

ANTI-DISCRIMINATION (PAY) ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO: EP 08/1999

Ms. Valerie Malone
(Represented by S.I.P.T.U.)

AND

Royal Victoria Eye and Ear Hospital
(Represented by I.B.E.C.)

File No: EP 24/1998

1. DISPUTE

- 1.1** This dispute concerns a claim by S.I.P.T.U., on behalf of Ms. Valerie Malone employed by the Royal Victoria Eye and Ear Hospital, that she is entitled to the same rate of remuneration as that paid to two named male comparators employed by the Incorporated Orthopaedic Hospital of Ireland, Clontarf and the Orthopaedic Hospital, Cappagh in terms of Sections 3(a), 3(b) and 3(c) of the Anti-Discrimination (Pay) Act, 1974. The names of the claimants and the comparators are listed in Appendix A along with their pay details.

2. BACKGROUND

- 2.1** The claimant is employed by the Royal Victoria Eye and Ear Hospital as a household domestic staff worker. One of the named male comparators is employed as a General Operative in the Incorporated Orthopaedic Hospital of Ireland while the other is employed as a portor in the Orthopaedic Hospital in Cappagh. The Union is seeking equal pay for its member with that which is being paid to the two named male comparators.
- 2.2** The Union attempted and failed to resolve the matter at a local level. It, therefore, brought its case to the Labour Court where an award was made in favour of the claimant which fell short of full equal pay with the named male comparators. The Union argues that the claimant is entitled to full equal pay with the named male comparators and, for that reason on 28th September, 1998 it referred a claim to an Equality Officer for investigation and recommendation.

3. SUMMARY OF THE UNION'S CASE

- 3.1** According to the Union the claimant is a part-time member of the domestic staff of the Eye and Ear Hospital since 1989. She works 25 hours per week from 9.00a.m. to 3.00p.m. Monday to Friday and is paid at the 5th point of the domestic pay scale i.e. the maximum point under the part-time staff agreement. The Union says that, since the mid 1980s, there has been an 8% differential paid to staff in Hospitals for carrying out stores duties. In 1994 the Union first raised a claim with the Hospital for the payment of 8% and on failing to resolve the issue at local level the Union referred it to the Labour Court on 25th February, 1998. The

Labour Court awarded the claimant 6% of the Porters rate by recommendation of the 20th April, 1998 but, according to the Union, the claimant lost out on the other 2% because she did not work “full-time”.

- 3.2** The Union says that the reason the claimant’s work is not being remunerated at the full 8% is because the claimant is employed as a domestic staff on a domestic capped rate at the 5th point of the scale by the Department of Health, which in itself, it says, is discriminatory. According to the Union there is no precedent for domestic staff being paid a differential for their stores duties and there is no documentation available from any source stating that the person on stores duties had to be on stores duties 100% of the time. In the Hospitals all porters are male who carry out stores duties. The Union says that the job which is in dispute in this submission is that of stores duties. The length of time the claimant spends on stores duties is at the discretion of the employer and not the claimant. According to the Union the claimant is a part-time worker at the employer’s decision and the stores work she undertakes during that time is as valuable to the employer as is the work of either or both named male comparator to their respective employers.
- 3.3** The Union claims that it is entitled to name male comparators working in different voluntary hospitals to the claimant because they are all part of the Voluntary Hospital Group. It also claims that all three hospitals are covered by Section 2(1) of the Anti-Discrimination (Pay) Act, 1974 as they are subject and responsible to, and under the control of the Department of Health & Children. The Union says that all three hospitals are financially dependent on the Department of Health & Children and it is this latter organisation who sets their rates of pay, holiday entitlements and superannuation scheme. The creation of any new or additional posts must be sanctioned by the Department. Furthermore none of the hospitals would be able to change the type of service they offer in terms of care provided. The Union, in its submission, points out that the hospitals cannot act as independent employers in an independent way and the correspondence previously submitted by the employer to the Labour Court substantiates this. The Union says that, as the hospitals are not separate employers but administered by the Department of Health & Children, they are intrinsically linked and, therefore, comparable to a holding company with a number of subsidiaries.

