

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

EMPLOYMENT EQUALITY ACT, 1998

EQUALITY OFFICER'S DECISION No: DEC-E/2002/4

PARTIES

**AN EMPLOYEE
(REPRESENTED BY IMPACT)**

AND

A LOCAL AUTHORITY

File No: CDEE2000/1105

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1. DISPUTE

This dispute concerns a claim by an employee that he was discriminated against by his employer, which was a local authority, on grounds of disability, within the meaning of section 6(2)(g) of the Employment Equality Act, 1998 and in contravention of sections 6(1) and 8(1) of that Act, in terms of his contract of employment and also when it failed to provide him with a reasonable accommodation as provided in section 16(3) of that Act.

2. BACKGROUND

2.1 The complainant commenced work with the respondent on 2 May, 2000 following his placement on a panel for Clerical Officer (registered or entitled to be registered with the National Rehabilitation Board). He was advised by letter dated 29 September, 2000 that his contract was terminated due to continued unsatisfactory performance and he was offered alternative employment in a non-administrative area of the Authority. He subsequently resigned from this post in March, 2001 to take up a Clerical position in the civil service. The union claims that the respondent did not explore or offer to the complainant any special treatment or facilities as permitted by section 35(2) of the Employment Act, 1998 and as required by section 16(3) of that Act.

2.2 The respondent rejects the union's allegations and states that the complainant was provided with constant on the job training and coaching. It argues that his concentration and performance levels were inadequate to such an extent that the respondent considered him unsuitable for a clerical position. The respondent was anxious however, that the complainant remain in its employ and it offered him alternative employment in an industrial capacity in a non-administrative area of the Authority, which the complainant accepted. He remained in this post until he resigned in March, 2001.

2.3 The union, on behalf of the complainant, referred a complaint under the Employment Equality Act, 1998 to the Office of the Director of Equality Investigations on 15 November, 2000. A hearing of the complaint took place on 14 May, 2001. A number of issues

emerged at the hearing which required clarification and gave rise to further correspondence subsequent to the hearing.

3. SUMMARY OF THE COMPLAINANT'S SUBMISSION

3.1 The complainant was placed on a panel for the position of Clerical Officer with the respondent following a special competition for persons registered with, or entitled to be registered with, the (then) National Rehabilitation Board (the complainant was diagnosed with an astrocytoma on the brain stem in 1984 and subsequently underwent surgery to have it removed). On 27 January, 2000 the complainant received a letter from the respondent informing him that the Authority was in a position to offer him a permanent position subject to receipt of satisfactory references, completion of a satisfactory medical examination and verification of his educational qualifications. The complainant underwent a satisfactory medical on 11 April, 2000 and on the same date the Authority received a satisfactory reference from a previous employer of the complainant. The respondent wrote to the complainant on 7 April, 2000 requesting him to report for duty on 2 May, 2000.

3.2 The complainant presented for duty on 2 May, 2000. However, although the competition in which he had competed was for a permanent full-time position (which was covered by the Authority's Circular - see Appendix A) and the offer of employment in the letter of 27 January, 2000 (see Appendix B) was also for a permanent position, the complainant was given only a temporary contract of employment for a fixed period of three months. The union contends that this treatment of the complainant was contrary to the terms and conditions of the circulars governing the competition. It further contends that the complainant had complied with all of the requirements set out in the circular and the letter of offer of employment. It submits therefore, that the complainant was treated different to other employees recruited by the respondent and that the reason for this difference in treatment was because of his disability.

3.3 The union contends that the complainant was assigned to one of the busier sections in the Authority. It adds that the Senior Administrative Officer in this section was not advised by

Personnel that the complainant suffered from a disability, which is contrary to the Department of the Environment and Local Government's Code of Practice for the Employment of People with Disabilities in the Local Authority Service (see Appendix C) (hereafter called the "Code of Practice"). It also argues that the complainant was given no formal training and rejects, in particular, the respondent's assertion that he was provided with one-to-one training by his immediate supervisor and contends that he was in fact "thrown in at the deep end". The union submits that this behaviour is also contrary to the Code of Practice.

