unclear, however, whether this occurred before or after the respondents became aware that the claimant had lodged a case against them.

4.7 The respondents submit that the claimant has failed to establish that she was treated less favourably by reason of her sex as the successful candidate was of the same sex. The respondents also submit that the claimant has failed to establish she was treated less favourably by reason of her marital status as the successful candidate was of the same marital status.

4.8 Clonmel Healthcare Ltd maintain that the process of selecting candidates was conducted in a non-discriminatory manner and that the company has credible and non-discriminatory reasons for not selecting the claimant.

Conclusions of the Equality Officer

5.1 In my investigation I have taken into account all written submissions and the oral submissions made at a joint hearing held between the parties on 10 October 2000.

5.2 I note that seven female candidates were interviewed on 12 January 1999 of which three (including Ms McDonald) were called back for interview a week later. Both sets of interviews were conducted by Mr Jack Kinsella and Mr Martin Gallagher. The interviews lasted between 30 and 45 minutes each. Ms McDonald's second interview took place on 19 January 1999.

5.3 The claimant has alleged that she was discriminated against under the Employment Equality Act, 1977 by Clonmel Healthcare Ltd under both

Section 2 (a) *where by reason of his sex a person is treated less favourably than a person of the other sex, and*

Section 2 (b) *where because of his marital status a person is treated less favourably than a person of the same sex.*

5.4 The claimant alleges that this discrimination occurred during the course of two interviews on 12 and 19 January 1999. During the course of these interviews the claimant states that she was asked questions concerning her marital status that would not have been asked of a man. These questions concerned her marital and family status and led to queries as to who would care for her children if she got the job.

5.5 I consider that the issues for consideration in this case are

- (a) whether discriminatory questions were asked of the claimant and,*
- (b) if so, whether these questions could be regarded as forming part of the interview process,*
- (c) were the questions discriminatory under the 1977 Act on grounds of either sex or marital status?*
- (d) was the selection of another candidate discriminatory given that the successful applicant was of the same sex and marital status as the claimant.*

5.6 *(a) whether discriminatory questions were asked of the claimant*

It is noted that both parties agreed that Mr Gallagher was some minutes late for one of the interviews but they disagreed on which one it was. On the occasion that Mr Gallagher was late, there is a consensus that Ms McDonald was invited into the interview room by Mr Kinsella. Ms McDonald claims that, at that point, Mr Kinsella asked her about her return from the USA, her family circumstances and her place of residence and that this line of questioning was discriminatory and resulted in her feeling uneasy during the remainder of the interview.

5.7 An important factor to be considered at this point is whether the post in question was gender specific, and, most importantly, whether the applicants themselves were aware that they were competing against people of a different gender and/or marital status. In this particular case, the post was not gender specific. The respondents state that both males and females could have applied for the position. The respondents have also confirmed that applicants were not made aware of the gender or status of the other candidates.

Ms McDonald, therefore, approached the interview not knowing whether the other candidates were male or female or what their marital status was. I believe, therefore, that she was entitled to feel uncomfortable about any discussions which dealt with her children's' upbringing, knowing that similar questions would almost certainly not have been asked of a male or of a single female candidate. I can, therefore, accept that such a style of questioning was likely to make the claimant feel vulnerable and uncomfortable.

Mr Kinsella has acknowledged that a conversation regarding the claimant's family situation occurred but contends that he was only engaging in "small talk" pending Mr Gallagher's arrival, and that their conversation did not form part of the official interview. Ms McDonald claims, however, that it was a fact-finding exercise on the company's part as no information on the claimant's marital status had been included on her CV.

5.8 In the absence of the original interview notes, I am satisfied, on the evidence before me, that the alleged line of questioning did occur and that a prima facie case has been established involving possible discriminatory questioning. The burden of proof in this case, therefore, rests with the respondent.

5.9 *(b) whether these questions could be regarded as forming part of the interview process,*

I note that Clonmel Healthcare Ltd have acknowledged that the conversation between Mr Kinsella and Ms McDonald may have been somewhat inappropriate. However the respondents insist that Mr Kinsella was simply trying to put Ms McDonald at her ease and that, while Mr Kinsella's line of questioning may have been somewhat misguided, it was well intentioned. The respondents maintain that this discussion did not form part of the formal interview. The company say that they had always intended that its interviews would be impartial and had even gone as far as to obtain guidelines from the Employment Equality Agency on how to conduct non-discriminatory interviews.

