

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 3/1999

PARTIES

MS SHEENAGH NIX  
(REPRESENTED BY THE I.N.T.O.)

AND

BOARD OF MANAGEMENT, OOLA NATIONAL SCHOOL  
(REPRESENTED BY MARGUERITE BOLGER, B.L.)  
INSTRUCTED BY ARTHUR O'HAGAN, SOLICITORS)  
DEPARTMENT OF EDUCATION  
MINISTER FOR EDUCATION

FILE NO: EE30/1997

## **1 Dispute**

- 1.1** This dispute concerns a claim by Ms. Sheenagh Nix that the Board of Management of Oola National School, the Department of Education and the Minister for Education discriminated against her in denying her promotion to the principalship of Oola National School contrary to the Employment Equality Act, 1977.

## **2. Background**

- 2.1** A vacancy for principal in Oola National School was originally advertised on April 1996 due to the retirement of the former principal. Ms. Nix, the claimant, applied for the position and was called for interview on 25 May 1996. She was verbally notified of the interview on 22 May 1996. This was in breach of regulations which provide that candidates are entitled to one weeks notice. She attended for interview on 25 May 1996 and was advised on 26 May 1996 that she was not successful. The INTO subsequently objected to the breach of procedures regarding notification for interview and raised the matter with the Department of Education who requested the Board of Management to re-interview for the position giving adequate notice to all interviewees. The second interviews were held on 5 November 1996. On 11 November 1996 Ms. Nix received official notification she was not successful. Subsequently the INTO, on behalf of the claimant, referred the case to the Labour Court under the Employment Equality Act, 1977.
- 2.2** In February 1997 prior to the successful applicant taking up his position as Principal he informed the Chairperson of the Board of Management that he had decided not to take up the position. The position was readvertised . Ms. Nix applied and was called for interview on 29 March 1997. She was informed by letter dated 4 April 1997 that her application was unsuccessful. On 14 July 1997 the INTO on behalf of the claimant referred this second case to the Labour

Court under the Employment Equality Act, 1977. The Labour Court, on 7 October 1997, referred the case to an Equality Officer for investigation and recommendation. Submissions were received from all parties. The Equality Officer originally assigned to investigate this claim and the earlier claim, was transferred from the Equality Service in May 1998 and the claims were reassigned. Joint hearings of the cases were held on 10 September 1998, following which further submissions were made. This Recommendation deals with the claim that the claimant was discriminated against in April 1997.

### **3. Summary of Claimant's Case**

- 3.1** The claimant originally submitted that she suffered discrimination on grounds of her sex and marital status and was penalised for taking action in pursuance of an entitlement under the 1977 Act contrary to Section 3 of that Act, in terms of Section 2. During the course of the joint hearing the Union on the claimant's behalf withdrew her claims under Sections 2(b) and 2(c) of the Act. Section 2 (a) of the Act, which deals with direct discrimination, states that discrimination shall be taken to occur:

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

Section 2(d) of the Act states that discrimination shall be taken to occur *“where a person is penalised for having in good faith - . . . made a reference under Section 19..”*

- 3.2** The claimant states that she was called to interview on 29 March 1997. She considers that she did a very good interview. She states that she was asked about her work on curriculum development in Mary Immaculate College, Limerick, her views on the current changes in the curriculum, the issue of curriculum overload, the importance of school planning, her approach to co-operative discipline, how she would deal with difficulties which may arise with staff or with parents, the

establishment of a parents' council, her organisational skills, extra curricular activities, her approach to assisting children with remedial and special needs, her attitudes to Irish and religion and what she could offer the school as Principal.

- 3.3** The claimant contends that she is better qualified and more experienced for the position than the successful candidate. She has an honours degree, a certificate in remedial education and sixteen years teaching experience as an Assistant Teacher in Oola National School which is currently a four teacher school. In the absence of the Principal on sick leave during the school year 1995-96 the claimant took responsibility for 5th and 6th class. The vice principal carried out all the administrative duties of the Principal during his absence. However she relied heavily on the claimant regarding school discipline and the implementation of school policies.
- 3.4** The claimant states that during the school year 1986-87 she took part in a project in development education jointly organised by Mary Immaculate College and Trocaire. Upon completion of the course she was seconded by Mary Immaculate College and Trocaire for the calendar year 1988 to collate all the information and to compile a teaching pack for use in Primary Schools. This pack was entitled "Ar Scath a Cheile" and was formally launched in 1989. The claimant was involved in promotion of this pack during inservice courses in 1989. She contends that her management and leadership skills have been developed and enhanced as a result of her year's secondment, and during the year in which she assumed additional responsibilities during her Principal's absence on sick leave.
- 3.5** She states that the successful candidate Mr. Patrick Enright, qualified in 1979 and she qualified one year later. Mr. Enright taught in a boys' national school which catered for 2nd-6th class boys in single grade

classes in Tipperary town since 1979. She taught in Oola National school which caters for boys and girls and involves multi-class teaching. She claims that her experience is more relevant to the position of Principal of Oola National School, Mr. Enright is male and married. She is female and married but separated.

