

EQUALITY OFFICER'S DECISION NO: DEC-EE/2014/006

PARTIES

Liliya Skopinska

(Represented by Technical Engineering and Electrical Union)

Vs

Portmarnock Sport & Leisure Club

(Represented by Athrú Solutions)

FILE NO : EE/2011/524

Date of issue: 10th of February, 2014

1. Dispute

1.1 This dispute involves a claim by Ms. Liliya Skopinska that she was discriminated against by Portmarnock Sport & Leisure Club on grounds of race, in terms of section 6 of the Employment Equality Acts, 1998 to 2008 and contrary to section 8 of those Acts, in relation to her conditions of employment. The complainant has also submitted claims of harassment on grounds of race and of victimisation.

2. Background

2.1 Ms. Liliya Skopinska referred a complaint under the Employment Equality Acts 1998 to 2008, to the Equality Tribunal, on the 1st of July 2011, alleging that the respondent had discriminated against her and harassed her, on grounds of race, when she was denied access to a store room for work equipment and tools and which she and other staff had also used as a changing room, without any explanation. The complainant also claims that she and other female members of staff were forced to work in an area in the presence of naked men. A complaint of victimisation was also submitted but was withdrawn at the hearing.

2.2 In accordance with his powers under section 75 of the Employment Equality Acts, 1998-2008 the Director delegated this case on 12th of September, 2013 to me, Orla Jones, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of those Acts. This is the date I commenced my investigation. Written submissions were received from both parties. As required by Section 79(1) of the Acts and as part of my investigation I proceeded to a Hearing on the 21st of October, 2013.

3. Summary of complainant's case

3.1 The complainant submits that she is a Polish National and was employed by the respondent as a cleaning and maintenance person from June 2005 to August 2011.

3.2 The complainant submits that she arrived at work one day to find that the room used for storing work materials and equipment and also for changing her clothes, was locked and no explanation was given for same.

3.3 It is submitted that the room was eventually opened by Ms. M a supervisor and that the complainant and others were allowed access to the room while supervised by Ms. M.

3.4 The complainant and others were instructed to dress and undress under supervision.

3.5 The complainant and other female staff were forced to work in an area in the presence of naked men.

3.6 It is submitted that this treatment amounts to discrimination and harassment on grounds of race.

4. Summary of respondent's case

4.1 The respondent denies all allegations of discrimination and harassment on grounds of race.

4.2 It is submitted that the room in question is a boiler room and unbeknownst to the respondent, was being used as a personal storage and recreational facility by members of staff.

4.3 The respondent became aware of an incident in the room in January 2011 following a complaint.

4.4 Following this incident, the room was locked on the night of Friday 28th of January, 2011 and all staff of the respondent were restricted access to the boiler room as an internal investigation was being carried out.

4.5 On Monday 31st of January 2011, Ms. M the Pool Manager was given a key to allow staff access to the room as necessary.

4.6 Staff were not forced to work in the presence of naked men and the respondent took all reasonable steps to ensure that cleaning of the changing rooms was finished prior to occupation by the public.

5. Preliminary Jurisdictional Issues- Settlement Agreement

5.1. The respondent at the hearing submitted that the Equality Officer has no jurisdiction to investigate the claim as the complainant had signed a disclaimer at the time of her redundancy waiving and discharging any claim against the respondent including claims arising under the Employment Equality Acts 1998-2008. The respondent presented to the hearing a letter to the complainant issued on 26th of August 2011 and containing details of her voluntary redundancy. Before I can consider the substantive issues, I have to consider whether this disclaimer amounts to a settlement agreement and whether it means that I do not have jurisdiction to investigate this claim.

5.2 The Labour Court set out an approach to settlements, in *Sunday World Newspapers Limited v Steven Kinsella & Luke Bradley*, Determination No. FTD066 as follows:

“It is clear from the authorities that a provision in a statute prohibiting contracting out does not prevent parties from lawfully agreeing to settle or compromise claims based on the statute. There is, however, often a subtle but substantial difference between a genuine bargain to settle or dispose of a claim, which is lawful and enforceable, and an attempt to exclude or limit the Act, which is void and of no effect. The case law indicates that the following considerations are relevant in distinguishing the former from the latter: -

- 1. The terms of any waiver must be construed strictly against the party from whom it emanated. Where there is doubt the course of negotiations between the parties should be examined so as to ascertain what was intended.*
- 2. An agreement to wave statutory rights must be supported by adequate consideration.*
- 3. The waiver should normally arise from an agreement reached as a result of*

meaningful negotiations and professional advice having been sought and given.