5.10 In considering whether the questions asked of the claimant could be construed as forming part of the interview process, I have taken the following points into account:

Interview practices have developed significantly in recent years. It is now widely accepted that interviews should have a structured approach, that marking schemes should be developed beforehand and that interview notes should be taken and retained. It is also now standard practice for dedicated interview rooms to be set up and for applicants to be admitted to an interview room only when the interview board is in place.

In this particular case, the claimant was admitted to the interview room before the second interviewer arrived and a conversation ensued with Mr Kinsella. In my opinion, the claimant was, therefore, entitled to feel that she was now in an interview situation and that any questions asked of her would have a bearing on her candidature. I, therefore, cannot accept the respondent's claim that Mr Kinsella and Ms McDonald only engaged in "small talk" before Mr Gallegher's arrival and that this discussion and the information derived therefrom, had no bearing on the overall outcome of her candidature. In the absence of the original interview notes, I can find no evidence to substantiate the respondent's claim that the discussions in question did not form part of the interview process.

5.11 *(c) were the questions discriminatory under the 1977 Act on grounds of either sex or marital status ?*

I note that the respondents' primary argument is that what happened at the interview stage had little relevance to the overall outcome. They point out that Ms McDonald's case was based around an allegation of discrimination on the grounds of gender and marital status. The respondents' argument is that, as the successful candidate was of the same sex and marital status as the claimant, no comparator exists by which the claimant can claim discrimination under section 2(a) or 2(b) of the Employment Equality Act, 1977.

The relevant sections of the 1977 Act are as follows:

Section 2 (a) where by reason of his sex a person is treated less favourably than a person of the other sex, and

Section 2 (b) where because of his marital status a person is treated less favourably than a person of the same sex.

While the recent Employment Equality Act 1998 specifically provides for the use of a hypothetical comparator, it is not clear from the 1977 Act whether a specific comparator is required. On the other hand, the 1977 Act does not provide, like the Equal Pay Act, 1974, that there must be a specific named comparator with different sex or marital status. We must, therefore, consider whether it is possible to interpret the 1977 Act as permitting a hypothetical comparator.

5.12 The 1977 Act is the implementing Irish legislation for the Equal Treatment Directive, and in the event of ambiguity has to be interpreted consistent with the Directive. The Directive provides at Article 2 that "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination *whatsoever* on grounds of sex either directly or indirectly by reference in particular to marital or family status." This has been interpreted by some authorities¹ as permitting the use of hypothetical comparators.

5.13 In the Irish context, sexual harassment is generally accepted as discrimination for the purposes of section 2 of the 1977 Act, following *A Garage Proprietor and a Worker (EEO 2/1985)* and a series of later Equality Officer and Labour Court decisions to that effect. The Garage Proprietor case did not involve any comparator. The conduct was seen by the Labour Court as so blatantly discriminatory that none was necessary, it simply commented that "Freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect." This approach would not be possible if the 1977 Act required an actual comparator.

5.14 If it was always essential to produce an actual comparator, the overall purpose of the 1977 Act and the intention of the Equal Treatment Directive could easily be frustrated. It is well known that large areas of employment remain heavily segregated and it is often the case that there are only female applicants for some specialist posts or for less well-paid jobs. It would be invidious if female workers subjected to discriminatory comments or other treatment were unable to make any claim under the Irish legislation because their jobs were specialist positions or jobs that males were not interested in applying for, and they cannot therefore produce an actual male comparator. It seems contrary to the Directive to arrive at such an interpretation, in the absence of very clear wording to that effect within the Act.

For all of these reasons, it seems entirely permissible to use a hypothetical comparator and ask "Would a person of the opposite sex from the claimant, on the balance of probabilities, have been treated more favourably in this situation? Would a person of the same sex but different marital status from the claimant, on the balance of probabilities, have been treated more favourably in this situation?"

5.15 This approach has in practice already been taken by Equality Officers in other cases of discriminatory questioning. In the case of *Fleming v. Dr J Maloney, Blackrock Clinic (EE04/1996)*, the only actual comparators apparently were married women. During the course of the interview for a part-time secretary position, the claimant was asked about child-minding arrangements for her children. In that case, the Equality Officer found that the claimant had been discriminated against by being asked discriminatory questions but had not been discriminated against in being refused the post. Although no males applied for that post, a hypothetical male or single female comparator was used in deciding whether

¹ Ellis on European Community Law, 2nd edition p. 193-194

the questions put to the candidate were discriminatory. The Equality Officer stated that "*I accept that there were probably no male or single female applicants for the post, however, I consider that the respondent discriminated against the claimant when she asked her or allowed her to be asked questions which would not be asked of a male or single female.*"