3.4 The union states that the complainant was asked to attend a meeting with his Senior Administrative Officer and the Acting Principal Officer of the Department on 15 August, 2000. At this meeting the complainant acknowledged that he could suffer from fatigue and that on some occasions concentration was difficult. However, he felt that overall he was able to do his job. The Acting Principal Officer stated although she had no doubt that the complainant was giving of his best, that overall his performance was considerably short of what was required to perform his job. She added that although a two month extension of the complainant's contract had been approved, based on his current performance, a further extension or a permanent appointment could not be recommended. The union contends that this approach is contrary to the terms of the circular governing the competition which provides for a permanent post which has a probationary period of one year. The union submits therefore that the complainant, who was very distressed following this meeting, was treated unfavourably and that this treatment was as a result of his disability.

3.5 Following the meeting of 15 August, 2000 the complainant contacted an officer from FÁS, whom the complainant had been involved with previously, and asked him to intervene with the respondent on his behalf. The FÁS official (hereafter called "Mr. A") met with officials from the respondent on a number of occasions, most notably with the complainant's Senior Administrative Officer on 15 September, 2000 and outlined the various ways in which FÁS/NRB might be of assistance - see letter from this Official to the complainant's union at Appendix D. The union states that the respondent's failure to examine these initiatives constitutes a breach of section 16 of the Employment Equality Act, 1998.

3.6 The union states that subsequent to the meeting mentioned in the previous paragraph the complainant's parents met with officials from the respondent, including the County Manager, to discuss the complainant's situation (4 and 15 November, 2000). The union contends, and its contentions were supported by the complainant's parents at the hearing, that the attitude of the respondent during these meeting was at the very least, patronising. It alleges that officials of the respondent stated (i) that because the complainant's disability was not a physical disability the services suggested by Mr. A might not be of any benefit; (ii) the complainant had walked into lampposts and was a liability; (iii) finance was not an issue, but the respondent could not have somebody sit beside the complainant to do his work for him and (iv) that the complainant's parents should consider medical attention for him as there appeared to be a requirement for same. The union submits that the above comments indicate an extremely jaundiced view by the respondent to the employment of people with disabilities and the complainant in particular.

3.7 In addition to the above, the union alleges that the respondent did not explore the obvious option of transferring the complainant to another section where the work might have been more suitable to him. It further contends that the respondent made no attempt to match the complainant's skills with the work required, although his Senior Administrative Officer clearly states in a reference he prepared for the complainant on his (the complainant's) departure from the section in November, 2000 that the complainant possessed good interpersonal skills and also displayed an aptitude for computer work and data compilation.

3.8 In conclusion, the union submits that the respondent failed to examine the options available to it as regards special treatment or facilities for the complainant which would have enabled him fully competent and capable of undertaking the duties attached to the post of clerical Officer in the respondent organisation.

4. SUMMARY OF THE RESPONDENT'S SUBMISSION

4.1 The respondent denies that it discriminated against the complainant in any manner whatsoever, contrary to the Act. It states that its letter dated 27 January, 2000 clearly indicated that the appointment was subject, *inter alia*, to verification of the complainant's

educational qualifications. The respondent states that its records indicate that the complainant's educational certificates and birth certificate were not checked by it until 5 May, 2000, three days after the complainant had taken up duty. The respondent states that in circumstances where some of the items required by it (educational qualifications, medical report, references) are outstanding on the day a new employee reports for duty, it is the respondent's normal practice to place that employee on a short term contract, pending permanency. The respondent contends therefore, that the complainant was not treated less favourably than any other new employee whose documentation was incomplete when taking up duty.

- 4.2** The respondent rejects the union's assertion that the complainant was assigned to one of the busier sections in the Authority and states that the section to which he was assigned was not a pressurised environment and was characterised by its friendly, helpful staff. The respondent states that the complainant was assigned duties along the following lines - opening post, typing acknowledgements and other basic letters, photocopying and filing. It adds that it became evident to the complainant's line managers fairly soon after he commenced work, that the complainant was neither capable or competent to carry out the duties assigned to him. It contends that there were constant errors in his work, even with the most routine tasks of photocopying and there was a recurring problem with the complainant falling asleep at his desk almost daily.
- 4.3** According to the respondent the complainant was afforded continuous on the job training by a Staff Officer and Assistant Staff Officer in the section. It adds that this training comprised demonstrating to the complainant what was required and that this training was provided on a daily basis. The respondent states that this training did not result in an improvement in the complainant's performance and had a consequent detrimental effect on work flow in the section.
- 4.4** The respondent acknowledges that the complainant attended a meeting with his Senior Administrative Officer and the Acting Principal Officer of the Department on 15 August, 2000. It accepts that the complainant was informed at this meeting that his performance was below the level required, that his permanency could not be recommended unless there was

