

THE EQUALITY TRIBUNAL

EMPLOYMENT EQUALITY ACTS 1998-2011

Decision DEC – E2014 – 011

PARTIES

Ms Karen Coakley

and

Department of Social Protection (represented by Ms Niamh McGowan,
B.L., instructed by the Chief State Solicitor)

File References: EE/2011/594
Date of Issue: 20th February 2014

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Keywords: *jurisdiction – whether respondent is the correct respondent - Catholic University School v. Dooley & Scannell - family status – access to employment – lack of eligibility for position for reasons unconnected to family status – no prima facie case.*

1. Claim

1.1. The case concerns a claim by Ms Karen Coakley that the Department of Social Protection discriminated against her on the ground of family status contrary to Section 6(2)(c) of the Employment Equality Acts 1998 to 2011, in terms of access to employment.

1.2. The complainant referred a complaint under the Employment Equality Acts 1998 to 2011 to the Director of the Equality Tribunal on 16 August 2011. A submission was received from the complainant on 20 November 2012. A submission was received from the respondent on 18 February 2013. On 12 December 2013, in accordance with his powers under S. 75 of the Acts, the Director delegated the case to me, Stephen Bonnlander, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Acts. On this date my investigation commenced. As required by Section 79(1) of the Acts and as part of my investigation, I proceeded to hold a joint hearing of the case on 15 January 2014. The last piece of correspondence relating to the complaint was received on 4 February 2014.

2. Summary of the Complainant's Written Submission

2.1. The complainant submits that in April 2011, she applied for a position as TÚS Supervisor, and was successful. TÚS is an employment scheme administered on behalf of the State by Pobail. The complainant would have been employed by the West Cork Development Partnership, and was due to commence employment on 4 July 2011. On 28 June 2011, the complainant received a phone call from the West Cork Development Partnership to say that it needed to withdraw the offer due to the intervention of the respondent. The respondent's Sligo office had contacted the Partnership to advise that,

unlike what the complainant's local social welfare office had confirmed, the complainant did not meet the necessary criteria.

2.2. The complainant states that when she became unemployed, she received Jobseekers Benefit for a year, and when she was not eligible for that benefit any longer, was put on the One Parent Family Payment, instead of Jobseekers Allowance. She states that she was never even offered to go on Jobseekers Allowance. However, the scheme she had successfully applied to work for rules out recipients of the One Parent Family Payment, therefore the complainant was deemed ineligible to participate. Her job offer from West Cork Development Partnership was subsequently withdrawn at short notice.

2.3. The complainant notes in her submission that this was deeply distressing to her, as she is eager and willing to work and to return to building a career. She states that she offered to re-imburse the respondent the monies she received on the One Parent Family Payment, over Jobseekers Allowance in return for a chance to take up employment in the scheme, but that this was not accepted by the respondent. According to the complainant, the respondent was unresponsive to her plight. She writes: "In fact, I was brushed aside and nobody would take accountability for this scenario. Due to my family status and the error by social welfare I have lost my job and I have been treated appallingly."

2.4. The complainant contends that this constitutes discrimination on the ground of family status.

3. Summary of the Respondent's Written Submission

3.1. The respondent denies discriminating the complainant as alleged or at all. First of all, it denies being the complainant's employer, or prospective employer, within the meaning of the Acts, and states that this should be West Cork Development Partnership. It does acknowledge, however, that it is the entity responsible for setting eligibility criteria for participating in the TÚS scheme.

- 3.2. It submits that the rules of the TÚS scheme state that applicants have to be in receipt of Jobseekers Benefit or Jobseekers Allowance and “fully unemployed”. The aim of the scheme is to provide quality work opportunities for people affected by long-term unemployment. The places on the scheme are randomly offered to persons on the Live Register who meet these criteria. There are 5000 places on the scheme. Supervisor positions are advertised in the press; however, the eligibility criteria as set by the respondent are the same as those of ordinary participants. It further states that these eligibility criteria were clearly communicated to the complainant.
- 3.3. With regard to the complainant’s entitlement to social welfare benefits, the respondent states that the complainant’s Jobseekers Benefit ran out only after the closing date for applications. She then had an entitlement to either Jobseekers Allowance or the One Parent Family Payment. It is the respondent’s policy to pay claimants the payment which is most beneficial to them. It also states that the complainant did not receive the Jobseekers Allowance because she declined to be means-tested. It further states that the One Parent Family Payment allows the recipient additional earnings of up to €100 before any diminution in payments occurs.
- 3.4. In its written submission, the respondent does not advance any arguments whatsoever as to why recipients of the One Parent Family Payment are excluded from the TÚS scheme.

