

ODEI - THE EQUALITY TRIBUNAL

EMPLOYMENT EQUALITY ACT, 1998

EQUALITY OFFICER'S DECISION DEC-E2002-045

PARTIES

Byrne

AND

FÁS
(Represented by William Fry, Solicitors)

File ref: EE/2000/034
Date of issue: 18 September 2002

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1. DISPUTE

1.1 This dispute concerns a claim by Ms Philomena Byrne that she was discriminated against by FÁS on the ground of age, contrary to the provisions of section 6 of the Employment Equality Act, 1998, in terms of section 12 of the Act, when she was not offered the training course of her choice.

1.2 The complainant referred a complaint of discrimination to the Director of Equality Investigations on 6 July 2000. In accordance with her powers under section 75 of that Act, the Director then delegated the case to Anne-Marie Lynch, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. Submissions were obtained from both parties and a joint hearing of the matter was held in January 2002. The main reason for the delay was the fact that the complainant took almost twelve months to provide her submission. Subsequent correspondence with the parties was finally completed in May 2002.

2. SUMMARY OF THE COMPLAINANT'S CASE

2.1 The complainant stated that she had always had an interest in art and design, but did not have the opportunity to study art when younger. A course in Interior Design, to be run by FÁS at its training centre in Poppintree, appeared to offer her an opportunity to obtain employment in the area of design or to go on for further training. She applied for the course and attended for an interview, conducted by a male and a female interviewer, at the training centre in August 1999.

2.2 The complainant said that the applicants were first gathered together in a classroom and given a brief description of the course by the male interviewer. The applicants were then invited to determine their own order for interview. The complainant was third and said she did not worry about the fact that the other applicants were all young girls.

2.3 The complainant said that the male interviewer invited the other applicants into the interview in a very informal and chatty way, but she found his manner of speaking to her off-putting and abrupt. She said that at no time during the interview did either interviewer do anything to put her at her ease. She said she was not asked any questions about designers, colour, fabric etc, and in fact was not asked any questions about design. Her interview lasted approximately five minutes, whereas she claimed the other applicants' interviews lasted approximately twenty minutes.

2.4 Having had no correspondence from FÁS, the complainant telephoned after a few weeks to enquire if she had been successful. She was told she should already have received a letter, and she said she had not. On the following day, she received a letter saying she had been unsuccessful. The complainant said she was disappointed, though not surprised and she assumed that her portfolio was not good enough. She put the matter down to experience and subsequently attended a FÁS night course in Interior Design as well as a VTOS Interior Design course.

2.5 In February 2000, the complainant re-applied for the full-time course in Poppintree and again attended for an interview, carried out by the same interviewers. She said the male interviewer was again offhand but she felt that she had a chance this time as he seemed more impressed with her portfolio. While he looked through her portfolio, she explained to the female interviewer why she wanted to change career.

2.6 The male interviewer then asked how she felt she would be at technical drawing. The complainant explained that when she tried out colour schemes, she lacked the training to put them down on paper. She felt it was vital if she wanted to go into design in any professional capacity and she really wanted to learn it. She felt she had some ability at mathematics and she could draw, so she would be able to learn. Her son was an A student in Leaving Certificate technical drawing and would be able to help with any difficulties.

2.7 According to the complainant, the male interviewer's reply was "the reason I am asking this is that some people find this very difficult and some are not able to learn it at all. And I have to say this, and you may not like what I am going to say, that it is

always the older people who have a problem with it. They just cannot do it. In fact one woman in the class, she is an older woman, failed to make the grade because she just could not do the technical drawing". The complainant said she was absolutely shocked at this discriminatory statement, coming from a tutor in a state-run agency. As an older woman, she found these remarks very insulting. She was totally speechless and did not know what to say in reply.