- 3.4** The Union cites the case of Clonskeagh Hospital v Two Telephonists (EP 40/1979) in which the Equality Officer decided that the women who work in one hospital could compare themselves with the male comparator who worked in another within the same Health Board region. The Union says that some place could mean the entire state as was held in the case of North Western Health Board v Brady (EP 12/1985, DEP 9/1985) where the rate of pay for employees was determined nationally. In this case the Union says that the health services are covered by the reference in Section 2(1) of the Act to ‘same or associated employer’.
- 3.5** The Union argues that the claimant performs ‘like work’ with the two named comparators in terms of Section 3(a) of the Anti-Discrimination (Pay) Act, 1974. It lists the duties (see Appendix B) undertaken by the claimant and the two named comparators and uses this list as a support for its contention. In terms of Section 3(b) of the 1974 Pay Act the Union claims that all three jobs involve the intake of supplies and the delivery of same to hospital departments. It says that there is no significant difference between the jobs and that there is no greater physical effort involved in one store duty over another. In terms of Section 3(c) of the 1974 Pay Act the Union says that the skill requirements, responsibility, physical effort, mental effort and working conditions are the same for the job undertaken by the claimant and that undertaken by each of the two named male comparators. In conclusion the Union says that ‘like work’ does exist between the work of the claimant and the two named male comparators and, for that reason, the claimant is entitled to equal pay with the named male comparators.

4. SUMMARY OF THE RESPONDENT’S CASE

- 4.1** According to the respondent the claimant in this case is employed by the Royal Victorai Eye and Ear Hospital as a household domestic staff worker earning £132 for a 25 hour week. She is seeking equal pay with two named male comparators, one of whom is working in the Orthopaedic Hospital in Clontarf while the other is employed in St. Mary’s Hospital, Cappagh. The respondent says that it does not accept that the claimant has any entitlement under the terms of the Anti-Discrimination (Pay) Act, 1974.
- 4.2** The respondent says that it does not accept that the three hospitals named in this claim are either the same or associated employers within the meaning of Section 2 of the

Anti-Discrimination (Pay) Act, 1974. This issue was addressed previously by the Labour Court in the case of the Department of Agriculture, Food and Forestry and IMPACT (DEP 2/96) in which it held that the Department of Agriculture, Food and Forestry and the organisation Teagasc were not the same or associated employers. The Labour Court concluded that these two organisations were not the same employer as each was an employer in its own right.

4.3 The respondent argues that it is the same with the three hospitals named in this claim. Each hospital has its own board and each is an employer in its own right. The respondent says that the hospitals are not “associated” employers. It argues that a crucial element in relation to “association” is control and no one hospital board has control over the other two and the Department of Health and Children does not have control over any of the three hospitals. The respondent accepts that the Department may fund the hospitals and have a supervisory role in relation to how the hospitals spend their money. It says that this supervision is to do with the State management of public finances and not with the control over how each hospital carries out its functions. The respondent says that the Department cannot tell any of the hospitals how to carry out its functions or even what work to do. Neither could it decide to close down any of the hospitals. On this basis the respondent says that, as the ‘same’ or the ‘associated’ employer does not exist between the organisations, no entitlement to equal pay exists in this claim.

4.4 The respondent says that it is not in a position to contest the issue of whether or not ‘like work’ as defined by Section 3 of the 1974 Pay Act exists between the jobs of the claimant and the named comparators because it does not know what jobs the named comparators perform as it does not employ these people. The respondent says that work inspections will be necessary to establish to nature of the jobs performed by these comparators and following these work inspections the respondent says that it will submit an evaluation of all three jobs under Section 3 of the 1974 Act.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In making my recommendation in this claim I have taken into account all of the arguments

(both written and oral) made by both parties to this claim.

5.2 In this case the Union, on behalf of the claimant, is claiming equal pay in terms of Section 3(a), 3(b) and 3(c) of the Anti-Discrimination (Pay) Act, 1974 with two named male comparators, both of whom work in different hospitals to the claimant. The respondent, in its submission, states that it is not in a position to contest whether or not ‘like work’, as defined by Section 3 of the 1974 Act, exists between the jobs of the claimant and the named male comparators because it does not know what jobs the named male comparators perform as it is not their employer.

