

# **ODEI - THE EQUALITY TRIBUNAL**

**ANTI-DISCRIMINATION (PAY) ACT, 1974**

**EQUALITY OFFICER'S RECOMMENDATION NO: DEC-E2002-044**

## **P A R T I E S**

- (1) An Employee vs Midland Health Board**
- (2) 254 Employees vs South Eastern Health Board**
- (3) 189 Employees vs Midland Health Board**

**Claimants' Representative : INO**

**Employers' Representative : HSEA**

*File No's : (1) EP 26/1998, (2) EP 13/1999 (3) EP 14/1999*

*Date of Issue: 17 September, 2002*

## **1. DISPUTE**

- 1.1 This dispute concerns related claims submitted by the Irish Nurses Organisation (INO) on behalf of 444 named female general nurses employed at the Midland Health Board and the South Eastern Health Board that they are entitled under the terms of the Anti-Discrimination (Pay) Act, 1974 and Article 119 of the Treaty of Rome (Article 141 from 1st May, 1999 by virtue of the Treaty of Amsterdam) to the same superannuation entitlements as those provided to psychiatric nurses employed at the Health Boards.

## **2. BACKGROUND**

- 2.1 The INO initially submitted a claim in December, 1998 on behalf of one named claimant who is employed at the Midlands Health Board. The INO later submitted claims in April, 1999 on behalf of a further 189 claimants who are employed at the Midlands Health Board and 254 claimants who are employed at the South Eastern Health Board. The INO named the Health Boards and the Department of Health as Respondents. The claimants are female and are employed as general nurses. General nurses require 40 years service in order to qualify for full pension entitlements while psychiatric nurses may retire on full pension with 30 years service. The INO has named several male psychiatric nurses as comparators and is claiming equal superannuation entitlements, which it describes as remuneration, on behalf of the claimants.
- 2.2 Following a preliminary hearing which was held in January, 2000 the INO was satisfied that the Health Boards were the relevant employer for the purposes of the claim and withdrew the claim against the Department of Health. As the claimants and comparators were employed at various levels in general and psychiatric nursing and were not only subject to different superannuation arrangements but were also paid from different pay scales, were on different points on those scales and were in receipt of different allowances, I sought clarification from the parties as to how a claim for equal remuneration under the 1974 Act might proceed. As the issue in dispute was the difference in the service requirement for full pension entitlement between general and psychiatric nursing, the parties agreed as follows:

- in order that the investigation could focus on the issue in dispute i.e. superannuation entitlements, the Respondents would not, for the purposes of this investigation, contest the issue of 'like work' within the meaning of Section 3 of the 1974 Act
- the INO would name a sample claimant and comparator in each Health Board who were on the same salary scale.

2.3 Submissions from the parties were received and a hearing took place in March, 2001. Arising from that hearing further submissions were made by the parties and a further hearing took place in October, 2001.

### **3. SUMMARY OF THE CLAIMANTS' CASE**

3.1 The INO alleges discrimination by the Midland and South Eastern Health Boards against the claimants contrary to the provisions of the Anti - Discrimination (Pay) Act, 1974 and Article 119 of the EC Treaty. For the purpose of calculation of pension benefit, the comparators' pension scheme entitles them to one years service for each year of service for the first 20 years of service and two years service for each year thereafter. The claimants on the other hand are credited with one year's service up to the maximum of 40 years service. The comparators therefore have full pension rights on completion of thirty years service while the claimants are required to serve forty years before being entitled to full pension. The INO argues that it has been established in many judgments of the European Court of Justice that pensions are regarded as "deferred pay", referring in particular to the ECJ in *Weber von Hartz and Bilka—Kaufhaus*<sup>1</sup>, and therefore come within the scope of Article 119 of the E.C. Treaty, the Equal Pay Directive 75/117 and the 1974 Act.

3.2 The INO contends that the effect of the Health Boards' practice constitutes sex discrimination contrary to Article 119 in view of the fact that 93% of general nurses are women. The INO states that the practice of giving preferential pension entitlements to the comparators while sex neutral is discriminatory in effect and impact. The INO goes on to say that both claimants and comparators are governed by the same superannuation scheme 'for Officer grades', paying the same contribution and

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<sup>1</sup> *Bilka-Kaufhaus Bmbh v. Weber von Hartz* ECJ 170/84 (1986) E.C.R. 1607

employed by the same employer. The INO rejects the respondents' assertion that the provision of the Mental Treatment Act 1945 constitutes grounds other than sex for the purpose of the 1974 Act and does not therefore discharge the onus of proof on the employer under Section 2(3). The impact and effect of the Health Boards' practice is discriminatory and disproportionately affects females.