2.8 She said the respondent again did not have the professionalism or courtesy to advise her of the outcome of her interview. She did not receive a letter and had to ring FÁS. She was told a letter should have issued, and if she had not got one, a letter would issue in that day's post. The complainant asked if the places had been allocated and was told that they had. She received a letter the following day saying she had been unsuccessful. She was shocked at the shoddy treatment which she had again been subjected to. She had been prepared to make allowances on the first occasion but this was too much.

2.9 The complainant wrote to the Director General of FÁS regarding her grievances. She was subsequently offered a place on the course but she was unavailable at the time. She was offered a place at a later date, and did consider taking up the offer. However, she did not feel able to do so as she felt she wouldn't have been on a level playing field. As an older woman, she felt she would have had to prove herself and would not have been able to enjoy the course.

2.10 In conclusion, the complainant said that she gave this matter some thought and she felt very strongly that she was not given a fair hearing in these interviews, that the interviewers' style was unprofessional and that the male interviewer's remarks and attitude were inappropriate and discriminatory.

3. SUMMARY OF THE RESPONDENT'S CASE

3.1 The respondent said the particular course took fourteen trainees at the time the complainant applied and now takes eighteen. The course lasts for 24 weeks, with a four-week work placement, and leads to a City & Guilds qualification. The subjects include colour, furnishings, scale drawing, perspective and paint finishes. The prerequisites for the course are that the trainee must be over eighteen, with a Leaving Certificate standard of Education, proof of interest in the course and a flair for design. No art qualification is necessary, and a portfolio is preferable. The course is extremely popular and it is not unusual for there to be over 100 people on the waiting list.

3.2 The respondent said that the male interviewer mentioned has been the Instructor for the Interior Design course for eleven years, at the rate of two courses per year. He interviews over fifty applicants each year, and he has trained over 400 people in interior design with no complaints about his training or recruitment style. Regarding the complainant's comments about the duration of her interview, the respondent points out that looking through a large portfolio may take ten or fifteen minutes without any questions being asked. The respondent also pointed out that the female interviewer referred to by the complainant was not a member of the interview board in August 1999, although she was in February 2000.

3.2 The complainant first applied for the course in August 1999 and did not secure a place. When notified of this, she made allegations to the Director General of FÁS that she had not being treated equally with others. The respondent suggested that in view of the fact that 100% of the applicants were female, she appears to have chosen age as the discriminating factor.

3.3 The complaint to the Director General was forwarded to the Manager of the Training Centre, who requested that she be accommodated on the course due to commence in August 2000 because of her special interest. When offered a place on the course, the complainant declined because of unsuitable timing. She was again offered a place on the course due to commence in February 2001, but was again unable to accept.

3.4 Most recently, the complainant was offered a place on the course due to commence in August 2001. On 17 August, she rang the respondent and said she could not take up the offer as she was required to give "notice". The respondent said that if this

“notice” was to an employer, under no circumstances would it encourage a person to leave employment to take up a course.

3.5 Looking back over the trainee records for Interior Design over the last five years, the respondent said that a wide diversity of age groups is apparent. It said it is obvious that age was never a determining factor when being accepted for the course. The respondent’s records demonstrate that the number of persons over the age of forty who obtain places is broadly proportional to the number of applicants of that age.

3.7 The respondent said that the Instructor may have stated as a fact from his experience that those older trainees who do not have mechanical drawing skills tend to experience real difficulties with the course. Many applicants do not appreciate the depth to which this topic is covered in the course and may find that they are in over their heads. The respondent also suggested that older applicants may have more commitments, and that these, combined with the general stress of being on the course, may cause some difficulties. There was no suggestion that older applicants could not accomplish their goals, and the respondent would encourage people of all ages to actively pursue their interests.

3.8 In conclusion, the respondent said that on several occasions it has sought to accommodate the complainant on the Interior Design course but to no avail. FÁS prided itself as an equal opportunities organisation both in the recruitment of trainees for courses and the promotion of its staff. It is against this background that the respondent robustly rejected the complainant’s allegations against the Instructor.

