

SUMMARY

2010/47: Employer ordered to give employee who was discriminated against meaningful work and to pay her compensation equalling three years' salary (IR)

An employee alleged that she was given a "dummy" job by her employer, and that less experienced and less qualified younger men were groomed to take the promotions she would have expected to obtain in the normal course of her career. This claim of discrimination on the grounds of gender along with a claim of victimisation for making a complaint, contrary to the Employment Equality Acts 1998 - 2008 (the "EEA"), resulted in one of the highest compensation payments in recent times before the Equality Tribunal in Ireland.

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Facts

The Complainant, Ms Murphy, commenced employment with Ireland's national railway service Córas Iompair Eireann (CIE) in 1971. Initially working as a computer programmer, Ms Murphy was one of three staff to be awarded a scholarship to complete a degree in commerce. She attained a first class honours in a primary International Marketing degree in 1984 and also in her masters studies which were sponsored by CIE the following year. On foot of this, the Complainant joined CIE's marketing department. She was also appointed to various committees in the Marketing Institute of Ireland and other professional organisations. In January 2003, Ms Murphy returned from a career break to resume her position as Marketing Projects Manager, at which point her career at the Respondent went into freefall. The Complainant alleged that:

- she was discouraged by her supervisor from taking part in interviews for posts which would have been a promotion, as those posts were on an ungraded salary scale compared to her graded position;
- she was told that a new role of Marketing Communications Manager, which was created for her, would be a promotion. However, appointment to this role was never announced and it was not included in the CIE organisation chart. The role was not allocated a budget and had no direct reports. The Complainant never received an increase in remuneration, or individual or corporate bonuses, as had been promised to her by her supervisor;
- at a meeting, the Complainant's supervisor asked her what age she was, when she intended to retire and where her husband worked;
- when the Complainant refused to accept a voluntary severance package, she was effectively frozen out by her employer. Her membership subscription fees to professional institutions were cancelled, while male colleagues' fees continued to be paid;
- she was blocked from participating in the recruitment and selection process for other internal positions, one of which went to a younger male colleague; and
- her email account and IT usage had been monitored by the Respondent, after she took the equality claim against the company.

Ms Murphy submitted that she had felt distressed, undervalued and intimidated in CIE since 2003. She contended that she successfully completed every task she was assigned and wanted to continue working there.

The Respondent rejected all of the Claimant's allegations of discrimination, pointing out that as one of 792 middle ranking executives working in the Company, the Complainant was at a lower salary than 426 of her colleagues, 50 of whom were female. Her membership fees had not been paid because she had not followed administrative protocol and obtained her manager's approval.

CIE did not deny that there were discussions regarding voluntary redundancy, but submitted that whilst it was mentioned to her, there was no coercion. The Company also rejected the argument that the Complainant had been made to feel isolated and maintained that there had been a number of attempts to develop a worthwhile role for her. However, she had failed to attend many of the meetings organised to discuss this issue. There had been considerable difficulty in finding a suitable position for Ms Murphy for two main reasons. Firstly, because they believed the Complainant had "an exaggerated sense of her own importance and her organisational status" and, secondly, because her former managers and colleagues were reluctant to take her on board.

The Respondent claimed that on a once-off basis, Ms Murphy's supervisor took the very exceptional step of auditing her computer usage, due to suspected non-attendance at work. The Respondent submitted that this check showed that Ms Murphy did not attend regularly for work, and the majority of her computer usage related to her external involvement with the Marketing Institute.

Judgment

The Equality Tribunal ruled that simply offering somebody a severance package, of itself, does not constitute discriminatory treatment. However, placing obstacles in relation to access to promotion, as well as creating an atmosphere of isolation and lack of significant work in a role not commensurate with the Complainant's marketing skills and experience, was found to be discriminatory treatment in relation to Ms Murphy's conditions of employment.

The Equality Tribunal noted the fact that the Complainant did not routinely attend for work. However because the office was damp and the working atmosphere was very uncomfortable, she occasionally worked from home and there was evidence of remote access for Ms Murphy, which refuted the allegations of non-attendance at work.

The Equality Tribunal interpreted Ms Murphy's supervisor's advice to withdraw from interviews as a misrepresentation of the Marketing Communications Manager role. Obstacles were placed in the Complainant's way in respect of all relevant internal interviews. The

Equality Tribunal was satisfied that a man with similar qualifications and experience with this employer would not have been treated in the same way. As a result, the Equality Tribunal determined that the Respondent did not offer Ms Murphy the same access to promotional opportunities¹ as male employees.

