

**EMPLOYMENT EQUALITY ACT, 1977**

**EQUALITY OFFICER'S RECOMMENDATION No: DEC-E-2000/13**

**PARTIES**

**Mr. Dermot Cooney**

**-v-**

**Midland Health Board**

*File No: EE32/99*

**1. DISPUTE**

This dispute concerns a claim by Mr. Dermot Cooney that the Midland Health Board discriminated against him within the meaning of -

(i) section 2(a) of the Employment Equality Act, 1977 and in contravention of section 3 of that Act, when he was selected for temporary ward re-deployment within St. Loman's Hospital, Mullingar, Co. Westmeath and

(ii) section 2(d) of Employment Equality Act, 1977 and in contravention of section 3 of that Act, for taking action in pursuance of an entitlement under the Act.

## **2. BACKGROUND**

**2.1** St. Loman's Hospital, Mullingar is the parent psychiatric hospital of the Midland Health Board providing mental health services for the catchment area of Longford and Westmeath. In May, 1999 the hospital employed 61 male nursing staff (equivalent to 61 posts) and 72 female nursing staff (equivalent to 56 posts). Since the mid-1980's the hospital has operated a policy of integration, that is all nurses are assigned to both male and female wards irrespective of their gender.

**2.2** In May, 1999 the hospital comprised the following wards:

<b>Name of Ward</b>	<b>No. of Patients</b>	<b>Description of Ward</b>
Female Admission Unit	26	Female Acute
Male Admission Unit	24	Male Acute
St. Claire's Ward	29	Male Geriatric
St. Marie Gioretti's Ward	27	Male Geriatric
St. Brigid's Ward	28	Female Geriatric
St. Anne's Ward	25	Female Physco/Geriatric
St. Enda's Ward	27	Male Physco/Geriatric

**2.3** The claimant is employed as a staff nurse in St. Loman's Hospital, Mullingar. He alleges that on two separate occasions in late May, 1999 he was selected for re-deployment of duties from his rostered ward to another ward when he was not the junior nurse on duty, contrary to normal custom and practice operated in the hospital. He further contends that on both occasions there were female nurses on duty who were junior to him.

**2.4** The claimant referred a complaint to the Labour Court in November, 1999. As the Employment Equality Act, 1998 was in operation at that time, the Labour Court referred the complaint to the Office of the Director of Equality Investigations for necessary action. Submissions were received from both parties and a hearing of the complaint took place on 12 June, 2000. At the hearing the claimant furnished an additional submission which gave rise to further correspondence with both parties subsequent to the hearing.

## **3. SUMMARY OF CLAIMANT'S CASE**

**3.1** The claimant alleges that he was discriminated against on grounds of his sex when he was selected for re-deployment of duties from his rostered ward to another ward on two separate occasions in late May, 1999. The claimant contends that this action is contrary to normal custom and practice operated in the hospital which is to re-deploy the most junior

nurse on duty, having regard to relative lengths of service of all nursing staff on duty at a particular time, for duties outside of the ward, including escorting a patient to another hospital and re-deployment to another ward if required. He further contends that on both occasions there were female nurses on duty who were junior to him.

- 3.2 The claimant states that on both 21 May, 1999 and 31 May, 1999 he was rostered for duty on St. Marie Goretti's Ward. He contends that on both occasions he was selected by the Ward Sister for re-deployment to St. Enda's Ward because the Nursing Office had instructed that a male nurse should be re-assigned. He further argues that this is at variance with the custom and practice operated in the hospital that the most junior nurse on duty would be re-deployed. Mr Cooney states that on both occasions he was not the most junior nurse on duty - there were female nurses on duty who were junior to him - and he was selected merely because of his sex.
- 3.3 The claimant states that the ward to which he was re-deployed - St. Enda's Ward - may well be an integrated ward for the purpose of staffing, but that in practice it is consistently staffed by male nurses only. He argues that the material provided by the respondent in its submission illustrates this point in that there was not one occasion when a female nurse was re-deployed or re-assigned to St. Enda's Ward. He further argues that this would not be the case if the request for additional staff was from any other ward in the hospital. In those circumstances the most junior nurse on duty would re-deploy, whether male or female.
- 3.4 The claimant submits a copy of an Internal Memo dated 28 June, 1991 from the hospital's Chief Nursing Officer at the time. He argues that this Memo supports his contention that it was custom and practice to re-deploy the most junior nurse for duties outside of the ward. A copy of this Internal Memo is at Appendix 1.
- 3.5 The claimant also alleges that he was penalised contrary to section 2(d) of the Act. He contends that in the past he has suffered financial loss and also loss of benefits which employment equality legislation provided. In addition, he argues that the general practice of re-deployment within the hospital results in considerable disruption and stress for both patients and nursing staff and necessitates travelling to other areas of the hospital.