3.3 The INO alleges both direct and indirect discrimination in respect of what it describes as the diminished pension entitlement of the claimants. The INO states that it is settled law that when a claimant has established a *prima facie* case of direct pay discrimination the onus of proof then shifts to the respondent to show that there are 'grounds other than sex' within the meaning of section 2(3) of the 1974 Act for the pay differential. As the respondent has conceded that the claimants and comparators are performing 'like work', *prima facie* discrimination is established and the onus of proof shifts to the respondent, an onus which the respondents have failed to discharge. The INO contends that the ground other than sex cited by the respondent is inadequate to satisfy the test required by section 2(3) of the 1974 Act and that the policy in question is indirectly discriminatory in that it has a negative impact on women.

3.4 With regard to the allegation of indirect discrimination, the INO states that it is well established that indirect sex discrimination refers to disadvantage resulting from a criterion which is gender-neutral but which nevertheless impacts adversely and substantially on a particular sex. Once a *prima facie* case of indirect discrimination is established in a pay practice the onus of proof shifts to the respondent to show 'objective justification' for the measures resulting in the pay differential. The INO refers to Directive 97/80/EC<sup>2</sup> on the burden of proof in sex discrimination cases where it defines indirect discrimination as occurring:

*'...where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'*

The INO submits that this definition is consistent with the ECJ case law on this issue.

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<sup>2</sup> Council Directive 97/80/EC on the Burden of Proof in Cases of Discrimination based on Sex

3.5 The INO refers to the Supreme Court in *Nathan v Bailey Gibson*<sup>3</sup> where it stated that it was sufficient for the complainant:

*'... to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the Plaintiff's sex.'*

The INO also refers to the High Court in *Flynn v Primark (No. 1)*<sup>4</sup> in which Barron J. stated :

*'The principles of law established by the case law to which I have referred are not in my view in dispute between the parties. Once as between workers doing the like work there is a difference in pay which prejudices significantly more women than it does men then, whatever the reason, there is a prima facie discrimination and an onus rests on the employer to establish that this difference is not gender based but that reasons for such differences are objectively justifiable on economic grounds.'*

The INO submits that the claimants' group is overwhelmingly female.

3.6 The INO states that the classic formulation of the test for objective justification was stated by the European Court of Justice in *Bilka-Kaufhaus*<sup>5</sup> which ruled that an employer may justify an indirectly discriminatory pay policy:

*'... where it is found that the measures chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end.'*

The INO argues that the respondents' reliance on the relevant legislation is not adequate to satisfy the test for objective justification stating that indirect discrimination focuses on consequences and effect rather than on purpose and that

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<sup>3</sup> *Nathan v Bailey Gibson*, Supreme Court, (1998) I.R. 162

<sup>4</sup> *Flynn v Primark*, High Court (1997) 218 E.L.R.

<sup>5</sup> *ibid*

decisions of the European Court of Justice reflect this approach by focusing on the consequences of the impugned practice rather than the purpose of or explanation for it. The INO refers to the ECJ in *Enderby v Frenchay Health Authority*<sup>6</sup> where the Court stated:

*'Since justification of the discriminatory result is called for, it cannot be sufficient to explain the causes leading to the discrimination... If an explanatory approach were accepted as sufficient justification, that would lead to the perpetuation of sexual roles in working life instead of the equality of treatment which is sought, there would be afforded a legal argument for maintaining the status quo.'*

The INO states that whereas the legislation referred to might *explain* the origin of the impugned pension policy, it does not amount to objective justification for that policy.

- 3.7 The INO also argues that dual qualified nurses i.e. nurses who are registered as both general and psychiatric nurses, are equal to the comparators in all respects other than that they do not work in an area designated under the 1945 Act. The INO states that while the majority of nurses are female, those who can avail of added years are employed in an area which provides only 20% of nursing posts and that even within psychiatry, where the majority of nurses are female, 80% of those benefiting from added years (i.e. have more than 20 years service) are male. The INO attributes this to (i) segregation in patient care up until 1986 where male patients were nursed by male nurses and female patients were nursed by female nurses. According to the INO this meant that there were effectively 'quotas' for nurses of each gender and consequently proportionately more male nurses than in general nursing (ii) the marriage bar which existed until 1973 and (iii) social conditions which it states were more likely to lead to a female nurse breaking her service for child rearing and domestic purposes. The INO goes on to state that psychiatric nurses who work in the community are designated through a parent hospital which is designated under the 1945 Act and furthermore that psychiatric nurses who are deployed in the general nursing area in geriatric hospitals come within the scope of the 1945 Act.