considerable improvement on his part and that his progress would be monitored. It also accepts that the complainant was not represented at this meeting but adds that it would not be unusual for an employee to attend such a meeting unaccompanied. The respondent states that there is no stipulation that an employee cannot have a representative or observer present at such a meeting and adds that it was open to the complainant to subsequently contact his union representative with a view to meeting with Personnel to discuss the matter further. The respondent points out that the complainant did not avail of this option.

4.5 According to the respondent, following the meeting on 15 August, 2000, the complainant received even more intensive training - training which it asserts could be described as coaching. It adds however, that notwithstanding this attention, the complainant's performance did not improve to a standard which the respondent considered sufficient to carry out his duties. It decided therefore that his contract would not be renewed at the end of October, 2000 and the complainant was informed of this by letter dated 29 September, 2000. The respondent adds however, that it was anxious that a reasonable effort was made to retain the complainant in alternative, more suitable employment and he was offered and accepted employment, on a temporary basis, as a general operative in an industrial area of the Authority.

4.6 The respondent acknowledges that it had discussions with Mr. A on a number of occasions, both prior to and following the complainant's tenure as a Clerical Officer with the Authority. It states that a number of options where assistance might be available from FÁS were outlined to it, including (i) Employment Support Scheme- where a financial contribution would be paid to the respondent to offset the cost of the complainant's salary, (ii) A Job Coach for a defined period to assist the complainant and (iii) an independent assessment of the complainant to identify his work strengths and weaknesses. The respondent states firstly that its contacts with Mr. A were informal and in its view they did not purport to be professional advice, rather an outline of the services available. It adds that financial implications were not an issue, the provision of a Job Coach did not seem appropriate to the complainant's circumstances as it was the respondent's understanding that such a Coach was more appropriate to a person with mental disability as distinct from a person with

residual brain damage, which is what the respondent understood the complainant to suffer from. It further adds that the complainant's line managers had already provided extensive training and coaching for him, to no avail. The respondent states that it never had any objection to a vocational assessment of the complainant and adds that attempts to arrange such an assessment were put in hand after officials from the Authority met with the complainant's parents on 15 November, 2000.

4.7 The respondent notes that section 16(3)(c) of the Employment Equality Act, 1998 states that an employer's refusal or failure to provide special treatment of facilities to an employee with a disability, shall not be deemed reasonable unless such provision gives rise to a cost which is more than a nominal one to the employer. It contends that to employ the complainant to his potential retirement age of sixty five years would mean that it would be liable to pay him for in excess of forty years. It submits, based on the complainant's lack of productivity and even with external financial support in the form of Employment Support Scheme, that such a course would give rise to a cost to the Authority which would be more than nominal in nature.

4.8 Finally, the respondent strongly rejects the complainant's allegation that it adopted a "jaundiced" view of the complainant because of his disability. It adds that at all times the complainant was treated with the greatest respect and courtesy by all staff in the Authority.

5. SUMMARY OF THE HEARING

5.1 The complainant's union representative states that the respondent was in receipt of some of the information required by it before the complainant reported for duty on 2 May, 2000. She acknowledges the respondent's contention that it did not examine the complainant's original birth certificate and educational qualifications until three days later, 5 May, 2000. The union representative points out that the complainant did not receive written confirmation that an order had been signed confirming his appointment on a temporary basis until 7 June, 2000. The union argues therefore, that there was ample time for the Authority to appoint the complainant on a permanent basis, which was the position he had been offered by letter dated 27 January, 2000, in keeping with the terms of the competition he had competed in.