#### **4. SUMMARY OF RESPONDENT'S CASE**

- 4.1 The respondent rejects the complainant's contention that he was discriminated against or penalised contrary to the Employment Equality Act, 1977. It argues that in the context of nursing rostering arrangements generally in St. Loman's Hospital, it is normal practice that wards with surplus nurse staffing provision contribute to the staffing provision of wards with a deficit as the need arises. It argues that in a hospital setting emergencies arise from time to time which can create a need for staff to be re-deployed or re-assigned. Factors which can contribute to such an emergency include unplanned staff shortages, patient care requirements and additional service requirements such as special observations on patients and escort duties to other wards or hospitals. The respondent contends that such re-deployment or re-assignment applies equally to male and female nurses and that they are made on the basis of service and patient needs and not on the basis of gender.

- 4.2** The respondent accepts that it was general practice in the hospital for the most junior nurse on duty to be re-deployed when necessary. However, it submits that the Internal Memo of 28 June, 1991 from the Chief Nursing Officer was never intended as a rigid, inflexible system for re-deployment which must be followed in every instance. The respondent points out that the Memo states that the Assistant Chief Nursing Officer may, depending on the exigencies of the hospital, require a nurse other than the most junior or least experienced nurse on duty for the re-deployment. In support of this it provided data which illustrates that on several occasions around the time of the alleged discriminatory treatment of the claimant the most junior nurse on duty was not re-deployed (Appendix 2).
- 4.3** The respondent acknowledges that Mr. Cooney's gender was a motivating factor in his re-deployment to St. Enda's Ward on 21 May, 1999 but contends that its actions were not in breach of the Employment Equality Act, 1977 because of the particular circumstances which prevailed in that ward on the date in question. The respondent states that on the evening in question there were two male nurses on duty in St. Enda's Ward. This was the normal requirement for the ward to provide late evening cover. However, the respondent states that a particular patient and his immediate family were creating difficulties within the ward, which resulted in a number of the other patients becoming unsettled. Following a request by the nursing staff on duty in the ward for additional nurse assistance, the Senior Nursing Administration Officer selected St. Marie Goretti's Ward to provide a nurse for re-deployment. This decision was taken on the basis that the weekly staffing rosters had identified St. Marie Goretti's Ward as one with an excess of nursing staff provision. The claimant was selected because of the potential threat to female nursing staff by patients in St. Enda's Ward and the fact that he had worked in that ward previously and would be in a position to provide a calming influence over both the troublesome patient and his family i.e. he was considered to be the most suitable nurse available. The respondent accepts that there was a female nurse on duty in St. Marie Goretti's Ward that evening who was junior to the claimant.
- 4.4** As regards the claimant's re-deployment to that ward on 31 May, 1999, the respondent argues that the ward to which Mr. Cooney was originally rostered (St. Marie Goretti's) again had an excess of nurse staffing provision and that St. Enda's Ward had a nurse staffing deficit. The respondent states that given the arrangement it had with the Union that the re-deployment of female to St. Enda's Ward should be avoided, it was decided that Mr. Cooney was the most suitable nurse available to be re-deployed. The respondent again accepts that there was a female nurse on duty in St. Marie Goretti's Ward that evening who was junior to the claimant.
- 4.5** The respondent argues that the claimant did not suffer any adverse changes in his conditions of employment as a result of his re-deployment in that -
- (a) he has a contractual obligation to be deployed or re-deployed to any ward or facility within the hospital;
  - (b) his rostered duty period was not altered;
  - (c) his duties in the ward to which he was re-deployed were appropriate to his position as a Staff Nurse; and
  - (d) he suffered no loss of remuneration or other benefits.