- 3.6** The claimant states that she has an excellent track record in the school. She has taught combinations of second, third, fourth, fifth and sixth classes. She has been responsible for the teaching of music to fifth and sixth classes since her initial appointment and has demonstrated her commitment to the school through her choir work by returning on many occasions to assist the school as Musical Director during her maternity leave and during her year of secondment to Mary Immaculate College. She has developed an excellent relationship with the parents of the school, the broader school community and has worked very well with the staff.
- 3.7** The claimant claims that after her first interview in May 1996, the chairperson of the Board of Management informed her that there was very little between herself and the successful candidate, that she was very close second but that the interview board had wanted balance. As she reapplied for the post when the successful candidate refused it, the Board of Management were in a position to offer her the post. The Board of Management chose to offer the post to another male, who had similar teaching qualifications and less relevant experience than the claimant.
- 3.8** She believes that, in addition to the gender reasons as previously outlined, she was unsuccessful for the position on the basis that she had submitted a claim to the Labour Court under Section 19 of the Employment Equality Act, 1977. She also claims that her view that the Board of Management had favoured a male in order to ensure a

balance, as referred to by the Chairperson following her first interview, was reaffirmed by the Board's decision to appoint a male following the third interview.

- 3.9** She claims that she was the more suitable candidate for the position of Principal of Oola National School, given that her experience was in the school, dealing with mixed classes in multi-grade settings that she had demonstrated her commitment to the school and that she had shown her management, organisation and leadership skills through her involvement in curriculum development and in the formulation of the discipline policy of the school. The Board of Management decided to offer the position to a man on both occasions even though the claimant came a close second at the first interview. The Board of Management had the opportunity to offer her the post rather than readvertise it for the second time.

**4. Summary of Department of Education's Case**

- 4.1** The Department states that Rule 15 (1) of the Rules for National Schools states that the Board of Management of a school is charged with the direct management of the school including the appointment of teachers. All appointments are made by the Board of Management and as such, the contract of employment is made between the Board of Management of the school, as employer and the teacher. All appointments are subject to the approval of the patron and of the Minister for Education. The Minister's function in this regard is to sanction the appointment made by the Board of Management provided the person is suitably qualified and that the appointment is in accordance with the Rules for National Schools.
- 4.2** The Department contends that it has no function, other than that, in the actual appointment or dismissal of primary teachers and that the

initiation of legal proceedings is a matter for the attention of the Board of Management.

**5. Summary of Board of Management's Case**

- 5.1** The Board of Management of the National School rejects the claimant's allegation that she was discriminated against in terms of the Employment Equality Act, 1977
- 5.2** The Board states that the successful candidate from the first interview process declined to take up the offer of the position of Principal. This required the readvertisement of the position of principal and a recommencement of the interview process. On this occasion six candidates presented for interview, four females and two males, and it chose to appoint Mr. Patrick Enright for the position of principal.
- 5.3** The Board argues that the burden of proof in a case such as this rests on the claimant to show that the treatment to which she was subjected to was on grounds of her sex. It submits that she has adduced no evidence whatsoever to discharge her burden. There is no evidence that the decision to prefer Mr. Enright over the claimant was in any way based on her sex.
- 5.4** The decision to appoint Mr. Enright was based on objective criteria in no way connected to sex. These criteria included the definite views held by him on the role of principal in relation to staff, parents and pupils, his clear and thorough knowledge of educational matters, his openness to change in the curriculum and his clarity on how the school should adapt to meet the needs of a changing society.
- 5.5** The Board of Management does not accept the claimant's suggestion that her experience was more relevant than that of the successful candidate. It does not accept that her experience of multi-class

teaching in a co-educational school renders her better qualified for the position of principal than Mr. Enright's teaching experience in a single grade boy's school. The Board recognises that the claimant is an excellent classroom teacher. However in addition to classroom skills, particular management skills are required for the position of principal and it was in this respect that the interview board made the decision that Mr. Enright was the more suitable candidate for the job.

