

ODEI -THE EQUALITY TRIBUNAL

Employment Equality Act, 1998

DEC-E2002-039

Maguire
(Represented by the Equality Authority)

V

North Eastern Health Board
(Represented by HSEA)

File No. EE 2002/019

Date of Issue 22/08/2002

TABLE OF CONTENTS

SECTION	PAGE
Summary	
Dispute	1
Background	1
Summary of the Complainant's Submission	1
Summary of the Respondent's Submission	4
Conclusions of the Equality Officer	6
Decision	13

Appendix A - Copy of the Reference submitted
by the Complainant

SUMMARY¹

Maguire (complainant) Represented by the Equality Authority vs North Eastern Health Board (respondent) Represented by the HSEA:

Equality Officer Decision DEC-E 2002/039 (Coyle G.) 22nd August, 2002

Employment Equality Act, 1998 Sections 6, 8, 15, 32, 56, 74, 77 - Employment - Traveller - *Prima Facie* case - Burden of Proof - Harassment - Victimisation - Dismissal

Background:

The complainant alleges that he was discriminated against by the respondent on the Traveller ground when his complaint following harassment at the Christmas Party was not investigated. The complainant also alleges that he was treated differently by both management and colleagues when they became aware that he was a Traveller. The respondent denies the allegations that the complainant was treated less favourably on the Traveller ground. The respondent accepts that the complainant made a complaint about harassment at the Christmas Party but it did not consider that it was appropriate to get involved in an incident which occurred outside the workplace.

Conclusions:

The Equality Officer found that the complainant established a *prima facie* case of discrimination. The Equality Officer was not satisfied that the respondent had discharged the onus on it to rebut the allegations. The Equality Officer found that the respondent discriminated against the complainant in terms of Section 32 of the Employment Equality Act, 1998 and it failed in its obligations to investigate the complaint. The Equality Officer noted that the respondent reduced the working hours allocated to the complainant after he made the complaint.

Decision:

The Equality Officer found that the respondent did discriminate against the complainant and ordered the respondent to implement a Harassment Policy, a Code of Practice on staff treatment of members of the Traveller Community, a fair and transparent disciplinary procedure and the respondent was ordered to pay the complainant the sum of €5,000 for the stress suffered.

¹This Summary is provided for convenience only and is not part of the Decision for legal purposes.

Cases Cited:

1 Equality Officer Decision - Freeman v Superquinn (DEE-E2002-013) of 5th March, 2002

2 Equality Officer Decision - Eng v St. James Hospital (DEE-E2001-041) of 20th December, 2001

3 Equality Officer Decision - Nevin v The Plaza Hotel (DEE-E2001-033) of 7th November, 2001

4 Equality Officer Decision - Gorry v Manpower (DEE-E2001-017) of 8th June, 2001

Labour Court Determination - Teresa Mitchell v Southern Health Board (Cork University Hospital) (DEE 011) 15th February, 2001

1. DISPUTE

- 1.1** This dispute concerns a claim by Mr. Francis Maguire who was employed by the North Eastern Health Board that he was discriminated against in terms of Sections 6(1) and 6(2)(i) of the Employment Equality Act, 1998 and in contravention of Section 8 of that Act when he was treated differently by management and staff after they discovered he was a Traveller and when he was harassed at a Christmas Party.

2. BACKGROUND

- 2.1** The complainant commenced employment with the respondent organisation in November, 2001 as a Care Attendant in a temporary capacity. He says that three week after commencing employment it was discovered that he was a member of the Traveller Community and as a result attitudes towards him changed. At the Christmas Party he alleges that he was called a “knacker”. According to the complainant he asked the Director of Nursing to intervene to ensure that this did not happen again but she refused. Subsequent to this incident the complainant was dismissed.
- 2.2** Consequently the complainant lodged a formal complaint with the Director of Equality Investigations on 30th January, 2002 under the Employment Equality Act, 1998. In accordance with her powers under Section 75 of that Act the Director then delegated the case to Gerardine Coyle, Equality Officer on 20th February, 2002 for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. Submissions were received from both parties and a joint hearing took place on 23rd July, 2002 and the complainant submitted further information on 26th July, 2002.