4. The waiver should list the various Acts being taken into account.

5. The waiver is only valid if it is based on a free and informed consent given by a person with full knowledge of their legal rights.

6. It is for the employer to ensure that the worker is capable of giving an informed consent and the employer should normally advise the worker in writing to obtain professional advice before inviting him or her to sign a waiver.”

5.3 Firstly I shall look at the issue of ‘adequate consideration’. The respondent submits that the complainant was paid her statutory redundancy in addition to 4 weeks paid notice in lieu of service. It is clear from the letter of 26th of August, 2011 that the complainant had been on protective notice of redundancy along with other employees and that her volunteering for redundancy eliminated the need for a selection process in her area of employment. The payment made was in accordance with the complainant’s statutory redundancy entitlements. The complainant did not receive any additional payment over and above that received by her colleagues with the same length of service. Accordingly, the complainant applied for and received a redundancy package which consisted of statutory redundancy. The respondent provided no evidence that the complainant received any additional monies over and above that received by her colleagues with the same length of service and which could be construed to be a payment which would form the basis of a settlement of his outstanding claim. Accordingly I do not find that there was any element to this agreement which would constitute “adequate consideration” for the purposes of a settlement agreement.

5.4 It is submitted by the respondent that the complainant signed this letter with a full understanding of all it entailed and stated that the contents of the letter were explained to her prior to signing. The respondent stated that the complainant was accompanied by her husband who was also an employee when signing the letter. It was submitted at the hearing that the complainant was not aware of and didn’t understand the implications of the letter and was not aware that she could be signing away her right to a claim. The complainant signed the letter at the company premises, and was not offered the opportunity to take the agreement away to consider it.

5.5 The respondent contends that the agreement was clearly intended to include all claims regarding the complainant's employment including this claim before the Equality Tribunal. The Employment Equality Acts is included on the list of legislation to be covered by the Agreement. It is submitted that the complainant signed this document, as everyone else did, as part of her redundancy package and that she was not aware that it applied to her outstanding Equality claim.

5.6 The hearing was advised that the complainant did not receive any legal advice on the agreement nor was she represented on the day of signing of the agreement. The respondent states that the complainant's husband who was also an employee was present on the day the letter was signed. I am thus satisfied that the complainant was not afforded the opportunity to obtain legal advice before signing the letter and was not made aware that legal advice may be required in relation to the matter. It is clear from the evidence adduced in relation to this matter that the complainant was not represented at the signing of the agreement and was not at any point advised that his situation was unique, in that, the signing of this disclaimer could have the effect of putting an end to her outstanding Equality claim. I am satisfied from the evidence adduced on this matter that the complainant was not made aware that she may in signing this agreement, be signing away her right to her outstanding claim under the Employment Equality Acts.

5.7 I am satisfied that the complainant's signing of the disclaimer was not based on free and informed consent with the full knowledge of her legal rights and thus falls short of what is outlined at pgh 5.2 above. In addition I am satisfied that the complainant did not receive 'adequate consideration' which could be construed as a settlement of her outstanding claim. Accordingly based on the totality of the evidence adduced on this matter I find that the disclaimer signed by the complainant as part of the Redundancy Package does not amount to "*a genuine bargain to settle or dispose of a claim, which is lawful and enforceable*" and thus the complainant is not prevented from pursuing her outstanding complaint to this Tribunal. I am thus satisfied that I have jurisdiction to investigate the complaint before me.

6. Findings and Conclusions of the Equality Officer

6.1 The issue for decision by me now is, whether or not, the respondent discriminated against the complainant, on grounds of race in terms of Section 6 and contrary to Section 8 of the Employment Equality Acts, 1998 to 2008, in relation to her conditions of employment

and whether the complainant was subjected to harassment on the ground of race pursuant to section 6(2) and contrary to Section 14A (7) of those Acts . In reaching my Decision I have taken into account all of the submissions, oral and written, made to me in the course of my investigation as well as the evidence at the Hearing.

6.2 Section 85A of the Employment Equality Acts sets out the burden of proof which applies in a claim of discrimination. It requires the complainant to establish, in the first instance, facts from which it may be presumed that there has been discrimination. If she succeeds in doing so, then, and only then, is it for the respondent to prove the contrary. The Labour Court elaborated on the interpretation of section 85A in *Melbury v. Valpeters* EDA/0917 where it stated that section 85A: "places the burden of establishing the primary facts fairly and squarely on the Complainant and the language of this provision admits of no exceptions to that evidential rule".