- 5.6** In relation to the criteria used to appoint Mr. Enright it submits that the European Court had held that the evaluation of experience can only be held to be discriminatory where that experience has been evaluated subjectively rather than objectively. It submits that to hold otherwise would render any evaluation of an applicant with similar qualifications and experience impossible which clearly cannot have been the legislative intention. It contends that its choice of selection criteria does not show any evidence of discriminatory intention or effect.
- 5.7** It denies the claimant's suggestion that it was seeking to appoint a man to the position of principal in order to prevent the creation of an all-female staff in the school. The Board denies that there was any such policy or intention on its part and further denies that any statement was made by any representative of it which could have given the claimant the impression of the existence of any such policy. It submits that any interpretation on the use of the word "balance" to indicate the existence of a gender bias is incorrect and without basis.
- 5.8** The Board further contends that the claimant's recollection of the Chairperson's statement following her initial interview is incorrect and has been misinterpreted by the claimant. It states that any suggestion that any of its representatives had any agenda based on achieving a certain, or any, gender balance on the staff is completely unfounded and incorrect.

- 5.9** The Board submits for the reasons outlined that the claimant has failed to discharge her burden of proving that her non-appointment to the position of principal constitutes less favourable treatment on grounds of her sex. It further submits that she has failed to show that she was subjected to any discriminatory treatment in relation to the interview or the selection processes carried out.

## **6 CONCLUSIONS OF EQUALITY OFFICER**

- 6.1** In making my recommendation, I have taken into account all the submissions made to me by the parties.
- 6.2** The Department of Education argues that the contract of employment is made between the Board of Management of the school, as employer and the teacher. The Minister's function in this regard is to sanction the appointment made by the Board of Management provided the person is suitably qualified and that the appointment is in accordance with the Rules for National Schools. It contends that the Department has no function other than that, in the actual appointment or dismissal of primary teachers and that the initiation of legal proceedings is a matter for the attention of the Board of Management. The INTO does not accept this argument.
- 6.3** With regard to this argument I refer to Equality Officer's Recommendation EE12/1 990 (Board of Management, Rahugh National School; The Patron, Rahugh National; the Minister for Education and Ms. Margaret Egan - represented by the INTO) which addressed the question of "the employer" in the case of national school teachers in some detail, and ruled that, for the purposes of employment, the Manager (or the Board of Management) of the school was the employer. I am satisfied that the Board of Management is "the employer" for the purposes of this case.

**6.4** The claimant has alleged discrimination in relation to her failure to be appointed as Principal Teacher of the National School. I note that the grounds put forward by the claimant as supportive evidence of discrimination are as follows:

- she was the most suitable candidate given her experience in the school. Her experience was more relevant to the position than that of the successful candidate
- she had management and leadership skills which were developed and enhanced as a result of her year's secondment and her assumption of additional responsibilities during her Principal's absence on sick leave
- she was a very close second at the previous interview process in May and November 1996
- the interview board had decided to offer the post to a man in order to ensure a gender balance on staff thereby discriminating against her.
- she was unsuccessful for the position on the basis that she had submitted a claim to the Labour Court under Section 19 of the Employment Equality Act, 1977

**6.5** The Board of Management, Oola National School rejects the claimant's allegation that she was discriminated against in terms of the Employment Equality Act, 1977. I am satisfied that the issue which I must consider is whether the claimant has sustained her allegations

- (i)** that the respondent penalised her by not promoting her to the position because she had in good faith made a reference under Section 19 of the Act.
- (ii)** that the interview board discriminated against her on the basis of her sex.

**6.6** There is a direct conflict of evidence between the parties concerning the comment the Chairperson of both the Board of Management and

Interview Board is alleged to have made to the claimant. The claimant states that the Chairperson phoned her to tell her she was unsuccessful and that he said during this conversation "It was very close between you but they said it was a question of balance they wanted balance". The claimant contends that the word balance referred to "gender balance". The Chairperson at the joint hearing explained that he rang the claimant to tell her the outcome of the interview. He stated that he expressed his disappointment for her but did not indicate in any way that the successful candidate was chosen because he was a man. He could not recall using the word "balance" in the conversation. It is not a word he would use in this context. Having given careful consideration to this matter, I consider that it is not possible to infer from the evidence that the comment as alleged was made.