3. SUMMARY OF THE COMPLAINANT’S SUBMISSION

- 3.1** According to the complainant he commenced employment on 20th November, 2001 with the respondent organisation as a care attendant in the Service for the Elderly, Drogheda. The complainant states that he got on well with the staff and the patients. He enjoyed

work and was very dedicated to it. The complainant says that the Clinical Nurse Manager told him that he was a good worker and that he was good at his job. He worked for six consecutive days and he also worked his day off.

3.2 The complainant says that he was approached three weeks later by a fellow worker who indicated to him that she recognised him from somewhere and it was established that they knew each other from school. According to the complainant this fellow worker knew that he was a Traveller. It is the complainant's contention that, in the days following this, the atmosphere changed. His fellow workers did not talk to him as much as before and they started bossing him around, telling him what to do and also telling him to do their work. According to the complainant this continued until January, 2002. The complainant says that he felt intimidated and upset by his colleagues.

3.3 Two weeks into December the complainant handed out Christmas Cards to his fellow workers. He attempted to give a card to the Clinical Nurse Manager but she refused it in a rude manner. The complainant says that he was shocked and embarrassed by her manner. According to the complainant she took the card and then informed him that there had been a complaint made about him. When the complainant attempted to establish the nature of the complaint he was told to 'forget about it'. The complainant notes that when he was on a work break the Clinical Nurse Manager would interrupt him and ask him to carry out some task. According to the complainant she would never disturb any of the other staff on their breaks.

3.4 The complainant says that, on 19th December Geraldine Mattis (Assistant Director of Nursing) asked him to sign a three month contract and he notes that this was not mentioned in his job interview. It is the complainant's contention that this was all to do with the fact that he is a Traveller.

3.5 On 20th December, 2001 the complainant attended the staff Christmas party in the Bridgeford Hotel. He says that everything was going well until the end of the night when the fellow worker he had known from school (see paragraph 3.2 above) mentioned that

she was having a party in her house after the function in the hotel and she was inviting all her fellow workers. The complainant alleges that he heard her say to them “the knacker is not coming”. According to the complainant he told her that he did not want to go and he asked her not to call him a knacker to which she replied “you are a knacker”. The complainant says that he walked away to go home when this fellow worker’s boyfriend called him a knacker, kicked him to the ground and with the assistance of a friend proceeded to attack him.

- 3.6** The following day the complainant called to see the Director of Nursing (Matron) to inform her that he would be unable to work as he had injured his finger and he explained about the incident at the party the previous evening. The complainant asked the Director of Nursing to intervene and to ask the female in question not to call him names but the Director of Nursing stated that it had nothing to do with her. According to the complainant it was then that the Director of Nursing and the Assistant Director of Nursing told him that they did not consider him suitable for the job. The complainant says that he was told that he was too familiar with staff and slow at his work and he was informed that his work would be reduced to two days a week. He was told that the matter would be discussed again after the New Year.
- 3.7** The following day (24th December, 2001) at work there was a little party for the patients and the complainant along with a nurse was on duty giving out drinks and generally enjoying the party. The complainant says that he was chewing gum and the nurse was chewing sweets and they were both clapping their hands to the music. According to the complainant the Clinical Nurse Manager (Sister) called him and told him to stop chewing and standing there doing nothing. She also said that if patients’ relatives come in and see you like that they will think that you are common. The complainant says that he felt humiliated by this reprimand.
- 3.8** The complainant says that he worked on 26th December and on 28th December he telephoned the respondent organisation, as usual, to establish his work roster. According to the complainant he was told that there was no work for him that week. He was

telephoned on 4th January, 2002 and asked to attend work which he did and he was given work the following day also. The complainant says that, on both these days, his fellow workers were very nice to him. According to the complainant he was telephoned on 7th January, 2002 by the respondent and asked to attend for work for four days this week. The complainant attended for work on Tuesday, 8th January at 10.30a.m. and was told by the Clinical Nurse Manager (Ward Sister) that the Director of Nursing (Matron) wanted to meet him at 2.00p.m. At this meeting the Director of Nursing told him that his personality was not suitable for the job and that he was being let go. According to the complainant he asked for a reference and was told that it would not be a good reference. The complainant was told that he could work this week and the next week and then he would be let go. The complainant chose not to accept the two weeks offer of work and went home.