6.3 Section 6(1) of the Employment Equality Acts, 1998 to 2008 provides that discrimination shall be taken to occur where *“a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2).....”*

Section 6(2) (h) of the Acts defines the discriminatory ground of race as follows – *“as between any two persons that they are of different race, colour, nationality or ethnic or national origins... “*

6.4 Conditions of Employment

6.4.1 The complainant advised the hearing that she arrived at work on Saturday 29th of January 2011 to find the door to the store room, where she normally changed into her work clothes, locked. The complainant stated that this room also contained materials and equipment needed for her work as well as her work clothes. The complainant stated that no explanation was given as to why this room was locked and no alternative was offered. The complainant advised the hearing that once the office opened, she and other staff members inquired as to the reason for the room being locked, but no one was able to provide a reason. The complainant advised the hearing that a phone call was then made from the office to the Chairman, Mr. Q, to find out why the door was locked. The complainant advised the hearing

that two reasons were then given as to why the room was locked, firstly she was told it was for safety reasons and then that it was due to an ongoing investigation.

6.4.2 The complainant advised the hearing that for the next few days she had to get changed in the Kids room or in the toilets and had to leave her belongings in the office. The complainant advised the hearing that she and other staff members then requested to meet with the chairman in order to find out what was happening with the store room. She stated that a meeting was arranged with the Chairman, Mr. Q. The complainant advised the hearing that staff questioned the Chairman regarding the locking of the room and explained to him that they needed access to the room for belongings and equipment. Following this a key was given to Ms. M the lifeguard who would open the door when requested and standby and wait to lock it again once the complainant had retrieved what she needed from the room. The complainant stated that she had to change into her work clothes while Ms. M stood and waited for her to finish so she could lock the door again. The complainant advised the hearing that this was humiliating and that she felt as if she was being watched in case she was going to steal something. The complainant conceded that this was not said to her but stated that she felt as if she was not to be trusted. The complainant advised the hearing that Ms. M was the only one with access to the key and stated that in the event that Ms. C was on lifeguard duty when someone needed to access the room, they would have to wait until Ms. M was free and sometimes until after a swimming lesson was over. The complainant added that as Ms. C finished work at 2 o'clock, this also meant that no one had access to the room after 2 o'clock and so had to change their clothes in the toilets.

6.4.3 The respondent advised the hearing that the room in question is a boiler room and stated that on the night of 28th of January 2011 a complaint was received in relation to an incident which allegedly took place in the boiler room. Following this complaint, the room was locked in order not to compromise the integrity of an internal investigation in relation to the incident. The respondent added that a Garda investigation into the incident was also under consideration at the time.

6.4.4 The respondent advised the hearing that this boiler room is not an official staff changing room and states that it was unaware up to this point that staff were relying on the room as a changing room or as a store room. The respondent advised the hearing that the Club has ample changing facilities which are freely available and accessible to all staff for

the purpose of changing clothes. In addition, it emerged at the hearing that the changing of clothes being referred to by the complainant was the putting on of her work apron and shoes. The complainant when questioned did not dispute the fact that other changing facilities are available to staff and that staff can and do avail of the clubs changing rooms.

6.4.5 The respondent advised the hearing that the boiler room was locked following an incident on the night of the 28th of January, 2011 and stated that staff had no access to the room on the following day but added that once the respondent was alerted that staff required access to the room for items which they had stored there, a key was given to Ms. M in order to allow staff to retrieve whatever items they had stored in the room. Staff were granted access to the room on Monday morning 31st January, 2011. The respondent went on to state that complainant was only affected by this for one or two days and as soon as it became aware that staff had been using the room it provided access to the room. Thus the period in question during which staff were denied access relates to 2 days Saturday and Sunday, 29th and 30th of January 2011. The respondent advised the hearing that Ms. M was given a key and was told to allow access as and when requested by staff members but she was instructed to lock the door after staff had finished with the room as the internal investigation was still ongoing.

6.4.6 Ms. M advised the hearing that she did not at any stage stand and watch staff members getting changed into work attire but stated that she did wait outside the door, on the balcony, until they had finished in the room as she had been told to lock the room again after they had finished and it was her responsibility to ensure that the room was kept locked apart from when someone requested access. The respondent reiterated that it had up to this point been unaware that staff had been using the boiler room as a changing room and store. The respondent stated that it had in the past issued instructions that the boiler room was not to be used as a staff room for safety reasons and had begun the process of building designated locker rooms for staff. These locker rooms were still a work in progress at the time but the respondent had made it clear to staff that in the interim they could avail of the clubs existing changing facilities.