- 4.6 In addition, the respondent argues that a female nurse would be treated in exactly the same way if the exigencies of the hospital so required and provided data to illustrate this fact (Appendix 3). The respondent accepts that this data also illustrates that no female nurse had been re-deployed to St. Enda's Ward during the period covered. It also accepts that no female nurses had been rostered to that ward since 31 October, 1998 but added that this was because of the concerns of both Hospital Management and Unions representing nursing staff in regard to the safety and welfare of female nurses and the potential risk of attack or assault of those nurses by the male patients of St. Enda's Ward.

## 5. EQUALITY OFFICER'S CONCLUSIONS

- 5.1 The issues for consideration in this case are -

(i) whether or not the respondent discriminated against the claimant on the basis of his sex in terms of section 2(a) of the Employment Equality Act, 1977 in selecting him for re-deployment from his rostered ward to another ward in the hospital (St. Enda's Ward) on two separate occasions, 21 May, 1999 and 31 May, 1999; and

(ii) whether the claimant was penalised, contrary to section 2(d) of the Employment Equality Act, 1977 for having in good faith made a reference under section 19 of that Act.

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

- 5.2 Section 2(a) of the Employment Equality Act, 1977, provides that discrimination shall be taken to occur:

*“Where by reasons of his sex a person is treated less favourably than a person of the other sex.”*

To establish discrimination therefore, the claimant must show that he suffered less favourable treatment **and** that such less favourable treatment arises from an attribute of his sex.

- 5.3 The respondent acknowledged that the sex of the claimant was a factor in its decision to re-deploy the claimant but argued that he did not suffer unfavourable treatment as a result of the re-deployment and therefore its actions were not in breach of section 2(a) of the Employment Equality Act, 1977.
- 5.4 It is a function of management to utilise all the staff and other resources at its disposal at any given time in order for all areas of the hospital to function properly. In doing so, it must firstly have regard to its obligation that patient care is not compromised and secondly that the health and safety needs of both patients and staff are met. From time to time all organisations experience emergencies or other unplanned events which require management to assess the situation and take appropriate remedial action. I am satisfied that management in St. Loman's Hospital was faced with such a situation on both 21 May, 1999 and 31 May,

1999 and that it took a decision on both occasions which it considered to be the most appropriate in the circumstances. What I must examine is whether or not its actions discriminated against the claimant on grounds of his sex.

- 5.5 The respondent accepted that the sex of the claimant was a motivating factor in selecting him for re-deployment. It therefore remains for me to examine whether the re-deployment was less favourable treatment than the treatment that would be afforded to female nurses in the same circumstances. The respondent provided statistical information which indicated that during the two month period preceding the dates of the alleged discrimination both male and female nurses were re-deployed in the hospital. Of this number, approximately 15% involved re-deployment of a nurse (both male and female) who was not the most junior nurse on duty at that time. I am satisfied therefore that re-deployment applied to all staff irrespective of their sex and length of service.
- 5.6 The latter point in the preceding paragraph relates specifically to the complainant's argument that there was at least one female nurse on duty on each date who were junior to him and that they should have been re-deployed instead of him. Whilst it was accepted by both parties that it was general custom and practice that the most junior nurse on duty re-deploy, I note from an Internal Memo from the Chief Nursing Officer dated 28 June, 1991 (Appendix 1), that depending on the exigencies of the hospital, the Assistant Chief Nursing Officer may require a nurse other than the most junior or least experienced to be re-deployed. I am satisfied that the statistical evidence provided by the respondent supports the operation of such a policy.
- 5.7 I note that the statistical information provided by the respondent indicates that no female nurses were re-deployed to St. Enda's Ward during the two month period March - May 1999. This point was accepted by the respondent who added that there have been no female nurses rostered to that ward since the end of October, 1998. This particular action emerged from the concerns of both Hospital Management and Unions for the safety and welfare of female nurses and the potential risk of attack and assault of them by male patients in St. Enda's Ward. There was some conflict between the parties as to the genesis and extent of this issue but I consider that to be an industrial relations matter and not one for examination in this case. Nonetheless, both parties acknowledged during the course of the hearing that past discussions on the question of the safety and welfare of female nurses in St. Enda's Ward took place and there was general agreement that the avoidance of rostering female nurses to this ward was in the interests of all concerned.
- 5.8 In *Mid Western Health Board v the Psychiatric Nurses Association*<sup>1</sup>, the Labour Court found that -