4. SUMMARY OF THE RESPONDENT'S SUBMISSION

- 4.1** The respondent notes that the complainant is alleging that he was discriminated against on the grounds of membership of the Traveller community. The respondent denies that he was subjected to victimisation and that his dismissal was on discriminatory grounds. In relation to the allegation of victimisation the respondent contends that there was no victimisation in terms of Section 74(2) of the 1998 Act. The respondent states that in relation to the complainant's reference to dismissal, Section 77(2) provides that a claim for redress for dismissal on discriminatory grounds should be referred to the Labour Court and not the Director of Equality Investigations.
- 4.2** According to the respondent the complainant commenced employment as a Relief Attendant on 20th November, 2001. Relief staff are employed on an "if and when required basis" i.e. their hours of work may vary from week to week depending on service requirements. The complainant was assigned to the Drogheda Services for the Elderly which covers three sites namely St. Mary's Hospital, Boyne View House and the Cottage Hospital. He received induction training over the period of a day and a half and he then commenced working on 22nd November, 2001.

- 4.3** The respondent states that during the complainant's employment management received a number of complaints in relation to his performance and conduct and outlined to him their concerns regarding his suitability. On 8th January, 2002 the Director of Nursing (Ms. Kerr) met with the complainant and informed him that she would be terminating his employment as he was not deemed to be suitable for the job. She advised him that she would be rostering him for duty the following week after which his employment would be terminated. According to the respondent the complainant stated that he would not be returning for duty.
- 4.4** The respondent rejects the complainant's allegations that he was subjected to discriminatory treatment and harassment during the course of his employment. The respondent rejects the allegation that the complainant being a member of the Traveller community had any bearing on the nature or duration of his contract. According to the respondent the complainant was employed as a Relief Attendant which meant that he was rostered for work on an "if and when required basis" subject to the exigencies of the service. The respondent states that the complainant was clearly advised that he was being employed on a three month contract and that his hours of work were not predetermined.
- 4.5** The respondent notes that the complainant did not make a formal complaint to management that his colleagues were giving him inappropriate instructions and the respondent contends that it cannot be held responsible for not taking action in relation to this matter. The respondent also rejects the complainant's allegations that he was treated differently by the Clinical Nurse Manager in relation to his breaks. According to the respondent any interruption of the complainant's rest breaks would be in response to a genuine service need and this would apply equally to all staff. In relation to the alleged harassment that occurred at the staff Christmas party the respondent acknowledges that the complainant reported the alleged incident to the Director of Nursing who felt that, as the alleged incident occurred outside the workplace, it would not be appropriate to get involved.

- 4.6 The respondent submits that there were a number of complaints in relation to the complainant's work performance and conduct which resulted in the termination of his contract of employment. The Director of Nursing met with the complainant on 21st December, 2001 to outline her concerns regarding his suitability and the need for improvement. The respondent notes that three Clinical Nurse Managers had to speak to the complainant in relation to his performance and conduct. Despite these warnings the respondent states that the complainant's conduct and work performance remained unsatisfactory and the respondent was left with no option but to terminate his employment.
- 4.7 The respondent rejects the complainant's allegations that he was subjected to discriminatory treatment and harassment during the course of his employment. The respondent states that the complainant's membership of the Traveller community had absolutely no bearing on any of actions with regard to his performance or termination of employment.

5. CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1 The issue for decision in this claim is whether or not the respondent discriminated against the complainant in terms of Section 6(1) and Section 6(2)(i) of the Employment Equality Act, 1998 when it allegedly treated him in a discriminatory manner. In making my decision in this claim I have taken into account all of the submissions, both oral and written, made to me by the parties.
- 5.2 The complainant alleged that the respondent discriminated against him on the Traveller ground contrary to the provisions of the Employment Equality Act, 1998. Section 6 of the Act provides that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, on one of the discriminatory grounds, including the Traveller ground. Section 8(1) of the Act provides that:

"In relation to -

(b) conditions of employment ...