4. Conclusions of the Equality Officer

Jurisdiction

- 4.1. The preliminary issue for decision in this case is whether the respondent, due to its role in both funding the TÚS labour activation scheme for which the complainant unsuccessfully applied, and in setting the terms and conditions that make applicants eligible to take up employment in the scheme, is a prospective employer of the complainant within the meaning of the Acts.
- 4.2. From all the evidence adduced in the submissions and at the hearing of the complaint, it is clear that the respondent wholly controlled the complainant’s

eligibility for her employment with the West Cork Development Partnership, as well as providing the funding for the salaries for participants under the scheme.

- 4.3. Therefore, while this is a complaint about access to employment, I am of the opinion that, insofar as a potential tripartite employment relationship between the complainant, West Cork Development Partnership and the respondent is concerned, the facts in the case on hand closely mirror those before Dunne J. in *Catholic University School v. Dooley & Scannell* [2010] IEHC 496. In this case, the two respondents to their employer's appeal were privately employed teachers who had claimed less favourable treatment under the Protection of Employees (Part-Time Work) Act 2001 and the Protection of Employees (Fixed-Term Work) Act 2001, than other teachers at their school who were paid by the Department of Education. Dunne J in her judgement carefully examined the contracts of Mr Dooley and Ms Scannell, and found that while the school determined their own contracts and pay, it had "no hand, act or part" in the pay and conditions of employment set down by the Department of Education for teachers on its payroll. Dunne J went on to find that

In determining the employer for the purposes of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is an analogous position. I do not accept that the chosen comparators have the same type of employment contract or relationship as the claimants with the school. To that extent, it seems to me that the Department has to be viewed as the employer of the chosen comparators for the purpose of the legislation.

I am satisfied that the analogy drawn by Dunne J equally applies to the facts in the case on hand, and that the Department of Social Protection is the appropriate respondent for this complaint, in which it is alleged that conditions of access to a particular labour-activation scheme, *which it solely determines*, are indirectly discriminatory for a person who enjoys the protections of the Employment Equality Acts, and that I therefore have jurisdiction to investigate this matter. I am satisfied that it was not within the gift of West Cork

Development Partnership to change the access conditions set by the Department.

Discrimination Complaint

4.4 The main issue for decision in this case is whether the complainant was discriminated against in terms of access to employment on the ground of her family status.

4.4. In evaluating the evidence before me, I must first consider whether the complainant has established a *prima facie* case pursuant to S. 85A of the Acts. The Labour Court has held consistently that the facts from which the occurrence of discrimination may be inferred must be of “sufficient significance” before a *prima facie* case is established and the burden of proof shifts to the respondent.

4.5. In coming to my decision, I have considered all oral and written evidence presented to me by the parties.

4.6. There was no dispute that the complainant has family status.

4.7. With regard to the TÚS programme, officials from the respondent department gave extensive evidence, both on the programme itself, and the specific situation the complainant found herself in. It emerged from this evidence, which the complainant confirmed was true, that the complainant would not have been eligible for the supervisor position on the TÚS programme for reasons that were wholly unrelated to her family status: She was not unemployed for long enough – by the time she was offered the position, her Jobseeker’s Benefit had not yet expired – and she was not wholly unemployed, as she held a position as town councillor in Skibbereen for which she received the usual honorarium. The respondent considers such an engagement to be casual employment, and it excludes applicants from eligibility for this particular programme. By way of background, Mr A., Principal Officer in the relevant division of the Department, explained that the TÚS programme was created specifically for long-term unemployed persons

who were in danger of becoming wholly estranged from the labour market. It is a specific policy response to the unemployment crisis that has gripped the country since 2008.

4.8. In subsequent correspondence with the Tribunal, the complainant accepted that she would not have been eligible for the position, and indeed I am satisfied that these particular eligibility criteria, which the complainant did not meet, are wholly independent of her family status. Accordingly, the complainant is not in a position to establish a *prima facie* case of indirect discrimination on the ground of family status, and her complaint can not succeed. It should be noted, however, that the respondent dropped all previously stated requirements for TÚS supervisor positions in June 2013, and now only states to organisations participating in the scheme that these positions should preferentially go to persons who are unemployed. Accordingly, there would be no barriers for the complainant if she wished to re-apply for a position under the scheme at the present time.

5. Decision

5.1. Based on all of the foregoing, I find, pursuant to S. 79(6) of the Acts, that the Department of Social Protection did not discriminate against Ms Karen Coakley, on the ground of family status, in access to employment contrary to S. 8(1) of the Acts

Stephen Bonnlander
Equality Officer
20 February 2014