On the issue of victimisation², the Equality Tribunal ruled that whilst CIE had a right to monitor emails to ensure employees conform to company acceptable IT usage policy, accessing the Complainant's emails in this case was not to examine her work pattern or whether she was using CIE's facilities for personal financial gain, but was to further intimidate her and to be privy to her complaint of gender discrimination and bullying against her supervisor. It was found by the Equality Tribunal that the accessing of Ms Murphy's email in this context constituted victimisation.

The Equality Tribunal concluded that CIE had discriminated against Mrs Murphy in relation to her conditions of employment contrary to the Act on the ground of gender³. She was also discriminated against in relation to access to promotion on the ground of gender⁴. In addition, it was found that the Respondent victimised the Complainant within the meaning of the Act⁵. In accordance with the Act,⁶ the Equality Tribunal ordered the following:

1. that the Complainant be provided with meaningful work, consistent with her skills and experience, with immediate effect;
2. that the Respondent provide for a facilitation/mediation process, with a view to restoring working relationships; and
3. that the Respondent pay the Complainant EUR 126,000 (the equivalent to two years' salary), in compensation for discrimination in relation to her conditions of employment and access to promotion and a further EUR 63,000 (the equivalent to a year's salary) in compensation for the distress caused by victimisation. The total award therefore amounted to EUR 189,000.

Commentary

The decision of the Equality Tribunal is of significance in Ireland as the award of EUR 189,000 is one of the highest in recent years. Under Section 82 of the EEA, the Equality Tribunal has authority to order re-instatement, re-engagement and/or compensation where discrimination, harassment or sexual harassment is deemed to have occurred. The maximum compensation which may be awarded is two years remuneration⁷. A separate order of compensation may be made in respect of victimisation, as occurred in this decision.

Whilst justice must be done, the equivalent of three years' salary is viewed as excessive by

some commentators, particularly when one considers that Ms Murphy still works with CIE. We would query whether the arrears of the shortfall between her graded salary (EUR 63,000) and the salary that would have been earned had Ms Murphy had access to promotion, plus an award for victimisation, would have been a more proportional redress, particularly where Ms Murphy is still an employee of CIE.

The level of award in this case preceded plans announced in March 2010 by the European Commission to launch a new EU strategy for gender equality for 2010-2015. It intends to use a series of measures aimed at significantly reducing the pay gap between men and women over the next five years. The average gender pay gap in the EU currently stands at 18%⁸. The Commission has outlined that it plans to use both legislative and non-legislative instruments to reduce the gap.

From a legislative perspective, the strategy intends to look at items such as reinforcing the obligation to ensure gender neutral job classifications and pay scales, improving the provisions on sanctions in case of a breach of the right to equal pay, to ensure that they are dissuasive and proportional (e.g. higher sanctions in the case of repeat offences). The Commission strategy team is also considering implementing the reporting of gender pay gaps and ensuring transparency on pay at company and individual levels, or collectively through information and consultation with workers. The Commission plans to analyse the economic and social impact of certain options with the European social partners.

These are all positive steps in the right direction and there is no doubt the pay gap needs to be closed. Sanctions such as the award made in this case should act as a deterrent against future breaches.

Comments from other jurisdictions

Austria (Martin Risak): According to the Austrian Equal Treatment Act the remedies for discrimination in connection with career advancement (section 12 (5)) or in the case of victimisation (section 13) consist of compensation for actual financial loss and compensation for loss of dignity and hurt feelings. The Act foresees that the amount of compensation in the first case is either a minimum of the pay differential for three months if the employee would have been promoted based on a non-discriminatory selection process, or a maximum of EUR 500 if the employee would not have been promoted anyway. With this legal background an Austrian court would not have awarded the employee a sum close to the one in the case at hand.

Minimum and/or maximum amounts in the equal treatment legislation seem to have a

noticeable impact on court practices, as courts tend to use them as a reference point. Having rather low minimum compensation combined with the lack of a maximum in Austria seems to have a more negative effect on the sums awarded to employees who have suffered discrimination than the lack of minimum compensation combined with the rather high maximum award in Ireland.

