

EMPLOYMENT EQUALITY ACT,1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 6/1999

PARTIES

Ms. Sheila O'Dea, Ms. Sheila Hallinan & Ms. Nora O'Dwyer

-vs-

South Eastern Health Board

File No's: EE25/1998, EE26/1998, EE27/1998

1. DISPUTE

- 1.1 The dispute concerns claims by Ms Sheila O'Dea, Ms Sheila Hallinan and Ms Nora O'Dwyer that in January 1998 the South Eastern Health Board discriminated against them within the meaning of Section 2(a) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act in its allocation of night duty postings to them.

2. BACKGROUND

- 2.1 The South Eastern Health Board provides a mental health service for North and South Tipperary at St. Luke's Hospital, Clonmel. The hospital provides twenty four hour in-patient care for acutely ill patients, long stay psychogeriatric patients, mentally handicapped patients and mentally disturbed patients. The Health Board employs male and female psychiatric nurses to provide these services. The provision of a twenty four hour in patient service requires that nurses be rostered for night duty. The normal nursing requirement for the night duty roster is 15 nurses. Nurses who are rostered for night duty are paid a night duty allowance. The dispute concerns the amount of night duty postings allocated to female nurses compared with their male counterparts.
- 2.2 The claimants referred claims to the Labour Court in June, 1998. The claims were subsequently referred by the Labour Court to an Equality Officer for investigation and recommendation. Submissions were received from the parties to the claim who requested that the complaints be heard together. A joint hearing of the complaints was held on 5 February, 1999. The respondents furnished a further submission at the hearing which gave rise to further correspondence with both sides subsequent to the hearing.

3. SUMMARY OF THE CLAIMANTS' CASE

- 3.1 The claimants allege that the Health Board discriminated against them in terms of Section 2(a) of the Employment Equality Act, 1977.

Section 2(a) states that discrimination shall be taken to occur where

'where by reason of his sex a person is treated less favourably than a person

of the other sex'

- 3.2 The South Eastern Health Board is required to provide twenty four hour care for its patients at St Luke's Hospital, Clonmel. At the time of the claim there were nine wards in operation, seven of which were mixed wards catering for male and female patients while the remaining two were single sex wards. The provision of this service requires that a certain minimum nursing complement be maintained during night-time hours. Hospital management have determined that the minimum requirement is 15 nursing staff. At the time of the claim this number was broken down 8 male nurses and 7 female nurses. The claimants state that the male and female nursing staff are fully trained to cater for all of the patient requirements at night, regardless of the patient's gender, including the restraint of disturbed and violent patients and looking after personal hygiene requirements.
- 3.3 A round of night duty covers a 28 day period and consists of one week on nights followed by one week off, a further week on nights followed by a further week off. A nurse therefore works 14 nights during a 28 day round of night duty. To provide a complement of 15 nurses every night of the year amounts to a total of approximately 390 night duty postings per annum. These postings are allocated to those nurses who are available for night duty postings. Prior to 1998 a total of 88 nurses were available for night duty, 42 males and 46 females. There were then 416 night duty postings per annum (a tenth ward was in operation at the time), 208 were allocated to the 42 males nurses and 208 were allocated to the 46 females nurses. The average number of night duty postings for male nurses was 4.95 and for female nurses was 4.52.
- 3.4 The ratio of female to male nurses who were available for night duty increased significantly in January 1998 when 23 long term temporary female nurses and 1 temporary male nurse were made permanent as part of an agreement under the Programme for Competitiveness and Work. A number of male nurses retired around this time also. The resulting number of nurses available for night duty became 34 males and 68 females. At the same time the total number of night duty postings per annum dropped to 390 as a result of a ward closure. Of the 390 night duty postings 208 were still allocated to the reduced number of male nurses

while 182 were allocated to the significantly higher number of female nurses. The average night duty postings then became 6.12 for males and 2.68 for females. These figures are shown in tabular form below:

Pre 1998 Night Duty Postings

	Available Nurses	Night Duty Postings	Average Per Nurse
Female	46	208	4.52
Male	42	208	4.95
Total	88	416	4.73

Night Duty Postings in 1998

	Available Nurses	Night Duty Postings	Average Per Nurse
Female	68	182	2.68
Male	34	208	6.12
Total	102	390	3.82

- 3.5 The claimants argue that there are no justifiable grounds for the different allocation of night duty postings to male and female nurses. Night work carries a premium rate of pay and female nurses, as a consequence of what they see as an inequitable allocation of night duty, have lower earning potential than their male counterparts. As the night duty allowance is pensionable there is a knock on effect so that the pension of a female nurse would be lower than that of a male nurse with similar service. The claimants have provided detailed calculations prepared by an accountant of what they regard as unfair loss of earnings and reduced pension entitlements. The claimants also state that nurses who are on night duty can work additional hours on their off weeks and further increase their earnings. Such

additional hours would not be pensionable.