6.4.7 When asked at the hearing how the matter related to her race, the complainant stated that the staff involved, who were denied access to the room, were all non-Irish as they were Polish, Latvian and Lithuanian. She added that locking the room was in her opinion a way to

keep them in their place but conceded that this was not said by the respondent. It emerged at the hearing that the only staff member who had a key and who permitted other staff access to the room was also non Irish and is in fact Scottish. The respondent at the hearing stated that it has over 50 employees Irish and non-Irish and that all of them apart from Ms. M, who is Scottish, and who held the key, were restricted from accessing the room while the investigation was ongoing. The respondent added that a Garda investigation into the incident was also being contemplated at the time.

6.4.8 The complainant has submitted that she was denied access to the boiler room in question and that this amounts to discrimination on grounds of race. The respondent at the hearing gave evidence that the boiler room was locked and that all staff were allowed restricted access via Ms. M who held the key, therefore all staff were treated the same irrespective of race. The complainant has stated that she was forced to change into her work clothes while Ms. M stood and waited for her. However it emerged at the hearing that while Ms. M did wait for the complainant to finish in the room, she waited outside the door until the complainant had finished in order that she could lock the door again as instructed. In addition the complainant has stated that she was not permitted access to facilities for changing into her work clothes, however it is clear from the evidence adduced that the respondent as a Sports and Leisure Club has other changing facilities which the complainant has conceded that all staff are permitted to avail of. Accordingly I am satisfied based on the totality of the evidence adduced her that the complainant was not discriminated against **or** harassed by the respondent in relation to these matters.

6.5 Harassment

6.5.1 The complainant advised the hearing that she and other female members of staff were forced to work in an area in the presence of naked men. The complainant advised the hearing that a part of her job involved cleaning the male and female changing rooms where she would sometimes have to carry out her work while male members of the public changed their clothes. The respondent advised the hearing that it had taken all reasonable steps to ensure that staff were finished cleaning the changing rooms before allowing them to be opened to the public. The respondent added that it has a strict policy in this regard and stated that all relevant staff are instructed that the cleaning of the changing rooms must be completed before 7 am in order that the rooms can be made available to the public from 7 am onwards.

6.5.2 Ms. M, witness for the respondent advised the hearing that it is her responsibility to open the changing rooms to the public and stated that she checks to ensure that all staff are finished their cleaning duties and the changing rooms are completely empty before opening them to members of the public. Ms. M stated that she herself had on occasions been assigned to clean the changing rooms as she started work at 6 am. Ms. M advised the hearing that she cleaned the male changing rooms first and then the female rooms and that this was completed by 6.50 am prior to her opening the changing rooms to the public at 7 am. When asked whether there was a possibility that a cleaner who was running late, could still be cleaning the male changing rooms, after they had been opened to the public, the respondent stated that this could not and did not happen as someone else would be assigned to clean the areas if the designated person did not show up or was running late. The respondent also added that it had done all in its power to ensure that the complainant and other cleaners would not be working in the changing rooms after they were opened to the public. The respondent added that the complainant along with other cleaning and maintenance staff had been given a clear instruction that all cleaning was to be completed before 7 am and stated that they had never received any communication from staff that this time was not adequate or that it had ever resulted in a female member of staff cleaning the male changing rooms after they had been opened to the public. It is clear however, that the respondent cannot be held responsible for ensuring that the complainant did not enter or re-enter the changing rooms, after they had been opened to the public, and it is reasonable to expect that an instruction that cleaning of the changing rooms should be completed prior to 7 am, would have and should have been complied with by the complainant and other cleaning staff.

6.5.3 I am satisfied from the totality of the evidence adduced here that the respondent did not force the complainant to work in an area in the presence of naked men and had in fact stipulated that all cleaning should be completed prior to the changing rooms being opened to the public. In addition, I am satisfied that Ms. M only opened the doors to the public after the cleaning of the changing rooms was completed. Accordingly I am satisfied that the complainant was not subjected to discrimination or harassment by the respondent in relation to these matters.

7. DECISION OF THE EQUALITY OFFICER.

7.1 I have completed my investigation of this complaint and make the following Decision in accordance with section 79(6) of the Employment Equality Acts, 1998-2008. I find that -

(i) the complainant was not discriminated against by the respondent on the ground of race pursuant to section 6(2) and contrary to section 8 of the Acts in relation to her conditions of employment

(ii) the complainant was not harassed by the respondent on the ground of race pursuant to section 6(2) and contrary to Section 14A (7) of those Acts.

Orla Jones
Equality Officer
10th of February, 2014