

The Employment Equality Act, 1998

Equality Officer Decision

DEC - E /2002/001

Anne Harrington

-v-

East Coast Area Health Board

File No: EE/2001/003

Date of issue: 23 January 2002

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1. CLAIM

- 1.1** The case concerns a claim by Ms. Anne Harrington that the East Coast Area Health Board discriminated against her in terms of section 6(2)(g) of the Employment Equality Act, 1998 and in contravention of section 16 of the Act in relation to interview facilities for the post of Senior Pharmaceutical Technician and in contravention of section 8 of the Act in relation to the selection process for appointment to the post.

2. BACKGROUND

- 2.1** On 6 July 2000, the complainant attended St. Colmcille's hospital for interview for the position of Senior Pharmaceutical Technician. The complainant claims that proper facilities for the interview were not put in place and there was a difficulty in relation to gaining physical access to the building where the interview was being held and also in relation to access to the interview room itself. She also claims that the marking she received in relation to the interview was unjust and unfair. The complainant alleges that she was discriminated against in relation to the interview facilities and the selection process for appointment on the basis of her disability.

- 2.2** The complainant referred a claim to the Director of Equality Investigations. In accordance with her power under the Act, the Director then assigned the case to an Equality Officer for investigation and Decision. Written submissions were received from both parties to the claim. The respondent denies the allegation of discrimination. A joint hearing of the claim was held on 27 September 2001.

3. SUMMARY OF THE COMPLAINANT'S WRITTEN SUBMISSION

- 3.1** The complainant attended for interview on 6 July 2000 at St. Columcille's Hospital for the post of Senior Pharmaceutical Technician. She stated in her application for the post that she was a wheelchair user. She was invited to attend for interview by telephone and she enquired whether the interview room was accessible for a wheelchair user and she was informed that it was accessible.
- 3.2** When the complainant arrived at the hospital for the interview, the entrance to the administrative building consisting of steps was not accessible. The wheelchair accessible ramp which gave access via the Pharmacy was blocked by cars. She eventually gained access to the administrative building via the main entrance to the hospital. It was then necessary for her to use a stair lift to get to the interview room, however, the stair lift was not working. Eventually, the interview took place in a waiting room which was not properly set up for interview.
- 3.3** At the interview, the complainant received markings of 55% for organisational skills, 30% for professional/technical knowledge and 35% for communication skills. She alleges that the marks awarded for professional/technical knowledge and communication skills were unjust. The feedback that she received after the interview stated that she needed training in completing a C.V. and that she also needed to do a course as she lacked hospital experience. She also submits that the questions asked at the interview were irrelevant. The complainant alleges that she was discriminated against on the disability ground in relation to the interview facilities and the selection process for appointment to the post of Senior Pharmaceutical Technician.

4. SUMMARY OF THE RESPONDENT'S WRITTEN SUBMISSION

- 4.1** The respondent rejects the complainant's claim of discrimination. In relation to the complaint concerning access to the administrative building, the Chief Pharmacist of the respondent hospital spoke to the complainant and advised her that she could gain access to the building via the ramp into the Pharmacy. Another employee told the complainant that the best way to gain access to the interview room was through the main entrance of

the building and a stair lift would take her to the interview room on the first floor. The Recruitment Officer for the respondent met the complainant at reception to take her to the interview room on the first floor and then discovered that the stair lift was broken. The room used for the interview at ground floor level may not have been ideal but it was difficult to find an alternative room at ground floor level at short notice.