5.3 It is my intention, therefore, to firstly examine the issue of ‘same’ and ‘associated’ employer before addressing the question of ‘like work’. In adopting this approach I have had regard to the Labour Court’s finding in the case brought by S.I.P.T.U. against the Irish Times Limited¹ in which the Court held that it

“has not investigated the claim of ‘like work’ in detail by examining the work of the claimant and of the comparator, and considers it unnecessary to do so, since it is satisfied that even if there were ‘like work’ (which is denied), the employer was justified paying different rates of remuneration on grounds not related to the sex of the workers”.

5.4 In its submission the Union says that, as the hospitals are all voluntary hospitals, they are ‘associated’ and, therefore, fall within the scope of the Anti-Discrimination (Pay) Act, 1974. It further argues that, because the Department of Health and Children provide funding to the hospitals, the claimant and the named comparators are employed by an associated employer. The respondent says that hospitals are individual employers operating independently of each other. It says that they are neither the ‘same’ nor ‘associated’ with each other.

5.5 The first issue for consideration is whether or not this claim comes within the scope of the Anti-Discrimination (Pay) Act, 1974. The claimant works in one hospital and the named male comparators both work in two other hospitals. Section 2 of the 1974 Pay Act deals with the issue of entitlement to equal pay as follows:

2(1) *Subject to this Act, it shall be a term of the contract under which a*

¹ Irish Times Limited and S.I.P.T.U. Determination No. DEP985

woman is employed in any place that she shall be entitled to the same rate of remuneration as a man who is employed in that place by the same employer (or by an associated employer if the employees, whether generally or of a particular class, of both employers have the same terms and conditions of employment), if both are employed on like work.

2(2) *For the purposes of this section two employers shall be taken to be associated if one is a body corporate of which other (whether directly or indirectly) has control or if both are bodies corporate of which a third person (whether directly or indirectly) has control.*

The claimant was recruited and is employed by the respondent organisation. The two named male comparators were recruited and are employed by two other hospitals. While each of the hospitals are part of the Voluntary Hospital Group they each have their own board. The Department of Health and Children had no role in the recruitment of the claimant or either of the two named comparators. None of them are members of the Department's staff and they are not paid by the Department. I am, therefore, satisfied that the claimant is not employed by the same employer as either of the two named male comparators. Furthermore the Department of Health and Children is not the claimant's or the comparators' employer. An analogy can be drawn between this claim and the High Court judgement in the case of *Brides v Minister for Agriculture, Food and Forestry*² in which Mr. Justice Budd held that the claimants and the named comparator were not employed by the same employer. He held that the claimants, as civil servants, were employees of the State whereas the comparator was an employee of Teagasc.

5.6 It is also necessary to consider this claim in terms of the extended definition of employers under the 1974 Act i.e. whether the claimant and the named male comparators are employees of associated employers. As already stated (and accepted by both parties) the claimant and the named male comparators are employed by three different hospitals, each of which are members of the Voluntary Hospital Group. I note that each hospital has its own board and operates independently of each other. Furthermore no one hospital has control over the other two hospitals. On this basis I am satisfied that the status of "associated employer" does not exist between the three hospitals.

² High Court Judgement delivered on 21st July, 1997

5.7 In its submission the Union said that all three hospitals are subject and responsible to, and under the control of the Department Health and Children and, therefore, are administered by that Department. Each hospital must receive Department sanction for new or additional posts. The Union draws an analogy between the Department over the three hospitals and a holding company with a number of subsidiaries. The respondent, in its submission, rejects this argument. Mr. Justice Budd in the case of *Brides v Minister for Agriculture, Food and Forestry* (as referred to above) considered the issue of “control” as the criterion under which “association” is to be ascertained in terms of Section 2(2) of the Anti-Discrimination (Pay) Act, 1974. He held that the Department of Agriculture, Food and Forestry could not tell Teagasc

“how to do its work or even what work to do and on the basis of the findings that the Respondent cannot tell Teagasc how certain things are to be done or how money under its control is to be spent, it seemed a reasonable conclusion that Teagasc is not run by the government but is an independent body with regard to day to day control.”