5.2 In response, an official from the respondent's Personnel Division states that where there is a gap in the information which a new employee is required to produce, it is the respondent's usual practice to appoint those persons on a temporary contract of employment for a three month period, at the end of which the employee is appointed on a permanent basis or has the contract extended for a further period, depending of the employee's performance. The official adds that the complainant was treated in this manner because he did not have all the necessary documentation. He was therefore treated no different to any other new employee in the same position. In support of its assertion the respondent furnished details of the number of employees appointed by it on temporary contracts in each of the six month periods preceding and following the complainant's appointment in May, 2000. During this combined period, sixty employees were appointed on temporary contracts, twenty eight of whom were from panels for permanent positions. These twenty eight employees were unable to produce all of the information required by the respondent on the date of taking up duty. Of this number five remain employed in a temporary capacity - three because they are medically unfit and two because of unsatisfactory service. As far as the official was aware such practices were not covered by any Circular from Central Government.

5.3 The complainant's representative rejects the respondent's assertion that the complainant was provided with extensive one-to-one coaching by staff in the section. She submits that the training provided was "ad-hoc" in nature and was provided on the job, an assertion that was supported by the complainant himself. She adds that it was some days after the complainant was assigned to the section that his Senior Administrative Office was advised that the complainant suffered from a disability and that it was some considerable time later before his immediate supervisor was made aware of this point. She went on to say that neither of these personnel ever spoke with the complainant about his needs arising from his disability. She submits that these shortcomings were contrary to paragraphs 13 and 14 of the Authority's Code of Practice and that they supported the complainant's contention that the respondent did not adequately explore the options available to it in respect of reasonable accommodation.

- 5.4** The respondent confirmed that the complainant's Senior Administrative Officer was not made aware on the complainant's first day that he suffered from a disability, although this Officer was informed of the position within two working days. The respondent could offer no explanation for this oversight. No comment was offered as to whether or not the complainant's immediate supervisor was fully aware of the complainant's disability, although the complainant's Senior Administrative Officer states that this official commented within days of the complainant's assignment to the section that he had difficulties with his concentration level. The respondent did however, re-iterate its contention that the complainant was afforded extensive personal training by his Staff Officer.
- 5.5** The union representative states that the complainant had successfully completed his Leaving Certificate and the NCVA Certificate in Business Studies, which clearly illustrates that he has the ability to concentrate. She submits a report from the Civil Service Commission in respect of the Clerical Officer Competition for candidates registered or entitled to be register with the NRB in which the complainant had competed in early 2000. This report indicates that the complainant was placed in the upper group of some 600 candidates in respect of Verbal Comprehension and Numerical Reasoning and the middle group in respect of Classification Testing and Clerical Checking - with an overall placement in the upper middle group (70%-79%). The union representative also submits a Synopsis of a Vocational Assessment Report carried out by the National Rehabilitation Hospital on the complainant - the assessment had been the subject of much discussion with the respondent in the past - which also indicates that the complainant was suitable for clerical work.
- 5.6** The respondent re-iterates that it never had any objection to the Vocational Assessment of the complainant and adds that it had contacted Mr. A on several occasions about this matter. However, the respondent was unable to produce any details of these contacts because there were no details on the file.
- 5.7** The respondent's Personnel Official confirms that it was probable that no attempt were made by the respondent to re-assign the complainant to another section in the Authority because the nature of his duties were basic and common to all sections. It adds therefore

that there would be no benefit to such a course. This assumption is supported by the complainant's Senior Administrative Officer who states that he had spoken on several occasions with the then Personnel Officer about the complainant's performance and had recommended that re-assignment was not a practical proposition. The respondent states that no record of these discussions were on file and adds that the only documentation relevant to this issue on file was a blank assessment form issued by Personnel. It adds that such an approach would not be unusual and that comments about the performance and suitability of an employee would be taken verbally because of time constraints.

5.8 Finally, the respondent confirms that it did not have a Disability Liaison Officer in May, 2000 and that these duties were carried out by officials in the Personnel Section. It also advises that neither the complainant's Staff Officer or Senior Administrative Officer had completed any training on disability issues, except in areas of Health and Safety and Evacuation.