- 4.2** In relation to the stair lift not being in working order, the respondent submits that it was only when the Recruitment Officer accompanied the complainant to the stair lift that he realised that it was broken and he had no reason to believe, or had any knowledge prior to the interview that the stair lift was not working.
- 4.3** The respondent submits that every effort was made to facilitate the candidate for interview purposes when it was discovered that the original interview room was not accessible. The interview board then moved to another room at ground floor level to suit the needs of the complainant and did everything possible to facilitate her during the interview process.
- 4.4** The respondent submits that the questions asked at interview were phrased in a manner to be helpful to the interview board and to collect as much information as possible in relation to the candidate's experience and working practice and to identify specific periods of employment. The notes and comments made on the marking sheet were meant to be helpful to the candidate in identifying areas of weakness which merited attention.
- 4.5** The marks allocated under the three headings at interview reflected the considered assessment of the interview board on the capacity of the candidate to do the work required having regard to the responsibilities of the post and based on the information contained in (a) the application form and (b) obtained through the questioning process at interview stage.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In this case, the complainant alleges that the East Coast Area Health Board directly discriminated against her on the disability ground in relation to the interview facilities and in relation to the selection process for appointment to the post of Senior Pharmaceutical Technician with St. Columcille's Hospital. I must firstly consider whether the respondent directly discriminated against the complainant on the disability ground in relation to the interview facilities in contravention of section 16(3) of the Employment Equality Act, 1998 by failing to do all that is reasonable to accommodate the needs of a person who has a disability subject to the nominal cost requirement. I must then consider whether the respondent discriminated against the complainant in terms of section 6(g) of the Employment Equality Act, 1998 and in contravention of section 8 of the Act in relation to the selection process for appointment to the post of Senior Pharmaceutical Technician. In making my Decision in this case, I have taken into account all of the evidence, both written and oral, submitted to me by the parties.

The meaning of discrimination

5.2 Section 6(1) of the Employment Equality Act, 1998 provides that:

"Discrimination shall be taken to occur where, on any of the grounds mentioned in subsection (2) (in this Act referred to as "the discriminatory grounds"), one person is treated less favourably than another is, has been or would be treated."

Section 6(2) provides that as between any two persons, the discriminatory grounds are, inter alia:

"that one person is a person with a disability and the other either is not or is a person with a different disability (in this Act referred to as "the disability ground")"

5.3 In addition to less favourable treatment, discrimination normally also involves a difference in treatment. In a case relating to nationality discrimination, the European Court of Justice stated:

“It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.”¹

The European Court of Justice subsequently referred to the case and stated in a case relating to gender discrimination:

“It is well settled that discrimination involves the application of different rules to comparable situations, or the application of the same rules to different situations.”²

Establishing a prima facie case of discrimination

5.4 A person making an allegation of discrimination under the Employment Equality Act, 1998 Act has to present *prima facie* evidence of his or her allegation. *Prima facie* evidence has been described as:

“Evidence which in the absence of any convincing contradicting evidence by the employer would lead any reasonable person to conclude that discrimination had probably occurred.”³

Once a *prima facie* case of direct discrimination has been established, the burden of proof then shifts to the respondent who must rebut the presumption of discrimination by showing that it did not discriminate unlawfully. If the

¹ Finanzamt Koeln-Altstadt v. Roland Schumacker Case C-279/93 ²Gillespie & ors v. Northern Health and Social Services Board & ors [1996] ECJ C342/93 ³Dublin Corporation v. Gibney EE5/1986 ⁴Wallace v. South Eastern

complainant fails to establish a *prima facie* case of discrimination, the burden does not shift to the respondent to show that it did not act in a discriminatory manner.

In relation to the burden of proof, the Northern Ireland Court of Appeal commented that :

“Once the evidential burden has shifted,, the question then is whether there is any evidence to justify the conclusion that the evidential burden has been discharged by the respondent.”⁴

The Labour Court has applied the test and stated:

“The first question the Court has to decide is whether the [claimant] has established a prima facie case of discrimination”.⁵

In a subsequent case, the Labour Court has stated:

“.... the [claimant] 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 [claimant] succeeds in discharging that evidential burden. If she does, the respondent must prove that she was not discriminated against on grounds of her sex. If she does not, her case cannot succeed.”⁶

The Labour Court also applied the principle of the shifting burden of proof in a case relating to disability discrimination. It stated:

⁵The Rotunda Hospital v. Noreen Gleeson DEE003/2000 18 April 2000⁶Dr. Teresa Mitchell v. Southern Health Board (Cork University Hospital) DEE011 15 February 2001⁷A Computer Component Company v. A

“The respondent terminated the complainant’s employment because she suffered from epilepsy. This, prima facie, constituted an act of discrimination on the disability ground. The respondent can only be relieved of liability if it can be shown that, by reason of her disability, the complainant was not fully competent and fully capable of performing the duties of her employment, having regard to the conditions under which those duties were to be performed and could not have had her needs reasonably accommodated.”⁷

Claim of discrimination in relation to the interview facilities

5.5 I will firstly consider the claim of discrimination in relation to the interview facilities. Section 16 of the Employment Equality Act, 1998 imposes an obligation on employers in certain circumstances. In particular, section 16(3) provides:

(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.