4. INVESTIGATION AND CONCLUSIONS OF THE EQUALITY OFFICER

4.1 In reaching my conclusions in this case I have taken into account all of the submissions, both oral and written, made to me by the parties.

4.2 The complainant alleged that the respondent discriminated against her on the ground of age, 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 age. Section 12 provides that

(1) Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training, shall not, in respect of any such course offered to persons over the maximum age at which such persons are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade unions or otherwise)-

(a) in the terms on which any such course or related facility is offered,

(b) by refusing or omitting to afford access to any such course or facility, or

(c) in the manner in which any such course or facility is provided.

(2) In this section “vocational training” means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity.

It is clear that the services provided by the respondent constitute “vocational training” for the purposes of the Act.

4.3 The complainant obviously felt unhappy with many of the aspects of the interviews she attended. As well as the comment about older people which she attributed to the Instructor, she mentioned specifically that she felt she was not given an opportunity to demonstrate her ability, that the interviewers’ style was unprofessional, and that she was not notified about the results of either interview. All of these criticisms were directed at both interviews attended by the complainant.

The first interview

4.4 It should be noted that the first interview attended by the complainant was in August 1999, eleven months prior to her referral of a complaint under the 1998 Act. This

incident is therefore outside the time limit of six months specified in section 75 of the Act, and cannot be investigated as an incident of alleged discrimination.

4.5 However, the first interview provided much of the context to which the complainant objected, so I find myself obliged to have regard to that interview. Notably, the complainant said she was disappointed but not surprised when she did not succeed on the first occasion. It would appear that the complainant's dissatisfaction with the first interview, including the statements regarding its duration and the fact that she was not given the opportunity to demonstrate her capability, emerged from her experiences with the second interview. Having not been properly informed that she had not obtained a place on the course, the complainant was understandably annoyed. When she was not notified on the second occasion, the two incidents together created a larger issue.

4.6 The first interview took place in August 1999. The complainant referred her claim to the Director in July 2000, and provided her written submission in July 2001. As a result, her allegations relating to the first interview were made almost two years after its occurrence. The amount of time which had elapsed would appear to have caused the complainant's recollection of certain events to become less positive. The respondent gave evidence, which the complainant did not dispute, that the female interviewer referred to by her was not on the first interview board. By extension, I am satisfied that the complainant's assertions regarding the duration of her interview and the professionalism of the interviewers fall far short of providing any evidence of discrimination. I am also satisfied that the failure to notify the complainant of her interview results, while discourteous, does not constitute discrimination on the ground of age unless the complainant had been in a position to prove that she had been treated differently from applicants who were younger.

The second interview

4.7 Most of my comments regarding the first interview apply also to the second interview. This was held in February 2000, almost eighteen months prior to the complainant's written submission, with the consequent possibilities for unreliable recollection by both parties. The difference on this occasion is that the complainant alleged that the Instructor made a very specific reference to age which she considered to be discriminatory. In her written submission, the complainant included a long passage,

cited at 2.7 above, which she attributed to the Instructor and which she implied was recorded speech by using quotation marks. She agreed at the hearing that this was not the case, but she insisted that the passage quoted was her sense of what had been said.

The Instructor's comment

4.8 The respondent's version of the comment made by the Instructor differs in some respects. In the first place, the Instructor did not offer a specific formulation of words he may have used at the interview. As previously stated, the submissions and the hearing in the claim occurred more than eighteen months after the disputed comment was made, and recollections were necessarily vague. The respondent's written submission had suggested that the Instructor may have stated as a fact from his experience that those older trainees without mechanical drawing skills tended to have real difficulties with the course.

4.9 At the hearing, the Instructor said that the mechanical drawing element of the course was not in itself the focus of his concern for older trainees. In his experience, they tended to have the most difficulty with the course, although he was not suggesting they could not complete it. He suggested that the combination of the stress of being on the course, the level of detail required for the mechanical drawing aspect and the fact that they may have more commitments could lead to difficulty for them.