5.16 Another case of note is *Phelan v. Michael Stein Travel (EE15/1998)*, where the claimant, a married woman, was asked questions at the interview about her children and her child-minding arrangements. She was not offered the position. The Equality Officer found that the line of questioning was discriminatory and contrary to the Employment Equality Act, 1977. Of interest here is the fact that the successful candidate was also married with children and, in the Equality Officer's opinion, more suited to the position.. However, this fact did not deter the Equality Officer from deciding that the claimant had been subjected to discriminatory treatment at the interview. Again the Equality Officer had no difficulty in finding that questions about her marital status and childcare arrangements were discriminatory, despite the apparent absence of any comparator.

Similarly, in *Barrington v Medical Council, EE9/1988*, although there were a number of male applicants for the post the Equality Officer did not examine in his recommendation whether they had actually been asked the questions which the claimant complained of. He simply stated that he was "satisfied that no male candidate would have been asked the questions which the complainant was asked" thus using a hypothetical male comparator.

5.17 (d) was the selection of another candidate discriminatory given that the successful applicant was of the same sex and marital status as the claimant.

According to the respondents, the principle reason Ms McDonald did not get the job was that the interviewers were not satisfied about her availability to adequately cover emergency situations. They point out that the successful candidate lives in Monkstown, Co Dublin and is still employed by the company. The respondents maintain that the most suitable applicant got the job and, therefore, the claim of discrimination is not a valid one.

5.18 The respondents support their case by referring to two previous cases where male applicants were successful at interview over female applicants.² In both cases, the female candidates claimed discrimination on the grounds of sex but lost their cases because they were unsuccessful in proving that they were better qualified for the positions. The respondent's argument is that, as in the other two cases, Ms McDonald has failed to present material evidence upon which it could be concluded or inferred that she was better qualified for the position and that she was discriminated against in not being offered the position.

On considering this argument, I find that the cases referred to by the respondent have no direct relevance to the current case as the claimant is not disputing whether she was better qualified for the post. Indeed, she has already conceded at the oral hearing that the successful candidate was extremely well qualified for

² Church & General V A Worker (EE 8/1980 and Labour Court Determination DEE2/8) and

⁰ Carroll V Bailieborough Community School (EE 12/83)

the position and that there was little to choose between them. Ms McDonald's case centres entirely on the line of questioning adopted during the interview process.

5.19 In arriving at my conclusions, I have considered a number of previous Equality Officer cases where allegations of discriminatory questioning at interview were an issue but also where the successful candidate was found to be more suited to the position.

In *Carey v. McCarthy Daly Stapleton (EE16/1981)* ten people were interviewed for the position of dictaphone typist. During the interview the claimant was questioned about her marital status. In this case a more suitable applicant was offered the position. The claimant did, however, establish that she had been asked discriminatory questions in the course of her interview. In that case, the Equality Officer stated that "To say that discrimination did not take place because there was a more suitable and better qualified applicant is, in the Equality Officer's opinion, to adopt too narrow an interpretation of Section 2(b)".

5.20 Similarly, in the case of *Chaney v. UCD (EE15/1983)*, the claimant was asked about child-minding arrangements for her children. There was no evidence to show that male candidates had been asked the same questions. To prove discrimination in that case, it was not necessary for the claimant to show that she was the best person suited to the job - the respondent was found to have discriminated against the claimant simply on the basis of the questions asked at interview.

6. Recommendation

6.1 In view of the conclusions above, I find that Clonmel Healthcare Ltd did discriminate against Ms Majella McDonald in terms of Section 2(a) and Section 2(b) of the Employment Equality Act, 1977 in discussing matters relative to her marital and family circumstances during the course of the interview process conducted by the company between 12 and 19 January 1999.

6.2 With regard to the filling of the vacancy concerned, I believe that the fact that the claimant had children to look after was a consideration (though probably not the main one) which the interview board took into account and that this consideration would have been regarded as less of a factor if a male candidate was being considered for the post. I am, however, satisfied that there was little to choose between the quality of the candidates involved and that the company's decision to offer the position to a Dublin-based candidate was made for valid reasons unconnected with the claimant's sex.

6.3 I, therefore, recommend that Clonmel Healthcare Ltd pay Ms McDonald the sum of £1000 in compensation for the distress suffered as a result of the discrimination.

Brian O' Byrne
Equality Officer
20 December 2000