Germany (Paul Schreiner): The German legal situation seems comparable to the Dutch (see below). In principle, material and immaterial damages ("compensation" is the German legal term) may be awarded. As regards to material damages, a German court would have taken into account the situation as it would be both with and without the discrimination. In the case at hand, as a first step the court would have asked what the claimant would have earned had promotion occurred. Assuming she earned less than she would have done if she had been promoted, the next question is what the timeframe for the calculation of damages is in such a situation. German commentators disagree on this: some believe that damages should be based on the amount that would have been payable for a hypothetical notice period, whereas others believe that they should be granted for an unlimited period of time. From my perspective, the latter opinion is correct, given that if the claimant had been promoted, the employer could only have changed her position by way of "change termination", which is only possible in accordance with the unfair dismissal act. If there is no valid reason - and one would be hard to find, in a case in which discrimination has occurred - the termination would be void.

The Netherlands (Peter Vas Nunes): I doubt whether a Dutch court would, or indeed could have awarded an employee in Ms Murphy's situation anything like three years of salary. An employee who is paid a lower salary than he or she would in all likelihood have earned if he or she had been of the opposite gender, is entitled to the pay differential. An employer who breaches the equal treatment rules (e.g. by harassing and/or victimising) commits a breach of contract, which fact leads to an obligation to compensate the employee for his or her actual loss. If the employee is lucky, he or she may additionally be awarded a small award for "immaterial damages". In brief, a Dutch court would not have awarded Ms Murphy more than a fraction of EUR 189,000. Perhaps this is the reason gender-based differentials are so hard to root out.

United Kingdom (Alexandra Mizzi): An employment tribunal in the UK would not have awarded anything like the amount awarded to Ms Murphy in this case. The starting point would be to calculate her actual loss (i.e. the difference between her current salary and the salary she would have received had she been promoted). There would then be a discount to reflect the possibility that, even if she had not been discriminated against, she might not have been promoted. The tribunal could also award compensation for "injury to feelings". Minor cases attract awards of up to £6,000 under this head, while in the most serious cases of

discrimination (for example, where there has been a lengthy campaign of serious sexual harassment), awards of between £18,000 and £30,000 for injured feelings are regarded as appropriate.

The Equality Tribunal's judgement also illustrates the extent of its powers to force the respondent to treat the claimant fairly in the future. By contrast, UK employment tribunals are only empowered to make "recommendations" that will benefit the claimant (and, when provisions in the new Equality Act 2010 come into force, the wider workforce). Such recommendations are not legally enforceable, although a failure to comply with a recommendation would be of evidential value in a future claim.

Footnotes

¹ Contrary to Section 8 (8) of the EEA, which specifies that: "an employer shall be taken to discriminate against an employee in relation to promotion if, on any of the discriminatory grounds, the employer refuses or deliberately omits to offer or afford the employee access to opportunities for promotion in circumstances in which another eligible or qualified person is offered or afforded such access, or the employer does not in those circumstances offer or afford the employee access in the same way to those opportunities."

² Defined under Section 74 (2) of the EEA, which specifies that: "victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to a complaint of discrimination made by the employee to the employer, any proceedings by a complainant, an employee having represented or otherwise supported a complainant, the work of an employee having been compared with that of another employee for any of the purposes of this Act ..., an employee having been a witness in any proceedings under this Act..., an employee having opposed by lawful means an act which is unlawful under this Act..., or an employee having given notice of an intention to take any of the [foregoing] actions".

³ Section 8(1)(b) of the EEA.

⁴ Section 8(a) of the EEA.

⁵ Section 74(2) of the EEA.

⁶ Section 82 of the EEA.

⁷ Section 4 of the EEA (as amended).

⁸ Eurostat and Article: "European Commission seeks to significantly reduce gender pay gap"; 5 March 2010; European Commission: Employment, Social Affairs and Equal Opportunities website: <http://ec.europa.eu/social/main>.

Subject: Gender discrimination

Parties: Murphy (Complainant - employee) - v - C oras Iompair Eireann (Respondent - employer)

Court: The Equality Tribunal

Date: 13 November 2009

Case number: DEC/E2009/105

Hardcopy publication: Not yet available

Internet publication: www.equalitytribunal.ie

Creator: The Equality Tribunal

Verdict at: 2009-11-13

Case number: DEC/E2009/105