4.10 The suggestion from the written submission - that older people without mechanical drawing skills may have difficulty - effectively has no meaning. Either mechanical drawing is the problem, in which case all trainees without it would have difficulty, or it is not, in which case the implication is that it is the fact of being older which creates a difficulty. Regarding the Instructor's explanation at the hearing, it appears to me that the stress and the detail he described apply to all trainees, unless it is to be taken that older trainees deal less well with these factors. No argument was made or evidence produced that this was the case.

4.11 The final element of the Instructor's combination of factors was the question of older trainees having more commitments than younger trainees. There is of course no evidence of this. Older trainees may have older children, or no children. They may have

retired early, or they may wish to return to the workplace following a period of being full-time parents. In any of these circumstances, they may actually have fewer commitments than younger trainees with young children. It is self evident that the age of a individual does not provide any guide to their commitments.

4.12 It would appear that the Instructor made a series of presumptions about older people, and applied these to the complainant. From his evidence, it was apparent that he felt the course required a great deal of application and he genuinely wanted the complainant to understand the level of the challenge she was proposing to take on. However well meaning, I am satisfied that the comment he made constituted a discriminatory reference to the potential performance of older trainees.

The respondent's record with older applicants

4.13 On the date of the first interview in August 1999, the complainant was aged 47 years. The respondent's records demonstrate that, of the fourteen successful candidates, three were aged 42, 44 and 46 years. By the time of the second interview, the complainant was aged 48 years. On this occasion, of the fourteen successful candidates, one was aged 48 years. On the occasion of the interview in August 2000, when the complainant was not an applicant, individuals aged 42, 49 and 55 years were offered places. The respondent further stated that the number of successful applicants over the age of 40 was broadly proportional to the number of applicants of that age profile, and the complainant indicated she had no reason to question this assertion. It would appear from the evidence that the respondent does not operate a policy of discrimination against applicants on the ground of age. As the Instructor is the person who interviews the applicants and selects the trainees, it would also appear that he does not operate a policy of age discrimination.

4.14 I note that the respondent has made several attempts to facilitate the complainant with a place on the course of her choice. None of these offers has been accepted by the complainant, either because the timing was unsuitable or because she felt that her previous negative experience would cause her not to enjoy the course. On the evidence, it appears to me that the respondent had no intention to discriminate against the complainant, and that the comment by the Instructor was an unfortunate means of

expression which may have had more of an impact on the complainant than it would have had on another person. I noted that the complainant made several references to herself as an “older woman” and I formed the view that she almost expected to be treated in a less favourable way, and was therefore extremely conscious of any comments that might potentially imply this.

4.15 Obviously, the sensibility of the complainant does not make a discriminatory comment non-discriminatory. However, it does have an impact on the possible redress to be awarded, specifically in relation to the place on the training course. The complainant wished to participate on the course, and the respondent offered her a place following her complaint. As she has not felt able to take up the offer, I am unsure of the benefit in my ordering that the respondent provide her with a place. On balance, I consider that the respondent should offer the complainant a place on the Interior Design course commencing in February 2003 (ie the next course after the date of this decision). If the complainant is unable to take up this place, for whatever reason, I consider that the respondent will then have discharged its obligation on foot of this decision.

5. DECISION

5.1 Based on the foregoing, I find that FÁS discriminated against Ms Philomena Byrne on the ground of age, contrary to the provisions of the Employment Equality Act, 1998, when a discriminatory comment was made to her at an interview for a place on its Interior Design course.

5.2 I order that

- (a) the respondent pay the complainant a sum of €500 in compensation for the effects of the act of discrimination; and
- (b) the respondent make one final offer of a place on the Interior Design course to the complainant, giving her at least two months’ notice.

Anne-Marie Lynch
Equality Officer

18 September 2002