- 3.6 During the course of the hearing the Health Board circulated a further submission in which the Health Board outlined further proposals which were put to the unions (see paragraph 4.5 below). The claimants, in a written response subsequent to the hearing, stated that the new proposals did not provide for equal access to night duty for female nurses. Under the first new proposal, 16 nurses would be rostered for night duty at a time i.e. 10 females and 6 males. According to the claimants this would work out at 416 night duty postings in the year, 260 of which would go to 65 female nurses giving an average of 4 per nurse and 156 would go to 32 male nurses giving an average of 4.87 per nurse. Under the second new proposal, 15 nurses would be rostered for night duty at a time i.e. 10 females and 5 males, giving 390 night duty postings in the year. The allocation to male nurses would remain the same while 234 would go to 65 female nurses giving a lower average of 3.6 per nurse. The claimants held that the only fair allocation of night duty was 15 nurses per night duty roster made up of 10 female and 5 male nurses giving averages of 4 for female nurses and 4.06 for males. In the new submission the Health Board also referred to some 'marginal progress' which had been and that 8 females are now allocated to night duty while the number of males allocated is 7. The claimants state that the only reason the number of males on night duty was reduced in January 1999 was because of male staff shortages on day duty which had a knock-on affect on the night duty rosters. The Health Board rejected this interpretation in further correspondence after the hearing.

4. SUMMARY OF THE HEALTH BOARD'S CASE

- 4.1 The Health Board confirmed that the allocation of night duty between male and female nursing staff followed the pattern outlined above by the claimants although the Health Board would state that the number of male nurses available for night duty at the time of the claim was 39 and not 34 as stated by the claimants. The Health Board confirm that the appointment of 23 long term temporary female nurses to full time positions in January 1998 without any reduction in the allocation of night duty to male nurses had the effect of significantly reducing the amount of night duty available to existing permanent female staff.

- 4.2 The Health Board stated in their submission that they set out to address this imbalance and put proposals to the two unions representing psychiatric nurses in the hospital, both male and female, with a view to increasing the amount of night duty available to female nurses. One proposal was to increase the number of female nurses on night duty to 9 and to reduce the number of males to 6. An alternative proposal was to create what the Health Board referred to as a ‘fused panel’ of nurses where the gender of the nurses assigned at any time would be variable. While the unions had no difficulty with the Health Board’s aim of increasing the amount of night duty available to female nurses they would not accept any reduction in the number of male nurses allocated to night duty quoting reasons of patient and staff safety in particular, referring to the geographical layout of the hospital and the distances between wards. The Health Board responded to the unions that training had been provided for all staff in dealing with difficult clients and aggression. The training covered a Control and Restraint Programme and Breakaway Techniques. A personal alarm system was also in operation.
- 4.3 Despite the level of training provided, the staff unions insisted that there was a need to maintain the current number of male nurses on night duty in order to manage difficult situations on the admission and disturbed wards. The unions further requested the assignment of an additional male nurse to St John’s Ward (male disturbed patients). The Health Board responded that due to resource constraints it could only increase the overall number of nurses assigned to night duty by diverting resources from the day duty roster.
- 4.4 The Health Board summarised its position in its initial submission as follows:
“This difficulty with regard to frequency of access to night duty arose because of the number of females that were appointed following a competition for long term temporary nurses as part of the PCW Agreement on Pay and Conditions for nurses. The South Eastern Health Board has put proposals to staff on the resolution of the imbalance in access to night duty, staff have indicated because of safety and staff shortages on night duty on a male disturbed ward they cannot agree to the proposals being implemented. The South Eastern Health Board continue to pursue in their efforts to address this matter to create a balance in the rostering to night duty which is currently 8 males and 7 females per night.”

- 4.5 In a further submission presented at the hearing the Health Board outlined further proposals which were put to the nursing unions in the interim with a view to increasing the proportion of night duty allocated to female nurses. Under the first new proposal the number of females on night duty would be increased to 10 and the number of male nurses would be reduced to 6. An alternative proposal would have led to the number of female nurses assigned to night duty being increased to 9 while the number of male nurses would have been 6. The Health Board stated that these new proposals were also rejected by the unions.