(b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.

(c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.

5.6 The section obliges employers to do all that is reasonable to accommodate the needs of a person with a disability who is in employment subject to the nominal cost requirement. The section is silent in relation to the obligation on prospective employers to do all that is reasonable to accommodate the needs of prospective employees by providing special treatment or facilities. I must, therefore, firstly consider the appropriate principle of statutory interpretation to be applied to the section before seeking to reach a conclusion in relation to whether it imposes an obligation on prospective employers to provide reasonable accommodation at the selection stage for people with disabilities subject to the nominal cost requirement.

General principles of statutory interpretation

5.7 The literal approach to statutory interpretation was considered and applied in the High Court case of Mary Murphy and others v. An Bord Telecom Eireann (No: 1)⁸ and Keane J held that the “*words used in a statute must be considered in their ordinary and natural meaning.*” In that case, Keane J also referred to the teleological approach and stated that “*There are, of course, cases in which the courts have departed from the literal meaning of a statute where it is capable of another construction which avoids an absurd result that cannot possibly be intended by the legislature.*” The adoption of a teleological approach was again considered by Keane J in the case of Mary Murphy and others v. An Bord Telecom Eireann (No 2).⁹ In that case, Keane J referred to the European Court of Justice ruling in the same case¹⁰ which considered the question of the compatibility of the Anti-Discrimination (Pay) Act, 1974 with the provisions of Article 119 of the EEC Treaty and held that it was for the national court when interpreting and applying domestic law, to give to it, where possible, an

⁸ 1986 ILRM 483 High Court 4 March 1986⁹ Mary Murphy and others v. An Bord Telecom Eireann Case No. 2 11 April 1988 [1989] ILRM 53 ¹⁰ Case 157/86 European Court Reports 1988 page 0673¹¹ Texaco (Ireland)

interpretation which accords with the requirements of the applicable community law. In the resumption of the case before him in the High Court, Keane J stated that in the light of the ruling of the European Court of Justice, the Court:

“should seek if possible to adopt a teleological construction of the relevant sections of the Act of 1974, i.e. one which looks to the effect of the legislation rather than the actual words used by the legislature.”

The Murphy v. Telecom (No. 2) case established that the teleological interpretation should be applied in interpreting legislation which seeks to implement Community law. I note that there is not yet a Community law aspect to the prohibition on discrimination on the disability ground contained in the Employment Equality Act, 1998 given that Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation does not yet have vertical direct effect as the implementation date (December 2003) has not passed.

- 5.8** In a Supreme Court case¹¹ which considered the principles of statutory construction, Mc Carthy J. stated that the words must firstly be interpreted by the Court in their ordinary literal meaning and then, if necessary, the purposive approach must be adopted. He stated *“Whilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning.”* In a more recent authoritative statement of principle on the interpretation of statutes, Blayney J in the Supreme Court case of Howard and others, Byrne and others v. Commissioners of Public Works in Ireland¹² which considered, inter alia, whether a statutory authority required planning permission to build an interpretative centre, approved the general statement of principle on the interpretation of statutes contained in Craies on Statute Law (1971 7th edition at page 65) and in

¹²[1994] 1 I.R. 122¹³In the matter of Article 26 of the Constitution and in the matter of the Employment

Maxwell on the Interpretation of Statutes (1976 12th edition page 28). The quotation from Craies reads as follows:

“The cardinal rule for the construction of acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. ‘The Tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view’ [per Lord Blackburn in Direct United States Cable Co. V. Anglo-American Telegraph Co. 918770 2 App. Cas. 394]”

The passage in Maxwell which was endorsed by Blayney J reads as follows:

“The rule of construction is ‘to intend the Legislature to have meant what they have actually expressed.’ [per Parke J. In R. v. Banbury (Inhabitants) (1834) 1 Ad. & El. 136 at p. 142] The object of all interpretation is to discover the intention of Parliament ‘but the intention of Parliament must be deduced from the language used,’ [per Lord Parker C.J. In Capper v. Baldwin [1965] 2 Q.B. 53, at P. 61] for ‘it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.’ [per Lord Morris of Borth-y-Gest in Davies Jenkins and Co. Ltd. v. Davies [1967] 2 W.L.R. 1139 at P. 1156]”

5.9 Blayney J also considered the rule of interpretation in relation to the construction of a statute by implication and quoted the following from Craies:

“If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply

obvious omissions. But the general rule is 'not to import into statutes words which are not found to be there,' [per Patteson J. In King v. Burrell (1840) 12Ad. & El. 460, 468 and there are particular purposes for which express language is absolutely indispensable. 'Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.' [per Evershed M.R. in Tinkham v. Perry [1951] 1 T.L.R. 91,92]"

Blayney J considered that *"the first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain."* He held in the Commissioners for Public Works case that the first condition was not satisfied as the meaning of the Local Government (Planning and Development) Act, 1963 was *"perfectly plain"* and provided that planning permission is required for any development which is not exempted development and also provided that where a statutory authority wishes to undertake the construction or extension of any building, it must comply with the requirement to consult with the planning authority. Accordingly, a construction by implication was not appropriate. Blayney J then went on to interpret a provision of the Act (section 84) literally in accordance with the principles in Craies and Maxwell and held that the section could not be construed as relieving the Commissioners from the requirement of obtaining planning permission contained in section 24 of the Act.

The principle to be applied in this case

5.10 In accordance with the principles espoused by Blayney J in the Commissioners for Public Works case, I must firstly, in the present case, seek to apply a literal interpretation to section 16 of the Employment Equality Act. The result of interpreting that section literally would be that there would be an onus on employers to do all that is reasonable to accommodate the needs of a person

with a disability who is in employment. However, I consider that the meaning of the section is ambiguous in relation to whether there is an obligation on prospective employers to provide reasonable accommodation at the interview stage and is therefore not plain. A literal interpretation would effectively render the effects of section 16(3) meaningless and redundant and would produce an absurd result in that an obligation only to provide reasonable accommodation for people with disabilities in employment and not at the selection stage would mean that people with disabilities might never in fact be successful in getting into the workforce if their special needs were not reasonably accommodated at the selection stage subject to the nominal cost requirement. In this case, I consider that a literal interpretation is not appropriate as it would produce an absurd result.

- 5.11** In the circumstances, I must consider the adoption of a teleological or purposive approach to the interpretation of section 16. As an aid in adopting a purposive approach to the interpretation of the section, I have considered the long title of the Act itself and I note that it states, inter alia, that it is an Act to provide for discrimination in employment and in connection with employment. It provides:

“AN ACT TO MAKE FURTHER PROVISION FOR THE PROMOTION OF EQUALITY BETWEEN EMPLOYED PERSONS; TO MAKE FURTHER PROVISION WITH RESPECT TO DISCRIMINATION IN, AND IN CONNECTION WITH, EMPLOYMENT, VOCATIONAL TRAINING AND MEMBERSHIP OF CERTAIN BODIES;.....”

The Supreme Court in the case of the Article 26 reference of the Employment Equality Bill, 1996, to test its constitutionality specifically refers to the promotion of equality between employed persons and the prohibition of discrimination between persons. It stated:

“As is apparent therefrom the purpose of the Bill is to make further provision for the promotion of equality between employed persons, the prohibition of

discrimination between persons, to deal with harassment in employment and in the workplace and to provide for the implementation of the said Council Directives [75/117/EEC and 76/207/EEC].”¹³

5.12 I have also considered the Oireachtas debates on the legislation as an external aid to interpretation. I note that at Committee stage in the Seanad, Minister of State Wallace, presenting the Employment Equality Bill, 1997 spoke at some length on 28 May 1998 on the significance of section 16(3) and she specifically interpreted that provision as meaning that:

“... the Bill establishes the right of a person with a disability to be placed on a level playing field with a comparator by being given special treatment and facilities. Once account has been taken of this obligation it is a matter for the employer to select on grounds of merit and suitability as between the number of competent and capable candidates available to him or her.”

Subsequently, she stated:

“... the Bill is an important initial step in ensuring greater access to employment for people with disability.”

The statements of the Minister appear to indicate that the clear understanding of the presenting Minister and of the Oireachtas in passing the legislation was that it applied the duty of reasonable accommodation to the context of job interviews.