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

5.3 In relation to the burden of proof the traditional approach taken to complaints of discrimination on the original grounds of gender and marital status in the case law of the European Court of Justice and the Labour Court has been that once a complainant makes a *prima facie* case of discrimination, then the onus moves to the respondent to rebut the presumption of discrimination. This common law approach has become the statutory requirement in complaints of gender discrimination in employment following the transposition of Council Directive 97/80/EC into Irish law on 18th July, 2001 by means of the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001 (SI 337 of 2001). The Council Directive and Regulations are not applicable to grounds other than gender but as this approach appears to me to be fully consistent with the development of discrimination case law I intend to apply it to this complaint which has been brought on the Traveller grounds under the provisions of the Employment Equality Act, 1998. This approach has been adopted by Equality Officers in cases brought on the grounds of age and marital status², race³, traveller⁴ and disability⁵.

5.4 The complainant must establish facts from which it may be presumed that the principle of equal treatment was not applied to him. In the case of *Teresa Mitchell v Southern Health Board (Cork University Hospital)*⁶ the Labour Court said “... *this approach means that the appellant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A prima facie case of discrimination can only arise if the appellant succeeds in*

²Equality Officer Decision - Freeman v Superquinn (DEE-E2002-013) of 5/03/02

³Equality Officer Decision - Eng v St. James Hospital (DEE-E2001-041) of 20/12/01

⁴Equality Officer Decision - Nevin v The Plaza Hotel (DEE-E2001-033) of 7/11/01

⁵Equality Officer Decision - Gorry v Manpower (DEE-E2001-017) of 8/06/01

⁶Labour Court Determination DEE 011 of 15th February, 2001

discharging this evidential burden. If she does, the respondent must prove she was not discriminated against on [the relevant ground]. If she does not, her case cannot succeed”.

- 5.5** It is alleged by the complainant that attitudes towards him changed after three weeks working with the respondent. According to the complainant this followed a fellow worker having recognised him as a Traveller. This change in attitude manifested itself in fellow workers no longer talking to him as much as before, ordering him around and getting him to do their work. The complainant alleges that he attempted to give a Christmas Card to Ms. Vesey, a Clinical Nurse Manager and she initially refused it in a rude manner but later accepted it. It is the complainant's contention that Ms. Vesey informed him that there had been a complaint made against him but she refused to elaborate on the nature of the complaint. The complainant alleges that only he would be interrupted by management during his breaks to undertake tasks. On 19th December, 2001 the complainant was asked to sign a three month contract. The complainant alleges that, at a Christmas Party, a fellow worker called him a “knacker”. The following day the complainant brought this to the attention of the Director of Nursing and asked her to intervene by asking the fellow worker to refrain from calling him names. According to the complainant the Director of Nursing refused and informed him that she did not consider him suitable for the job citing familiarity with staff and slow work progress as the reasons. She also stated that she would discuss this matter again with the complainant after Christmas. At a party for patients on 24th December, 2001 the complainant alleges that the Clinical Nurse Manager (Ms. Murphy) reprimanded him for chewing gum and doing nothing. It is the complainant's contention that he was chewing gum and clapping his hands to the music. The complainant considered this criticism unfair as the nurse on duty was chewing sweets and clapping her hands. According to the complainant he was informed by the Director of Nursing on 8th January, 2002 that his personality was not suitable for the job and he was let go.