5 CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1 The matter for consideration is whether or not the South Eastern Health Board discriminated directly against the claimants on the basis of their sex in terms of Section 2(a) of the Employment Equality Act, 1977 and contrary to the provisions of Section 3 of that Act in their allocation of night duty postings to the claimants. In making my recommendation in this case I have taken into account all of the evidence, both written and oral, made to me by the parties to the case.
- 5.2 In the course of my investigation of the complaint I noted that the Health Board accepted that there was an imbalance in the allocation of night duty postings between male and female nurses which resulted in male nurses having greater access to night duty postings and higher earnings. In a letter from the Health Board to one of the unions representing psychiatric nurses in the hospital (copied to the Equality Officer by the claimants), the Health Board stated:

“The solution must be aimed at solving the inequality of access to night duty by females. In minimising the discrimination against females on the roster, the priority must be the provision of a client centred service that embraces the concept of staff and patient safety”.

- 5.3 I found the above extract to be consistent with the Health Board’s submissions to the Equality Officer and with the Health Board’s evidence at the hearing. The Health Board

was involved in ongoing discussions with the two unions with a view to reaching agreement on changes to the night duty rosters and indeed had put a number of proposals to the unions. It is clear from the evidence that the unions were not prepared to agree to the proposed changes and that as far as the claimants were concerned the discriminatory division of night duty postings was allowed to continue.

- 5.4 In relation to the new proposals referred to in paragraph 4.5 above, the claimants have stated that neither of these proposals would have resulted in equal access to night duty postings for female nurses.
- 5.5 According to the Health Board, the principal grounds for the unions' objections to the reduction in the allocation of night duty postings to male nurses was the need to maintain staff and patient safety at night. The claimants rejected this argument and argued that all nurses, male and female, were fully trained in the control of patients. The claimants stated that it was not unusual for wards, with the exception of the male disturbed ward, to be fully staffed by female nurses from 6 pm to 8.30 pm. The Health Board accepted the claimants' argument that all nurses were fully trained to deal with difficult situations and that the gender of a nurse should not be an issue. However the Health Board also stated that they had to accept that the nursing unions had expressed concern to the Health Board in relation to staff and patient safety and that the Health Board had to take on board those concerns.
- 5.6 I considered that the issue of staff and patient safety was central to this complaint. The Health Board, as employer, has certain responsibilities in relation to staff, patients and the general public under occupational, safety and health legislation. However in exercising those responsibilities it must also comply with employment equality legislation. Although in disagreement with the nursing unions, the Health Board is satisfied and the claimants agree, that the level of training provided to all nurses is such that they are all qualified to deal with any eventuality arising on a ward at night. It was stated at the hearing by the claimants that a Health and Safety Inspector of the Health and Safety Authority recently visited the hospital. The Inspector in his report referred to the need for adequate training in restraint techniques and the need for the immediate availability of three trained personnel in the event of a

disturbance. The claimants drew attention to the fact that the gender of personnel was not a safety and health issue with the Inspector. A copy of the Inspector's report was furnished to the Equality Officer by the Health Board subsequent to the hearing. The Inspector's report also referred to the need for improvements in the personal alarm system and the need for the Safety Statement to clearly identify the hazard, associated risk and control measures for dealing with workplace violence. I must conclude therefore that the issue of staff and patient safety cannot form the basis for a division in the allocation of night duty postings between male and female nurses.

- 5.7 I considered whether the sex of a nurse could be considered to be an occupational qualification for night duty having regard to Section 17 of the 1977 Act as amended. At the hearing I asked the claimants were there areas of patient care such as personal hygiene where it was appropriate that a nurse of the same sex should attend a patient. They responded that it was normal practice on the wards for nurses of both sexes to attend to patient needs as they arose regardless of the sex of the patient. They stated that a nurse was of no use on a ward if they could not attend to all patient requirements. The Health Board agreed that a nurse would tend to patient needs regardless of gender. I concluded therefore that sex was not an occupational requirement in terms of Section 17 of the 1977 Act in relation to night duty.
- 5.8 Having regard to paragraphs 5.1 to 5.6 above I find that the South Eastern Health Board did discriminate against the claimants in its allocation of night duty postings to them subsequent to the appointment of additional permanent nurses in January, 1998.

6 RECOMMENDATION

- 6.1 On the basis of the foregoing, I find that the South Eastern Health Board did discriminate against Ms Sheila O'Dea, Ms Sheila Hallinan and Ms Nora O'Dwyer on the basis of their sex in terms of Section 2(a) and in contravention of the provisions of Section 3 of the Employment Equality Act, 1977.

- 6.2 I recommend that the Health Board make immediate arrangements to ensure that qualified male and female nurses have equal access to night duty postings. This should be done by ensuring that the ratio of male to female nurses allocated to night duty reflects as closely as reasonably practicable the ratio of male to female nurses available for night duty.
- 6.3 I further recommend that the claimants be paid an amount of £1,500 each to compensate them for the loss and stress they have suffered as a result of the discrimination.

Raymund Walsh
Equality Officer
18 May, 1999