- 6.7** The claimant alleges that as she was placed second in the first interview process she should have been appointed Principal when the successful applicant decided not to take up the position. She contends that there was no need to readvertise the post and that normally in such circumstances it is not readvertised and the position is offered to the person placed second on the panel. At the joint hearing the Chairperson of both the Board of Management and Interview Board stated that he had been advised by the Department of Education to readvertise the position due to the time gap between the offer of the appointment to the successful candidate in November 1996 and his decision in February 1997 not to take up the position. He had no record of this conversation nor did he have the name of the Departmental official who gave him this advice/instruction. Mr. John Rigney, an official from the Department of Education who attended the joint hearing, stated that while the Department had no record of such a discussion this did not mean one had not taken place. He confirmed that a decision to readvertise would be consistent with the standard

advice of the Department of Education in situations such as this where the time scale was significant. The INTO did not dispute this or offer any evidence of similar situations where this had not occurred.

**6.8** The next matter for consideration is whether the interview board discriminated against the claimant on the basis of her sex I consider that an onus lies with the claimant being the person alleging that the discrimination occurred to produce evidence in support of her allegation. I also consider that where an employer treats a person in an unfavourable manner after that person has referred a dispute with him under Section 19 of the 1977 Act, it is reasonable to expect that employer to show that there was no relationship between the reference and his treatment of the person concerned. In a situation where a successful candidate is selected on the basis of performance at interview the questions I must consider are whether the interview was conducted in a non discriminatory manner, whether there are significant reasons why the claimant should have been selected and whether the selection board had credible and non discriminatory reasons for not selecting the claimant. I questioned the members of the interview board on the criteria that they used to select the successful candidate.

**6.9** The interview board informed me at the joint hearing that they did not follow the guidelines for the appointment of a School Principal as set down in the “Board of Management of National Schools- Constitution of Boards and Rules of Procedures”. Para 23 (a) (iii) states, inter alia,

“..The Selection Board shall meet within a reasonable period after the closing date for the receipt of applications. It shall establish criteria for the assessment of the applications, having regard to the Rules for National Schools and requirements of the particular post and shall decide upon the applicants to be called for interview. Records of the criteria for assessment of

applications and of the interviews shall be kept by the Chairperson...”

**6.10** The interview board also informed me that they did not comply with the guidelines for Boards in regard to the procedures for selecting teaching staff which were drawn up by a Working Party representative of the Patrons, the INTO and the Department of Education to assist Board in the implementation of paragraph 23. These guidelines are specifically designed to help promote equality of opportunity for men and women candidates having regard to the provisions of the Employment Equality Act 1977 and the Code of Practice of the Employment Equality Agency (1983). Para. 3 of these guidelines states inter alia

“..The Selection Board shall establish criteria for the assessment of applications and decide upon the applicants to be called for interview. In establishing these criteria the Board must take account of the provisions of the Employment Equality Act, 1977 and should have regard to the Code of Practice of the Employment Equality Agency (1983). Care must be taken to ensure that the criteria do not lead to discrimination against men or women applicants. The Chairperson of the Selection Board shall keep a record of the criteria used. The following factors should be taken into account, having regard to the requirements of the particular post, and the Rules for National Schools, though not exclusively nor necessarily in this order.

- professional qualifications
- teaching experience and reports on competence
- other relevant experience
- references.

..... Records of the interviews shall be kept by the Chairperson of the Selection Board.”

- 6.11** At the joint hearing I asked the Chairperson of the Selection Board for both the records of the criteria for assessment of applications and of the interviews. I was informed that none had been kept. I asked each of the board members to indicate how they reached their decision. The interview board members confirmed that there were no predetermined criteria set by or for them. No pre-interview discussion took place regarding criteria for assessment. Two of the interviewers indicated that they each use their own criteria when either of them are conducting interviews. They explained that they were experienced interviewers. They would have used general criteria rather than any specific criteria. The criteria which either one or both would normally use when conducting interviews cover areas such as discipline, ethos of school, role of school principal, teaching methods, home/school liaison, staff development, curriculum development, Irish, disadvantaged pupils, leadership. The Chairperson explained that he would have left the decision to the other two members of the interview board due to their interviewing experience. I consider that the manner of assessing the candidates should have been recorded and been available.
- 6.12** I note that the interview board kept no record of how it reached its conclusion. Brief notes prepared by the Chairperson some time following the interviews were submitted in evidence. These are notes on each candidate basically outlining impressions of them. However these notes do not shed any light on whether the same criteria were used for each candidate or how they were objectively assessed. The Chairperson's notes included a section entitled "Points made by Selection Board" which appear only to related to the interview board's impressions of the successful candidate. At the joint hearing the recollections of the interview board members of the interviews were vague. They had forgotten details but explained that Mr. Enright was

marginally better than the claimant and another female candidate. The interview board advised me that they had placed the other female candidate second but could give me no information as to why she was placed higher than the claimant.