5.13 In the Texaco case¹⁴ already referred to, Mc Carthy J. stated that a statute should be construed as a whole, particularly in the case of social legislation. He stated:

“True it is that one should seek to construe a statute as a whole, a principle perhaps less relevant to the construction of revenue legislation than, for instance, that with a social purpose.” In construing the Act as a whole, it appears to me that the effect of the legislation was to make provision for the elimination of discrimination in and in connection with employment, vocational training and membership of certain bodies on any of the nine grounds specified in the Act. Applying the statement of principle from Craies on statutory construction by implication in this case and in my view, to supply an obvious omission and it also being necessary to give section 16 sense and meaning in its context, I consider that section 16 should be read as obliging employers, including prospective employers, to do all that is reasonable to accommodate the needs of a person with a disability at the selection stage subject to the nominal cost requirement. To do otherwise does not take account of the effect of the legislation and renders the whole section meaningless. At the interview stage, a prospective employer will generally have selected from the total applicants those that s/he considers meet the requirements of the post and could therefore be considered as potential employees. A teleological interpretation of section 16 does not, therefore, impose an obligation on an employer to do all that is reasonable to accommodate the needs of every applicant with a disability including those who do not meet the requirements of the post.

- 5.14** At the hearing, the respondent clarified that it was possible to gain access to the Administrative Building via the ramp into the pharmacy, however, usual access to the Administrative Building would be gained by steps into the building or via the hospital entrance and up the stairs. At the hearing, the respondent confirmed that the complainant was advised by the Chief Pharmacist that she could gain access to the building via the ramp into the Pharmacy. However, it was submitted by the respondent and accepted by the complainant that access to the Pharmacy and the ramp were not mentioned to her by the Chief Pharmacist in the context of access to the interview room. Direct access to the Administrative Building was

14¹⁴ *Texaco (Ireland) Ltd. v. Murphy (Inspector of Taxes)* [1991] 2 I.R. 449 15 *Mary Turley- Mc Grath v. Co.*

not possible for the complainant due to steps, however, an alternative route via the hospital entrance and up the stairs was available. The complainant used the main hospital entrance, however, she was denied access to the interview room in the Administrative Building on the first floor as the stairlift was not working. Subsequently, the interview board moved to another room in the hospital building which the complainant submitted was a waiting room and was unsuitable. Her recollection was that they all sat in a semi circle and that she had no desk in front of her. The respondent submitted that the interview room may not have been ideal but that there was a desk. Both parties submitted that they could not remember definitively the interview room layout and neither parties evidence was convincing on the matter.

5.15 At the hearing of the claim in this case, the respondent stated that it does not dispute that the complainant has a disability, as defined in Section 2 of the Employment Equality Act, 1998. There is no doubt but that the complainant needed special facilities in order to have access to the interview. Adopting a purposive approach to the interpretation of section 16, I consider that there was an onus on the respondent to do all that was reasonable to accommodate the complainant at the interview stage by providing special facilities subject to the requirement that such a provision would not give rise to other than a nominal cost. In this case, the complainant stated on her application form that she was a wheelchair user. She advised the respondent of the matter when she was contacted in relation to the interview and she specifically asked whether the interview room was accessible. The respondent did not deny that it had knowledge of the complainant's disability prior to the interview. However, when she arrived for interview, it was not possible for her to gain access to the interview room on the first floor as the stairlift was not working. I find that the complainant has established a *prima facie* case of discrimination on the disability ground that the respondent failed to do all that was reasonable to accommodate the needs of the complainant by the provision of special facilities at the interview stage by ensuring that the interview room was accessible. The respondent did

not submit that the cost of having the stairlift fixed would have given rise to other than a nominal cost. In the circumstances, the respondent's failure to provide special facilities in relation to the stairlift cannot be deemed reasonable and I find that the respondent has failed to rebut the complainant's claim of discrimination. It is noteworthy that at the hearing, the respondent was not in a position to confirm that the stairlift had been repaired at that point in time and I shall refer to this matter again in my order for redress. In circumstances such as those in issue, I consider that it would be prudent for an employer who is on notice that a wheelchair user is attending an interview to notify the candidate in advance of any special access arrangements such as using a particular entrance and ensure that any equipment which would facilitate access to the interview room is working.