- 3.8 In conclusion, the INO argues that it cannot be deemed sufficient for an employer to provide an explanation for the causes leading to discrimination such as the provisions

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<sup>6</sup> *Enderby v Frenchay Health Authority* C-127/92 [1993] E.C.R. I-5535

of the Mental Treatment Act 1945. The employer must justify the discriminatory result which has led to a predominantly female group receiving less pay (pensions) than a comparator group when both are engaged in “like work”. The INO argues that there is a *prima facie* case of direct and indirect sex discrimination established by the facts of this case and that a presumption of unlawful discrimination arises which has not been rebutted by the respondents.

#### 4. SUMMARY OF THE HSEA’S CASE

4.1 While the Health Boards acknowledge like work, they contend that the difference in superannuation arrangements between general nurses and psychiatric nurses is not related to gender and therefore is permitted by reason of Section 2(3) of the 1974 which provides :

*'Nothing in this Act shall prevent an employer from paying to his employees who are employed on like work in the same place different rates of remuneration on grounds other than sex'.*

4.2 All nurses employed in health board hospitals - both general and psychiatric participate in the Local Government (Superannuation) (Consolidation) Scheme, 1998 which is governed by the Local Government (Superannuation) Act, 1956. This scheme provides for accrual of superannuation entitlement on the basis of 1/80<sup>th</sup> of pensionable pay for each year of service. However, psychiatric nurses employed in health board psychiatric hospitals have more favourable superannuation entitlements which arise from the provisions of the Mental Treatment Act, 1945 which provides as follows:

'66. (1) *This section applies to every officer or servant of a mental hospital authority—*

- (a) *whose name is registered in the register maintained under this Part of this Act by the authority, and*
- (b) *who has been in the service of a mental hospital authority for not less than twenty years, and*
- (c) *who is not less than fifty-five years of age.*

(2) *Subject to the provisions of this Part of this Act, an officer or servant of a mental hospital authority, who, while this section applies to him, resigns or otherwise ceases to hold office or employment shall be entitled to receive from the authority—*

- (a) *an allowance during life the annual amount of which shall consist of—*
- (i) *twenty-eightieths of his yearly salary or wages, and*
  - (ii) *where he has been in the service of a mental hospital authority for twenty-one or more completed years, two-eightieths of his yearly salary or wages in respect of each of the twenty-first and the subsequent (if any) of such completed years, and*
- (b) *a lump sum consisting of—*
- (i) *twenty-thirtieths of his yearly salary or wages, and*
  - (ii) *where he has been in the service of a mental hospital authority for twenty-one or more completed years, two-thirtieths of his yearly salary or wages in respect of each of the twenty-first and the subsequent (if any) of such completed years.'*

- 4.3 The HSEA argues that the net effect of the above provisions is that psychiatric nurses are credited with double service for pension purposes for every year worked after twenty years' service and may retire on full pension at age 55. The HSEA states that these provisions apply irrespective of gender to all psychiatric nurses who satisfy the criteria as set out in the legislation and are employed in hospitals defined as a mental health authority under the Mental Treatment Act, 1945. The HSEA states that psychiatric nursing is not a male dominated profession and provides the following table in support of this contention :

**Table 1 : Gender breakdown of Psychiatric Nurses at Respondent hospitals**

<b>Employer</b>	<b>No. of psychiatric nurses</b>	<b>No. of Males</b>	<b>No. of females</b>
<b>Midland Health Board</b>	307	102	205
<b>South Eastern Health Board</b>	760	273	487

The HSEA denies any discrimination contrary to 1974 Act or Article 119 of the EC Treaty.

## **5. CONCLUSIONS OF THE EQUALITY OFFICER**

- 5.1 The 1974 Act under Section 2(1) provides that a person is entitled to the same rate of remuneration as a person of the opposite sex where both are employed in the same



place, as defined by the Act, by the same employer, on “like work” unless the employer can show, under Section 2(3) that the difference in the rate of pay is justifiable on grounds other than sex. The Respondents in this instance have stated that for the purposes of this investigation they are not contesting 'like work' and that there are grounds other than sex for the different conditions regarding superannuation entitlements.

5.2 It is established in European Community law<sup>7 8 9</sup> that benefits payable under an occupational pension scheme constitute pay within the meaning of Article 119 of the Treaty of Rome. The European Court of Justice in *Defrenne v Sabena (No.2)*<sup>10</sup> also found that Article 119 on the principle of equal pay has direct effect in member states and overrides any statutory provision of a member state which contravenes this principle. It is undisputed that the Respondents, in determining the superannuation entitlements of psychiatric nurses, are complying with the terms of the Mental Treatment Act, 1945 and I am satisfied therefore that it is appropriate for me to consider the application of the 1945 Act in this instance with regard to the principle of equal pay.