6. EQUALITY OFFICER'S CONCLUSIONS

6.1 The issues for consideration by me are (i) whether or not the respondent discriminated against the complainant on grounds of disability, within the meaning of section 6(2)(g) of the Employment Equality Act, 1998 and in contravention of sections 6(1) and 8(1) of the Act, in terms of his contract of employment and (ii) whether or not the respondent failed to provide the complainant with a reasonable accommodation as provided in section 16(3) of the Act. In making my decision on these matters I have taken into account all of the submission, both oral and written, made to me by the parties.

6.2 I propose to deal with that part of the complaint related to the complainant's contract of employment, in the first instance. I note that the respondent does not dispute that the competition which the complainant sat was for a permanent post of Clerical Officer in the Local Authority. I further note that the respondent's letter of 27 January, 2000 to the complainant offers him a permanent post of Clerical Officer subject to receipt/confirmation by the respondent of certain information. The respondent contends, and it is not disputed by the complainant (he cannot be certain if he furnished the necessary information on his first

day), that some of this material - confirmation of the complainant's educational qualifications and his birth certificate - were not checked by the respondent until three days after the complainant commenced duty, 5 May, 2000. The respondent states that consequently, it placed the complainant on a temporary contract, in keeping with its normal practice in such circumstances. The respondent states that it applies this practice in every case where a new employee's documentation is incomplete and submits therefore, that the complainant was not treated unfavourably. The complainant states that he complied with all the necessary requirements of the respondent by 5 May, 2000 but did not receive confirmation of his appointment until 7 June, 2000. He submits that there was therefore ample time for the respondent to appoint him on a permanent basis, that its failure to do so constitutes unfavourable treatment of him and that this unfavourable treatment is based on his disability.

6.3 Section 6(1) of the Employment Equality Act, 1998 provides:

“For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as ‘the discriminatory grounds’), one person is treated less favourably than another is, has been or would be treated.”

Section 6(2) sets out the discriminatory grounds and section 6(2)(g) specifically provides:

“that one is a person with a disability and the other either is not or is a person with a different disability (in this Act referred to as ‘the disability ground’),”

Section 8(1) of the Act provides:

“In relation to—

- (a) access to employment,*
- (b) conditions of employment,*
- (c) training or experience for or in relation to employment,*
- (d) promotion or re-grading, or*
- (e) classification of posts,*

an employer shall not discriminate against an employee or prospective employee”

To prove discrimination therefore the complainant must establish that he was treated unfavourably **and** that this unfavourable treatment results from the fact that he suffers from a disability and the person to whom he compares himself either does not suffer from that disability, or suffers from a different disability.

6.4 I would point out at this stage that the respondent did not dispute that the disability suffered by the complainant was covered by the Act and I therefore offer no further comment on this point. Applying the test set out in the preceding paragraph to the instant case, I note that the respondent furnished details of the number of new employees appointed on temporary contracts of employment in each of the six month periods preceding and following May, 2000 (the time when the complainant was appointed). I note from these statistics that during these periods sixty employees were appointed on temporary contracts, twenty eight of whom had been placed on panels for permanent posts but had reported for duty with incomplete documentation. It is safe to assume, on the law of averages, that some of these twenty seven other employees (the complainant was included amongst this number) either did not suffer from a disability or suffered from a different disability to the complainant. In my opinion, the complainant was treated in exactly the same way as other persons were, in similar circumstances and I am satisfied that he was not treated in a less favourable manner. I find therefore that the complainant was not discriminated against by the respondent in respect of his contract of employment by reason of his disability. However, before I leave this issue, I would say that I have reservations about the respondent's practice in this area. It appears to me that there may be issues for answer by the respondent in areas of contract law in circumstances where an offer of permanent employment is effectively revoked and replaced by temporary fixed term employment on the basis of what might appear to be a technicality.

6.5 I will now deal with the second element of the complaint, which refers to the issue of reasonable accommodation. The complainant's representative alleges that the respondent failed to examine the options available to it in respect of special treatment or facilities which it could have provided to the complainant and that it effectively dismissed the assistance

which was available to it from FÁS in this area. The respondent rejects these allegations and states that it examined the options but was not convinced that they would be of assistance in the complainant's case.