- 5.6** The respondent denies that it discriminated against the complainant on the Traveller ground. It notes that the complainant made no formal complaint to management that his colleagues were giving him inappropriate instructions and says that it cannot be held responsible for not taking action in relation to this matter. The respondent also denies the allegation made by the complainant that he was treated differently in relation to his breaks. It is the respondent's contention that Ms. Vesey invited the complainant to a meeting to discuss his performance and he handed her a Christmas Card. As regards the alleged incident at the Christmas Party the respondent acknowledges that the complainant reported it but as it occurred outside the workplace it was not appropriate to get involved. According to the respondent a number of complaints were made in relation to the complainant's work performance and despite warnings his work performance remained unsatisfactory hence the respondent had no option but to terminate his employment.
- 5.7** There is no evidence to support the allegations by the complainant that attitudes of fellow workers towards him changed after three weeks of employment with the respondent and that he alone was interrupted during breaks by management to carry out tasks. The incident at the party for patients on Christmas Eve is acknowledged by both parties and I am satisfied that there is no evidence to support the contention that the complainant was treated less favourably on the Traveller grounds.
- 5.8** As regards the issue of the complainant handing a Christmas Card to Ms. Vesey there is a conflict between the parties as to whether the complainant approached Ms. Vesey to give her the card or whether he gave it to her after she called him to a formal meeting. In relation to the Christmas Party I note that both parties accept that the complainant reported the incident which occurred at that party and that the respondent declined to become involved. In relation to these two incidents I am satisfied that the complainant has established a *prima facie* claim of discrimination and the onus is on the respondent to rebut these allegations.
- 5.9** Concerning the issue of the complainant giving Ms. Vesey a Christmas Card, I am satisfied, on the balance of probabilities, that the complainant approached Ms. Vesey

with the card and that it was not done in the context of a formal meeting arranged by Ms. Vesey. The respondent in its submission failed to mention that Ms. Vesey had arranged a meeting with the complainant to discuss his performance, yet in its submission it clearly stated that the Director of Nursing arranged a meeting with the complainant on 8th January, 2002.

5.10 In relation to the alleged incident at the Christmas Party where the complainant alleges that he was called a “knacker” I note that the respondent submitted an undated statement signed by the Assistant Director of Nursing who was present when the complainant made the complaint to the Director of Nursing. It is stated in this statement that the complainant reported that he had been called ‘names’ at the party. However at the hearing of this claim I note that the respondent confirmed that the complainant had stated that he had been called a ‘knacker’ at the party. This conflict of evidence seriously undermines the credibility of the statement by the Assistant Director of Nursing submitted by the respondent.

5.11 At the hearing of this claim the respondent stated that it had no involvement in the organisation of the Christmas Party and no financial contribution was made towards it. However the Director of Nursing confirmed that this was the traditional Christmas Party that was held for staff of the respondent organisation on an annual basis and that she herself attended the party. In accordance with Section 56(4) of the Employment Equality Act, 1998 I have taken into account the provisions contained in the approved Code of Practice (Harassment) Order, 2002⁷ in which it states as follows:

“The scope of the sexual harassment and harassment provisions extend beyond the workplace for example to conferences and training that occur outside the workplace. It may also extend to work-related social events.”

I am satisfied that this Christmas Party was related to work inasmuch as the complainant would not have been present at the party if he had not been employed by the respondent organisation. The next question is whether or not the employer is vicariously liable. Section 32 of the Employment Equality Act, 1998 provides for harassment in the

⁷S.I. No. 78 of 2002

workplace or otherwise in the course of employment whether or not in the workplace. As a consequence of my finding that the Christmas Party was a work-related social event I am satisfied that the respondent discriminated against the complainant and failed to protect him from harassment under the Act. Section 15(3) of the Employment Equality Act, 1998 provides a defence for the respondent where the respondent can prove that it had taken reasonable steps to have prevented the harassment. However, I find that the respondent has failed to prove this. I am, also, satisfied that there was an onus on the respondent to investigate the complaint made by the complainant and that it failed to do so.

- 5.12** On 19th December, 2001 the respondent asked the complainant to sign a three months contract which commenced when the complainant took up duty in the respondent organisation. According to the respondent the purpose of the contract was to evaluate staff and once an employee was in situ for about a month they were then asked to sign a contract. The reason this contract was not signed on commencement of employment was because the respondent experienced a high staff turnover in the early days following commencement of employment. Hence only staff who remained in the job for four weeks were asked to sign contracts. Given the alleged concern over the complainant's suitability for the job it is difficult to understand why he was asked to sign a contract. Two days after signing the contract the complainant lodged a complaint about the alleged incident at the Christmas Party. After lodging this complaint the number of days work assigned to the complainant reduced and ultimately he was discharged from his job. At the hearing of this claim the respondent did say that there was no guarantee of rostering staff five days per week. Rather staff were rostered for work on an "if and when required basis". It is notable, however, that the complainant was rostered to work five days per week every week up until he made the complaint following the Christmas party and then the number of days he was rostered to work was drastically reduced from five to two days.
- 5.13** At the hearing of this claim the respondent stated that it could not have discriminated against the complainant on the Traveller ground as none of its management staff knew

that the complainant was a Traveller. I find that this defence is very much weakened by the fact that the respondent failed to state this in its written submission. If the respondent did not know that the complainant was a Traveller then this surely is the first point it would make in responding to the allegations.