5.3 The INO has argued that the 1945 Act is, in its effect both direct and indirect, in contravention of Article 119 on the principle of equal pay for men and women. I will first of all consider the question of direct discrimination on grounds of gender. Both the general and psychiatric nursing grades are populated by men and women. Male and female psychiatric nurses avail of the same superannuation entitlements and male and female general nurses avail of the same superannuation entitlements. The ECJ in *Julia Schnorbus v Land Hessen*<sup>11</sup> stated :

*"According to the criteria established by the caselaw of the Court, only provisions which apply differently according to the sex of the persons concerned can be regarded as constituting discrimination directly based on sex".*

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<sup>7</sup> *Bilka-Kaufhaus BmbH v. Weber von Hartz* ECJ 170/84 (1986) ECR 1607

<sup>8</sup> *Barber v Guardian Royal Exchange* ECJ 262/88 (1990) ECR 1889

<sup>9</sup> *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune* ECJ 7/93 (1994) ECR 4471

<sup>10</sup> *Defrenne v Sabena (No.2)* ECJ 43/75 (1976) E.C.R. 455

<sup>11</sup> *Julia Schnorbus v Land Hessen* ECJ 79/99 (2000) ECR 10997

I must conclude that there is no evidence of direct pay discrimination based on gender and find accordingly.

- 5.4 It is generally accepted that an allegation of indirect gender discrimination can be sustained where an apparently neutral requirement is applied in a manner which benefits a substantially higher proportion of one sex to the detriment of the other unless the requirement can be objectively justified. The European Court of Justice in *Weber von Hartz and Bilka—Kaufhaus*<sup>12</sup> found

*"Article 119 is infringed by a Department Store company which excludes part-time employees from its occupational pension scheme where that exclusion affects a much greater number of women than men, unless the enterprise shows that the exclusion is based on objectively justified factors which are unrelated to any discrimination based on sex .."*

The same Court in *Hill & Stapleton and The Revenue Commissioners and Department of Finance* stated :

*"According to settled caselaw, article 4(1) of the (Equal Pay) Directive precludes the application of a national measure which , although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex".*

In order to benefit from retirement on full pension at age 55 it is necessary for a nurse to be registered as a psychiatric nurse working in a hospital designated under the 1945 Act. I consider that the key issue here is the matter of the apparently neutral requirement which the INO believes adversely affects the claimants. While the INO has adverted to a number of exceptions where psychiatric nurses work in areas which are in every respect similar to general nursing, I am satisfied that in the majority of cases, it is a valid and essential criterion that to work as a psychiatric nurse one must be appropriately trained and registered as a psychiatric nurse. There is nothing in this criterion that militates against females and indeed 68% of registered psychiatric nurses nationally are female as illustrated in the Table 2 below.

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<sup>12</sup>*ibid*

**Table 2 : Registered General and Psychiatric Nurses in year 2000 nationally<sup>13</sup>**

	<b>Female</b>	<b>Male</b>	<b>Total</b>
<b>General</b>	51,219	1,541	52,760
<b>Psychiatric</b>	7,422	3,393	10,815
<b>Total</b>	58,641	4,934	63,575

The INO also suggests that a male psychiatric nurse is more likely to benefit from added years than a female psychiatric nurse (3.7 above) however I do not consider that this argument is relevant to the present case where the claimants are female general nurses and the comparators are male psychiatric nurses. The requirements in relation to psychiatric nursing have no relevance to, or detrimental impact on, a nurse who trains in general nursing, whether male or female. For whatever historical reasons concerning the nature of psychiatric nursing in 1945, the legislature considered it appropriate to provide that psychiatric nurses should be allowed retire on full pension at a younger age than general nurses and that remains the position to date. While the INO clearly feels that general nurses should be entitled to the same superannuation entitlements as psychiatric nurses, it appears to me that the INO has opted to use the 'gender' issue as one possible line of assault on the 1945 Act. Although psychiatric nurses do benefit from superior superannuation benefits under the 1945 Act, I do not accept that the evidence supports the contention that that the Respondents, in complying with the provisions of the 1945 Act, have directly or indirectly discriminated against female general nurses contrary to the principle of equal pay as enunciated in Article 119 of the Treaty of Rome. I should point out that had the INO succeeded in establishing *prima facie* that the application of the 1945 Act did indeed discriminate against female nurses then I do not consider that the Respondents could evade the requirements of Article 119 by simply citing compliance with the 1945 Act as a defense.

## **6. RECOMMENDATION**

- 6.1 In view of my conclusions above I find that the Claimants have no entitlement under the Treaty of Rome and the Anti-Discrimination (Pay) Act, 1974 to the same

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<sup>13</sup>Most recent statistics i.e. year 2000 from An Bord Altranais website <http://www.nursingboard.ie>

superannuation entitlements as that availed of by the Comparators by virtue of the provisions of the Mental Treatment Act 1945.

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Raymund Walsh  
Equality Officer  
17 September, 2002