6.6 Section 16(1) of the Employment Equality Act, 1998 provides:

“Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—

(a) will not undertake ... the duties attached to that position or will not accept ... the conditions under which those duties are, or may be required to be, performed, or

(b) is not ... fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

Section 16(3) of the Act provides:

(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.

(b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.

(c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.

- 6.7** The Act therefore does not require an employer to recruit, train or retain in employment a person who is not fully competent or capable to undertake the duties attached to a post. However, it also provides that a person with a disability must not be regarded as other than fully competent and capable of performing the duties attached to a post if the provision of special treatment or facilities would assist this objective. An employer is obliged to do all that is reasonable to provide such treatment or facilities unless its provision would give rise to a cost to the employer which exceeds a nominal cost.
- 6.8** I propose to examine, in the first instance, the three initiatives suggested by FÁS to the respondent as possibly being of assistance in accommodating the complainant. I note that the respondent states that any contact it had with FÁS was not considered by it as professional advice, rather it was an outline of the services available. I also note that paragraph 31 of the Department of the Environment and Local Government's Code of Practice states that *"on questions of expert advice local authorities should directly approach the organisation where the required expertise is most likely to be found."* I am satisfied that the personnel in the Local Authority who were involved in exploring the question of appropriate treatment and facilities for the complainant did not possess the relevant expertise in this area and consequently, they required external advice. I am of the opinion that the information provided by FÁS comprised such advice and that the Code of Practice placed an onus on the respondent to view and treat it as such, in the absence of any attempt by the respondent to obtain the advice elsewhere.
- 6.9** I propose to deal firstly with the suggestion from Mr. A that the complainant might undergo an independent vocational assessment to identify his work strengths and weaknesses. I note that the respondent states that it never had any objection to such an assessment and that it discussed this issue with Mr. A on a number of occasions, although no record of these discussions were retained on file. I am satisfied however, that these discussions were underway as early as 16 September, 2000, when the complainant's Senior Administrative Officer met with Mr. A. I have examined the report prepared by the Senior Occupational

Therapist at the National Rehabilitation Hospital who conducted this assessment and note the following:

“the complainant carried out three components of the Valpar Work Sample Assessment System. His results indicated very good accuracy. His work speed was just below the standard deemed desirable for open employment. However, his rating suggests that with familiarisation and repetition his work speed could reach the required standard. He carried out the General Clerical Test and his scores place him in the middle 40% of a clerical norm group - indicating that he is suitable for clerical work.”

6.10 The Senior Occupational Therapist also offered the following observations:

“The complainant impressed as highly motivated and demonstrated signs of good work traits as in interest, application, concentration, method and persistence. In certain circumstances the complainant may require some extra time with initial organisation of new work or a new process. Thereafter when a task is fully understood and a routine established he can manage independently.”

6.11 I note with particular interest that the report states that the complainant demonstrated good work traits in, *inter alia*, application, concentration and persistence - the very characteristics the respondent alleges were significantly lacking by him. The results of this assessment, in my view, clearly indicate that the complainant possessed the basic capacity to undertake the duties attached to the post of Clerical Officer and I am satisfied, on balance, that the vocational assessment presents a more realistic outline of the complainant's capabilities than the views of the untrained staff involved with the complainant's performance evaluation within the respondent Authority. I note that whilst the respondent did not have any objection to a vocational assessment of the complainant, it only began to give active consideration to the idea in mid-November, 2000, some six weeks after it had decided that the complainant was not capable of performing his job as a Clerical Officer. I find therefore, that the respondent's conclusion that the complainant was not fully competent and capable

to undertake his duties was a decision reached without proper consideration of all of the relevant factors and could not, therefore, have been reached in a reasonable and objective manner.