- 5.16** On a general issue, I would like to refer to a positive action measure contained in the Employment Equality Act, 1998 which employers may have regard to in the recruitment of people with disabilities. In relation to the issue of providing special treatment or facilities for people with disabilities, I note that section 35(2) of the Employment Equality Act, 1998 provides, inter alia, that:

“Nothing in this part or Part II shall make it unlawful for an employer or any other person to provide, for a person with a disability, special treatment or facilities where the provision of that treatment or those facilities -

- (a) enables or assists that person to undertake vocational training, to take part in a selection process or to work,*”

Claim of discrimination in relation to the selection process

- 5.17** Section 8(1) of the Employment Equality Act, 1998, prohibits discrimination by employers and providers of agency work, inter alia, in relation to access to employment. As with all discrimination claims, the onus of proving the factual

basis on which unlawful discrimination may be presumed rests with the complainant. In relation to discrimination regarding appointments, to establish a *prima facie* case of discrimination, it is not enough to adduce evidence of discriminatory views or attitudes held by the selection board, the complainant must also show that these attitudes had a clearly recognisable discriminatory effect and that the selection was based on them. I concur with the view expressed by one of my predecessors who stated:

“In a situation where a successful candidate is selected on the basis of his/her performance at an interview the questions which must be considered by an equality officer are whether the interview was conducted in a non-discriminatory manner, whether there are significant reasons why the claimant should have been selected and whether the Board had credible and non-discriminatory reasons for not selecting the claimant.”¹⁵

5.18 All of the interviews were conducted on the morning 6 July 2000 at half hourly intervals by an interview board consisting of two persons from outside the respondent organisation and the Chief Pharmacist of the hospital. The interview board consisted of two females and one male. The complainant was the last candidate to be interviewed. The Job Specification (attached at Appendix 1) which was drawn up by the Recruitment Department of the hospital in conjunction with the Chief Pharmacist some time prior to the interview stated that a Pharmaceutical Technician’s Diploma was essential together with three years hospital experience. The Person Specification (attached at Appendix 2) which was also drawn up by the Recruitment Department of the hospital prior to the interview again listed a Pharmaceutical Technician’s Diploma and three years hospital experience as essential requirements. A number of other factors which were also listed on the Person Specification as essential for the post included Organisational Knowledge, Professional Knowledge, Core Aptitudes, Special Aptitudes and Adaptability. The Job Specification and Person Specification were

sent to the complainant and other candidates prior to the interviews. The advertisement for the post (attached at Appendix 3) also stated that applicants should have a Pharmaceutical Technician's Diploma and at least three years hospital experience. Additionally, it stated that Pharmaceutical Technicians with less than three years experience or no hospital experience are invited to enquire about temporary positions. In order to establish a *prima facie* case of discrimination in relation to the selection process, the complainant would have to show that she was at least as qualified and possessed at least the equivalent hospital experience as the successful candidate.

5.19 The respondent provided copies of the applications submitted by the four applicants for the post, the notes made by the interview board in respect of each applicant and the marks awarded. I have examined the applications submitted by all of the candidates for the post. The successful candidate satisfied both requirements of the post as stated in the advertisement for the post in that she possessed a Pharmaceutical Technician's Diploma and had at least three years hospital experience. The complainant satisfied the first requirement in relation to qualifications, however, the successful candidate had additional qualifications for which she was given credit. It was not clear from the complainant's application form the amount of hospital experience she had. During the interview process, it was established that the complainant did have some hospital experience but did not have the three years minimum hospital experience. The successful candidate had in excess of the three years hospital experience requirement. It can therefore, be said that the successful candidate was better qualified and had greater hospital experience than the complainant.

5.20 As the complainant did not meet the requirement of at least three years hospital experience, she was not eligible for appointment to a permanent post but could as per the advertisement have enquired about a temporary position. I note that the standard application form is headed "*Post Applied For: Senior*

15¹⁵ Mary Turley- Mc Grath v. Co. Donegal V.E.C. EE 4/96 [1997] E.L.R. 1.

Pharmaceutical Technician". On the complainant's application form, she added "*or other positions in Pharmacy*" but did not specifically state her interest in a temporary Senior Pharmaceutical Technician position. At the hearing, the chairperson of the interview board stated that the board did not consider the complainant for a temporary position as it was asked to fill one position only which was the permanent position of Senior Pharmaceutical Technician. He further stated that a temporary position would only have been available if the board considered that none of the applicants were suitable for appointment to a permanent position which was not the case.