5.14 The respondent contends that the complainant has failed to make a valid complaint of victimisation in terms of Section 74(2) of the Employment Equality Act, 1998. The complainant lodged a complaint of harassment following the Christmas party on 20th December, 2001. It is accepted by management that the complainant did make this complaint. Under the provisions of Section 32(2) of the 1998 Act I am satisfied that the harassment suffered by the complainant constitutes discrimination by the respondent. There is an obligation on the employer to investigate the allegation made in relation to the Christmas Party and take appropriate action. The respondent failed to meet its obligations under the Act. As noted in paragraph 5.12 above the number of days work allocated to the complainant was reduced from five to two days per week following the complaint being made. I am, therefore, satisfied that the complainant was victimised in terms of Section 74(2) of the Act for having in good faith opposed by lawful means an act which is unlawful.

5.15 At the hearing of this claim the respondent was critical of the complainant's punctuality. I note that on the day following the Christmas Party the complainant did not attend work. It is the complainant's contention that he rang work at 8.30a.m. to say that he would be unable to attend work because of an injury sustained the previous night. Later in the day he called to his workplace to talk to the Director of Nursing. The respondent denied that it had received a telephone call from the complainant that morning. I note that there was no evidence of the complainant consistently attending for work late. In the circumstances I consider it harsh to criticise him about his punctuality when he did not attend work on one occasion. I attach as Appendix A a reference which the complainant submitted at the hearing. This reference was given to him by a subsequent employer and in it this employer compliments him on his timekeeping.

5.16 In conclusion I find that the complainant was discriminated against by the respondent and also that he was victimised for having opposed by lawful means an act which is unlawful under the Employment Equality Act, 1998. In relation to the complainant's complaint of dismissal I note that under the terms of Section 77(2) of the Employment Equality Act, 1998 such a claim should be directed to the Labour Court and I do not have jurisdiction to investigate such a claim. I find that the details provided in respect of the complainant's performance are relevant to a claim of dismissal.

6. DECISION OF THE EQUALITY OFFICER

6.1 In view of the foregoing I find that the North Eastern Health Board discriminated against Mr. Francis Maguire in terms of Sections 6(1) and 6(2)(i) of the Employment Equality Act, 1998 and contrary to the provisions of Sections 8 and 32 of that Act. I also find that the North Eastern Health Board victimised Mr. Maguire for having, in good faith, opposed by lawful means and act which is unlawful under Section 74(2) of the 1998 Act. In relation to the complainant's dismissal I find that I do not have jurisdiction to investigate this issue having regard to the provisions of Section 77(2) of the Act.

6.2 In accordance with the powers vested in me under Section 82 of the Employment Equality Act, 1998 I order the respondent to undertake the following:

- Implement a Harassment Policy
- Implement a Code of Practice on staff treatment of members of the Traveller Community
- Implement a fair and transparent disciplinary procedure
- Pay Mr. Maguire the sum of €5,000 for the stress suffered as a result of the discrimination and victimisation.

Gerardine Coyle
Equality Office

22nd August, 2002

APPENDIX A

Copy of Reference

submitted by

Complainant

1st July, 2002

To Whom It May Concern,

Francis Maguire worked part-time with Boyne Valley Foods Ltd. at our Mell Production plant from January to May, 2002.

During this time we found Francis to be a good worker with good timekeeping, having never been late for work.

His duties were working on the honey and chocolate production lines.

Unfortunately, we do not have a full-time job to offer Francis at this time.

I would recommend him for any job, as he is a good and willing worker and can adapt himself well to any job.

I can be contacted for any further reference information through the company switchboard at 041 987 0300.

Yours sincerely

Marita Tobin
Factory Manager
Boyne Valley Foods Ltd.
Mell