6.12 I shall now examine the second initiative suggested by Mr. A - a personal Job Coach for the complainant. I note that the respondent states that following the meeting between the complainant and two of his line managers on 15 August, 2000, the level of training afforded him increased to such an extent that it resembled coaching and that this coaching was performed on a one-to-one basis by the complainant's Staff Officer - without any success. I further note that the respondent states that the provision of a Job Coach did not seem appropriate to the complainant's circumstances as it was the respondent's understanding that such a Coach was more appropriate to a person with mental disability as distinct from a person with residual brain damage, which is what the respondent understood the complainant to suffer from. As I understand it the role of a Coach in these circumstances is to assist the individual concerned to identify the problems in relation to his/her work and through one-to-one tuition and instruction, enable the person to come to grips with these difficulties. It appears to me that to perform such a role effectively requires a significant degree of training - not least when dealing with an individual with a disability to have the necessary awareness of the special difficulties such a person might encounter. Whilst, I am not suggesting that the complainant's Staff Officer did not devote a high level of attention to him, her intervention did not prove successful and at that stage the involvement of a professional Coach might have been appropriate. I note that the complainant's vocational assessment, referred to in the previous paragraph, states that in certain circumstances the complainant may require some extra time with initial organisation of new work or a new process, but thereafter when a task is fully understood and a routine established he can manage independently. In the light of this comment, I am of the opinion that had a professional Job Coach been engaged by the respondent to assist the complainant, the complainant would have been able to carry out the functions attached to his post in a capable and competent manner. I find therefore, that the respondent did not reasonably assess this option, that its decision to dismiss it as not being possibly beneficial to the

complainant was hasty and influenced by subjective factors and could therefore not be considered reasonable.

6.13 The final initiative suggested by Mr. A which may have been of assistance to the respondent was use of the Employment Support Scheme. This scheme offers some level of financial support to employers who employ people with disabilities in certain circumstances. I note that the respondent states that financial matters were not an issue for the respondent but it nonetheless argues that if it were to employ the complainant until the age of potential retirement it would give rise to a cost which would exceed a nominal cost, even if assistance from the Scheme was obtained. I must say that I find these comments difficult to reconcile. Nonetheless I would state, in light of the results of the vocational assessment of the complainant - which indicate that the complainant was competent and capable of performing the functions of a post at clerical level following a period of instruction - that the likelihood of the respondent being subjected to around forty years of expenditure in respect of an employee with a poor level of productivity, was slight. In my view therefore, the worst scenario facing the respondent would have been it having to retain a professional Job Coach for two/three months, at which time the complainant would have been fully equipped to carry out his duties. I am of the view therefore, that the respondent made little, if any, attempt to explore the option of obtaining assistance under the Employee Support Scheme and its approach in this regard cannot be considered as reasonable.

6.14 In light of my comments in the foregoing paragraphs, I am satisfied that the respondent did not adequately examine the options available to it (as suggested by FÁS) in respect of special treatment and facilities which it could provide to the complainant and that its conclusion that the complainant was not fully competent and capable of undertaking the functions attached to his job was not one which was reached in a reasonable and objective manner. In reaching this view, I have been guided by the decision of the Labour court in *A Computer Component Company and A Worker*¹. Notwithstanding the above comments, I believe that I must consider whether the provision of this treatment or facilities

¹ EED13 of 2001

by the respondent would give rise to a cost to it, in excess of a nominal cost. On the basis of the evidence submitted during my investigation, I am of the opinion that the only outlay which the respondent would be have been liable for, which could be construed as financing special treatment or facilities, is the costs associated with retaining a professional Job Coach for a period and the cost of the vocational assessment.

6.15 I note the respondent states that the term “nominal” is not defined in the Act and this is correct. It is, in the first instance, a matter for this Office to decide what constitutes “nominal cost”, a point which was averted to on several occasions on the passage of the legislation through the Houses of the Oireachtas. In my deliberations on this particular matter, I have looked at the Oireachtas Debates on the legislation. I note at Committee Stage in the Seanad that the Minister of State at the Department of Justice, Equality and Law Reform stated that-

“Nominal may not be the same for every employer or enterprise and the term may be interpreted in a relative sense. What is nominal for a large enterprise employing hundreds of people will not be the same as that for a small business with two or three employees.”

In addition, I have examined the judgment of the Supreme Court in the *matter of Article 26 of the Constitution and of the Employment Equality Bill, 1996*². In that part of its judgment dealing with reasonable accommodation the Court states:

“That the Bill has the totally laudable aim of making provision for such of our fellow citizens as are disabled..... It requires [an employer] to bear the cost of all special treatment and facilities ... unless the cost of the provision of such treatment would give rise to undue hardship to the employer. There is no provision [in the Bill] to exempt small firms or firms with a limited number of employees.”