- 5.21** I have also considered the interview notes of all of the candidates. I note that the interview notes in relation to the complainant make a reference to her having had surgery and there is also a comment in relation to the complainant having "*Problems about doing ward duties*". At the hearing, I sought to establish how and why these issues arose and the respondent clarified that during the interview, the complainant volunteered information in relation to her disability and at the end of the interview when she was asked if she had any questions or wanted to provide other information, she stated that she had a concern in relation to ward duties. The complainant did not allege that she was asked any questions about her disability and she did not dispute the respondent's statement in relation to the comments on the complainant's interview notes.
- 5.22** The respondent submitted that marks were awarded by consensus based on the considered opinion of the interview board on the capacity of the candidate to do the work required having regard to the responsibilities of the position of Senior Pharmaceutical Technician and based on the information contained in (a) the application form and (b) obtained through the questioning process at the interview stage. The marks awarded were recorded on a standard marking sheet (Appendix 4) for each candidate which also included a column for some constructive comments to be made by the interview board. I note that a copy of

the complainant's marking sheet was forwarded to her with the letter advising her that she had not been successful at interview.

5.23 The respondent in this case drafted a job specification and a person specification for the post of Senior Pharmaceutical Technician. The essential requirements of the post in relation to qualifications and experience for the post are clearly stated in the Job Specification, Person Specification and in the advertisement for the post. I have found that the successful candidate was better qualified and had greater hospital experience than the complainant. The headings of Professional/Technical Knowledge, Communication Skills and Organisational Skills on which candidates were marked are also stated to be essential in the Person Specification. Assessment and marking of the candidates took place under the three headings. There is no evidence to suggest that the interview board took the complainant's disability into account during the selection process. Taking into account the various factors in the case, I find that the complainant has failed to establish a *prima facie* case of discrimination on the disability ground in relation to the selection process for the post of Senior Pharmaceutical Technician.

The respondent's policies

5.24 I have examined a copy of the Statement of Equal Opportunity submitted by the respondent and I note that it is headed Eastern Health Board and is dated July 1990 and is therefore out of date as it should be headed with the respondent's name and it also does not take account of the provisions of the Employment Equality Act, 1998. I note also that the Recruitment and Selection policy submitted by the respondent dated May 1999 is out of date and does not take account when referring to equal opportunities of the nine grounds of discrimination prohibited by the 1998 Act. I have also examined a copy of the Code of Practice for the employment of people with disabilities which was

submitted by the respondent. Again, it is headed Eastern Health Board and not with the respondent's name. I note also that at page 4 of the Code, it states:

“The Eastern Health Board will make all reasonable efforts to provide such special facilities and equipment as are necessary to enable applicants with disabilities to participate in competitions for posts for which they would otherwise be suited”

Whilst the aim expressed in that particular paragraph and the existence of a Code of Practice are laudable, clearly the mere existence of a Code is not sufficient to prevent discrimination and every effort should be made to implement the Code in practice.

6. DECISION

- 6.1** On the basis of the foregoing, I find that the respondent discriminated against the complainant in terms of section 6(2)(g) of the Employment Equality Act, 1998 and contrary to the provisions of section 16 of the Act by its failure to do all that was reasonable to accommodate the needs of a person with a disability by providing special facilities at the interview stage.
- 6.2** On the basis of the foregoing, I find that the complainant has failed to establish a *prima facie* case of discrimination on the disability ground in terms of section 6(2)(g) of the Employment Equality Act, 1998 and contrary to the provisions of section 8 of the Act in relation to the selection process for the post of Senior Pharmaceutical Technician.

In accordance with section 82 of the Employment Equality Act, 1998, I hereby order that the respondent:

- pay to the complainant €1,270 (£1,000) as compensation for the distress suffered as a result of the discrimination occurring in relation to the finding of discrimination referred to at 6.1 above;
- immediately provide and maintain an effective means of access to the Administrative Building by way of a functioning stair lift or otherwise:
- circulate to every member of staff a summary of the main provisions of the Employment Equality Act, 1998 within a three month period from the date of this Decision, if necessary by liaising with the Equality Authority.
- draft its own Equality Policy and take account of the provisions of the Employment Equality Act, 1998, if necessary, by liaising with the Equality Authority and make a copy of the revised policy available to every member of staff within a three month period from the date of this Decision;
- draft its own Code of Practice on the Employment of People with Disabilities within three months of the date of this Decision and specifically bring its contents to the attention of all interview boards in the future;
- draft its own Recruitment and Selection Policy which takes account of the provisions of the Employment Equality Act, 1998 within three months of the date of this Decision.

Mary Rogerson
Equality Officer
23 January 2002