***“The decision to assign a particular task to a nurse of a particular sex is not less favourable treatment if the task is within the range of responsibilities for which the nurse was employed.”***

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<sup>1</sup> Determination DEE795

The respondent argues that the duties to which the claimant was re-deployed were appropriate to his grade as a Staff Nurse. This particular point was not contested by the claimant at any time during my investigation and I think it is reasonable to assume that the duties of a Staff Nurse in a male geriatric ward (which is what St Marie Goretti's Ward is) and a male physco geriatric ward (which is what St. Enda's Ward is) would be very similar. It follows that the range of responsibilities which the claimant undertook in both wards would be ones for which he was employed. I note also that the claimant had previously worked in St. Enda's Ward and would therefore have been familiar with the operations of that ward.

- 5.9** In *Mid Western Health Board v the Psychiatric Nurses Association*<sup>2</sup> the Labour Court found that-  
***“Equality legislation does not require that employees of both sexes be employed in exactly the same manner; it requires that they not be treated less favourably on account of being a male or a female.”***

In this case the claimant was re-deployed to another area of work which was very similar in nature to the work he was rostered to perform and included tasks which the claimant had been trained to do. In the past, female nurses have been re-deployed where similar circumstances existed. I cannot accept, therefore, that his re- deployment resulted in unfavourable treatment of him contrary to the Act.

- 5.10** In light of the foregoing I find that whilst the claimant's sex was a contributory factor in his selection for re-deployment, he was not less favourably treated than a female nurse would have been in the same circumstances. I am of the view that the policy of re-deployment operated in St. Loman's Hospital is based on expediency which can in some instances take the sex of the nurse in question into consideration.

- 5.11** Section 2(d) of the Employment Equality Act, 1977 provides, *inter alia*, that discrimination shall be taken to occur-  
***“Where a person is penalised for having in good faith -***  
***(i) made a reference under section 19 or section 7 of the Act of 1974,***  
***(ii) opposed by lawful means an act which is unlawful under this Act or***  
***The Act of 1974' .....***”

Having taken into account the submission, both oral and written, of the parties in relation to this, I have found no evidence to support this claim.

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<sup>2</sup> Determination DEE795

**6. RECOMMENDATION**

I find that the Midland Health Board did not discriminate against Mr. Cooney in terms of sections 2(a) and 2(d) of the Employment Equality Act, 1977 and in contravention of section 3 of that Act.

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**Vivian Jackson**  
**Equality Officer**  
**28 December, 2000.**

## **APPENDIX 1**

## **APPENDIX 2**

**DETAILS OF RE-DEPLOYMENT WHERE NURSE WAS NOT MOST JUNIOR ON DUTY**

<b>Date</b>	<b>From</b>	<b>To</b>	<b>Staff moved</b>	<b>Sex</b>	<b>More Junior Staff not moved</b>	<b>Sex</b>
6/4/99	St Claire's	St. Marie Goretti's	P Finneran	M	P Whitney	M
19/4/99	St Claire's	St. Enda's	J Bardon	M	P Glennon P Whitney	M M
21/4/99	St. Marie Goretti's	Male Admission	P Lynagh	M	M Clarke	F
23/4/99	St. Marie Goretti's	Male Admission	D Gorman	M	A Boyhan	F
24/4/99	St Claire's	Male Admission	J Bardon	M	P Glennon	M
5/5/99	St Claire's	St. Marie Goretti's	J Bardon	M	M Bergin	M
6/5/99	St Claire's	Male Admission	P Finneran	M	P Whitney	M

## **APPENDIX 3**