**6.13** I consider that in situations where guidelines, such as these, for interviews boards are not complied with, I am not in a position to decide that the interview was conducted in a non discriminatory manner and I consider that an inference of discrimination is raised. In this regard I note that when another section of these guidelines on notification for interview was breached in the first interview, the Department of Education requested the Board of Management to reinterview for the position giving adequate notice to all interviewees. The Department of Education at the joint hearing advised me that the Board of Management had certified compliance with the Rules of National Schools when the successful candidate's appointment was sanctioned by the Minister. It is widely recognised that a subjective decision not based on any pre-determined criteria can facilitate unintentional discrimination. Its failure to base its selection on an assessment of the candidates on the basis of predetermined criteria and to keep records of such an assessment makes it more difficult for the interview board to show that its decision not to select Ms. Nix was not related to her sex or indeed to her previous case. However the subjective assessment of candidates does not in itself constitute evidence of discrimination based on sex. I consider that there should be other evidence in the case which would infer that there was discrimination on the basis of sex or that she was penalised because of her previous claim.

**6.14** I was furnished with a copy of the successful candidate's application and curriculum vitae. I have examined this and the claimant's

curriculum vitae in relation to the factors which should have been taken into account, in accordance with the guidelines referred to at Para 6.9

- professional qualifications
- teaching experience and reports on competence
- other relevant experience
- references.

**6.15** Professional qualifications - Mr. Enright had B.Ed degree from Mary Immaculate College, Limerick. He had a Diploma in Religious Studies and a Diploma in Computer Studies. He also had a Diploma in Counselling with Accord. He also had completed a number of inservice courses.

Ms. Nix has an honours B.Ed degree from Mary Immaculate College, Limerick. She completed a course project in development education jointly organised by Mary Immaculate College of Education and Trocaire in the school year 1986 -1987. She also holds a certificate in Remedial Education. She had completed a number of inservice courses.

**6.16** Teaching experience and reports on competence - The successful candidate had eighteen years teaching experience. He had been employed in a boys primary school since 1979. He had written references from his current principal, a priest from Accord with whom he had worked on premarriage preparation courses, and from a principal of an Irish College with whom he worked on summer courses in 1991 and 1992.

The claimant had seventeen years teaching experience. She had been employed as an assistant teacher in Oola National School since 1980. Upon completed of the course in development education she was seconded for 1988 to collate all the information and compile a Teaching Pack for use in Primary Schools. This pack was launched in 1989 and she was involved in the promotion of this during in-service

courses in 1989. The respondent stated that the claimant is an excellent classroom teacher.

**6.17** Other relevant experience - The successful candidate had organised and run basketball leagues for the various classes each term. He had organised school tours both abroad and in Ireland. He had prepared classes for confirmation. He had helped produce and stage a number of school shows. He had been involved in the establishment of a computer room in the school. He also presented a children's programme on local radio for 2 years. He had been Chairperson of the local branch of I.N.T.O for 5 years and was presently serving as a parent's representative on the Board of Management of his school. He was involved in the running of football marathons annually to help raise school funds.

The claimant was the choir and musical director in the school. She conducted the choirs and organised the music for all school events, such as First Communion, Confirmation and Concerts. She had been responsible for the teaching of music to fifth and sixth classes.

**6.18** The interview board stated that he performed better at interview. The Chairperson stated at the joint hearing stated that he told the other two members of the interview board that the successful candidate at the previous interview had decided not to take up the position. He made no reference to the claimant's claim. He explained that he left the decision of selecting the successful candidate to the other two members of the interview board due to their interviewing experience. The other two members of the interview board agreed with this. They stated that they were unaware at the time of the interviews that the claimant had submitted a claim under the Employment Equality Act 1977 in relation to the previous interview process.

**6.19** I consider that it is not possible to infer from the evidence that her treatment by the interview board constituted less favourable treatment on grounds of her sex or on grounds that she was penalised for taking a previous claim under Section 19 of the Act. I have considered that reference by the INTO to the case of Wallace and South Eastern Education and Library Board which inter alia states “the unsuccessful but better candidate was a woman is itself evidence of discrimination on grounds of sex”. I am not satisfied that it has been shown that Ms. Nix was the better candidate such that the allegation of discrimination on grounds of her sex can be sustained. Having considered all the evidence I have no option but to conclude that there is insufficient evidence to support a finding that Ms. Nix was discriminated against on the basis of her sex or was penalised because she had in good faith made a reference under Section 19 of the Act.

## **7. RECOMMENDATION**

**7.1** I find that Board of Management of Oola National School did not discriminate against Ms. Nix in terms of Section 2 of the Act and contrary to Section 3 of the Act.

Deirdre Sweeney  
Equality Officer

5 February 1999.