Mr. Justice Budd considered the findings in the case of *Clonskeagh Hospital v Two Telephonists*³ in which an Equality Officer dealt with the situation of an applicant working in Clonskeagh Hospital and claiming equal pay to that received by a male comparator employed in a different hospital where both hospitals were “run by” the same Health Board. The Equality Officer held that the two hospitals were “associated employers” for the purposes of Section 2 of the 1974 Pay Act. According to Mr. Justice Budd:

“This finding was made for the purposes of a recommendation of the Equality Officer and seems to have been a rational and practical application of the section.”

5.8 In this case I note that the Department of Health and Children fund each of the voluntary hospitals and that it has a supervisory role in relation to how the hospitals spend their money. The supervision is a management of public finances as opposed to a day to day control over how the hospitals functions. Furthermore, the Department of Health and Children could not unilaterally decide to close down any of the hospitals. I am satisfied that the hospitals are independent in their day to day functions, not being under the auspices of a Health Board, and having a relationship with the Department of Health and Children similar to that which Teagasc has with the Department of Agriculture, Food and Forestry. On this basis, I find that the

³ Equality Officer Recommendation Ref: EP 40/1979

claimant and the named male comparators are not employed by “associated employers” within the meaning given to the term by Section 2 of the Act of 1974.

- 5.9** As I have found that this claim does not fall within the scope of the Anti-Discrimination (Pay) Act, 1974 it is not necessary for me to address the issue of ‘like work’ between the claimant and the named male comparators in terms of Section 3 of this Act.

6. RECOMMENDATION

- 6.1** In view of my conclusions above I find that the claim brought by S.I.P.T.U., on behalf of Ms. Valerie Malone against the Royal Victoria Eye and Ear Hospital does not fall to be considered within the scope of the Anti-Discrimination (Pay) Act, 1974.

Gerardine Coyle
Equality Officer

1st July, 1999

APPENDIX A

Details of the Claimant
and the
Named Male Comparators

Claimant:

Ms. Valerie Malone
Domestic Staff
Royal Victoria Eye & Ear Hospital

Paid on the 5th Point of the Domestic Pay Scale

Comparators:

Mr. Fergus Fitzpatrick
General Operative
Incorporated Orthopaedic Hospital of Ireland, Clontarf

Mr. Damien Gannon
Porter
Orthopaedic Hospital, Cappagh

Both comparators are paid an 8% differential of the Porters Rate of Pay for stores duties in addition to their basic weekly wage.

The claimant is in receipt of 6% of the Porter's rate following a recommendation of the Labour Court (Recommendation No. LCR15846) of 20th April, 1998 and lost out on the remaining 2% because she does not work full-time. The Union argues that the claimant is entitled to the additional 2%.

APPENDIX B

List of Duties
performed by the Claimant
and the
Named Male Comparators
as submitted by the Union

Claimant's Duties:

- Receive and sign for surgical supplies
- Storing the supplies in the appropriate designated area in the store room
- Respond to enquiries/requests from Department Managers regarding stores
- Assist the Administrative Sister in determining levels of supplies
- Stocktaking
- Full responsibility for stores when Sister is off duty i.e. annual leave, sickness and absent
- Issue supplies/dressings to all departments
- Issue soaps and detergent supplies
- Issue disposal refuse bags to Porter staff on daily basis
- Keep stores clean and tidy

Mr. Fitapatrik's Stores Duties:

- Assist with goods inwards
- Shelf deliveries in general store room
- Keep store room tidy and clean
- Deliver general stores to wards (3) Blackheath, Gracefield and Verandath
- Help with stocktaking

Mr. Gannon's Stores Duties:

- Clean, wash and Hoover floors
- Clean shelves
- Deliver stores throughout hospital
- Intake of deliveries
- Assemble orders from Departments
- Stocking shelves
- Stocktaking