² SC, [1997] ELR 132

6.16 Whilst the Supreme Court was looking at the test of “undue hardship” which was contained in the Employment Equality Bill, 1996, in my view its comments recognised the potential difference in impact of that legislation on small, medium and large employers. The reasonable accommodation provision in the Employment Equality Act, 1998 is similar to that contained in the Bill of 1996, except that the test is now “nominal cost”. I am satisfied that the apparent distinction drawn by the Supreme Court between employers of different size and level of resource (mentioned above) refers equally to employers in both the public and private sectors and is still valid. In addition, it is clear from the Minister of State’s comments above, that the legislature’s understanding on the issue of “nominal cost” was that all employers would not be treated in an identical fashion and that the particular circumstances would have to be evaluated in each case. Applying the foregoing to the instant case, I do not believe that the costs associated with the facilities mentioned at paragraph 6.14 above, could be considered as anything other than nominal to a large public sector organisation.

6.17 The complainant cited a number of other examples where the respondent failed to give reasonable consideration to those issues in its examination of providing the complainant with reasonable accommodation. I do not propose to comment on these factors other than to say that an employer should exercise caution when conducting such an assessment. In addition, I would comment that the respondent’s actions on certain aspects of this case fell considerably short of what is set out in the Code of Practice - failure to notify the complainant’s Senior Administrative Officer at the outset that the complainant suffered from a disability, the fact that the complainant’s supervisory staff did not complete any disability training, the fact that the local authority did not have a Disability Liaison Officer at the time the complainant took up duty and nobody took that Officer’s place, the fact that the respondent never spoke with the complainant about his needs. I would also highlight the fact that very scant records of relevant discussion and actions in the course of the complainant’s tenure as a Clerical Officer with the respondent were retained on file. Without commenting on the foregoing points individually, I would point out that such shortcomings have, in the past, militated against a respondent in certain circumstances.

6.18 One other issue which emerged during my investigation, whilst not particularly relevant to the complaint of discrimination, gave me some cause for concern - this is the meeting which the complainant had with two of his senior line managers on 15 August, 2000. I note that the respondent states that this meeting was not a disciplinary one and that there is no stipulation that an employee cannot have representation at such meetings. Nonetheless, I am sure that such meetings are not a pleasant experience for any of the parties concerned and that in particular, the employee can leave the room quite distressed. I believe that this distress could well be increased in circumstances where the employee concerned has a disability. I would suggest therefore, that the respondent might consider changing the manner in which such meetings are conducted for all employees, but particularly where an employee with a disability is involved, by indicating to that employee, well in advance, that s/he might be accompanied by another person of his/her choice, including an union representative.

7. DECISION

7.1 In view of the foregoing I find that the respondent:

- (a) did not discriminate against the complainant in terms of section 6(2)(g) of the Employment Equality Act, 1998 and in contravention of sections 6(1) and 8(1) of that Act, in terms of his contract of employment with the respondent in May, 2000;
- (b) discriminated against the complainant when it failed to provide him with appropriate special treatment and facilities (reasonable accommodation) in the context of section 16 of the Employment Equality Act, 1998 during his tenure as a clerical officer with that organisation.

7.2 In accordance with section 82(1) of the Employment Equality Act, 1998 I hereby order the respondent to do the following:

- (a) to pay the complainant €15,000 by way of compensation for the distress suffered by him as a result of the complainant's failure to provide him with appropriate special treatment and facilities during his tenure as a Clerical Officer,
- (b) to provide all supervisory staff with appropriate training in disability issues - this training to highlight the requirements under the Employment Equality

Act, 1998 and the Department of the Environment and Local Government's Code of Practice for the Employment of People with Disabilities as well as an appropriate module on disability awareness. The training should commence within four months of the date of this decision.

- (c) that the training referred to at (b) should include, in particular, the official carrying out the duties of Disability Liaison Officer in the Authority. In addition, this official should attend on-going training/awareness courses, or appropriate conferences/workshops or seminars on disability issues to maintain an appropriate level of expertise in the area.
- (d) to keep the issue of disability training for staff in general, but particularly those at (b) and (c) above, under constant review.

Vivian Jackson
Equality Officer
4 February, 2002