

## **A Health Service Employee v The Health Service Executive (DEC-E2006-013)**

### **1) Reference Details**

Jurisdiction: Irish Equality Tribunal

Date of Decision: 10 April 2006

Link to full case:

<http://www.equalitytribunal.ie/index.asp?locID=109&docID=1228&COMMAND=PRINTER>

### **2) Facts**

The complainant was employed as a Care Attendant from March 1999 having previously worked for many years as a State Enrolled Nurse in England. Her employer paid for her to undertake a conversion course to allow her English nursing qualifications to be brought into line with standards set by *An Bord Altranais*. She was registered as a State Registered Nurse with *An Bord Altranais* in August 2003. She was offered a post as Staff Nurse in a temporary capacity to commence in October 2003 subject to *Garda* and Occupational Health clearance. She attended an appointment with an Occupational Health Nurse employed by the Health Board on 25 September 2003. At the meeting and based on the Health Declaration completed by her, the complainant was informed that she was clinically obese and that based on her body-mass index she was categorised as being morbidly obese. On this basis she was informed that she could not be accepted as a nurse and that an appointment would be made with the Occupational Health Physician which would probably take a month. The complainant wrote to the Director of Human Resources on 6 October 2003 regarding the length of time it would take to see the Occupational Health Physician. In that letter, she expressed her dissatisfaction at the way she had been treated in verbal comments from the Occupational Health Nurse and her view that she was being discriminated against. On 6 November 2003, the Director responded without addressing her complaint about her treatment on 25 September. The complainant attended an appointment with the Occupational Health Physician on 24 November 2003. The Director of Human Resources wrote to the complainant on 5 December 2003 attaching a copy of the Occupational Health Physician's report dated 17 November 2003 and a copy of the Board's pre-employment Health Assessment Policy. The letter conveyed the decision that the complainant's appointment was deferred subject to her satisfying "*the standards necessary for health clearance relative to the functional requirements of the post*" and indicated that she would be reviewed by Occupational Health in six months. The complainant received an appointment to see a dietician at the hospital on 5 February 2004. Although the dietician could not tell the complainant who made the referral, she did confirm to the complainant that she was not morbidly obese.

The complainant received a letter from an Occupational Health Nurse Adviser dated 2 March 2004 indicating that they had been in discussion with the Dietetics Department of the hospital. The letter pointed to the risks of extreme obesity and referred to fitness "standards" which reflect the functional requirements of the job and the ability to carry it out in a safe, effective and sustainable manner for not only the nurse but also for patients and colleagues. Since the complainant's registration with *An Bord Altranais* in August 2003, the complainant was frequently deployed as a Staff Nurse when they were short of staff. The

complainant's Union wrote to the complainant on 10 February 2004 pointing out that the respondent was imputing that the complainant had a disability, defined in the Act as one which exists at present, or which previously existed but no longer exists, or which may exist in the future or is imputed to a person. It was agreed that the complainant would be referred to another Occupational Health Physician. An appointment was made for 29 April 2004 and the report concluded that the risk was no different to her current position for which she had been deemed fit. The report also noted that as it was not currently causing her any significant problems, he could not find her unfit for the position of staff nurse. A position was offered to the complainant on 18 June 2004 on condition that she agreed to engage with the Occupational Health Department in their endeavours to reduce or eliminate risks previously identified by them. The complainant had been employed in a temporary capacity as a Staff Nurse since 28 June 2004 and in a permanent capacity since 28 March 2005.

The complainant referred a complaint under the Employment Equality Act 1998 to the Director of Equality Investigations on 26 February 2004. On 27 May 2005, in accordance with her powers under s. 75 of that Act, the Director delegated the case to Mary Rogerson, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. A submission was received from the complainant on 29 June 2005 and from the respondent on 24 August 2005. A joint hearing of the claim was held on 15 March 2006.

### **3) Law**

- Section 6(2)(g) of the Employment Equality Act, 1998 (definition of discrimination on the grounds of disability)
- Section 8 of the Employment Equality Act, 1998 (scope of application)

### **4) Legal Arguments**

#### *The Complainant*

The complainant alleged that the Health Service Executive directly discriminated against her on the disability ground in terms of s. 6(2)(g) of the Employment Equality Act, 1998 and in contravention of s. 8 of the Act in relation to access to the post of Staff Nurse. The complainant submitted that she was discriminated against as she was denied access to a post as Staff Nurse on the grounds that she had not satisfied the standards necessary relative to the functional requirements of the post because of her weight. She claims that she was discriminated against on the basis of an imputed disability.

#### *The Respondent*

The respondent denies that it discriminated against the complainant and submits that it was correct in acting upon the specialist medical advice available to it. It asserted that when the Occupational Health Department examines a prospective employee, the existence of any medical condition that might impact upon the contractual requirements of employees, the employees must demonstrate the capacity to render regular and efficient service. However, the Occupational Medical Department will not automatically deem a person unfit, simply due to the fact of them having a medical condition. Early, effective and energetic treatment for any treatable condition is usually offered, and this was the course of action advocated by

the Occupational Health Physician. The respondent concluded that the complainant was not discriminated against by virtue of the actions taken culminating in her appointment to the post of Staff Nurse.

## **5) Decision**

The Officer of the Equality Tribunal found that the respondent discriminated against the complainant on the basis of disability in terms of s. 6(2)(g) of the Employment Equality Act, 1998 contrary to s. 8 of the Act in relation to appointment to the post of Staff Nurse. The Officer therefore ordered that the respondent pay the complainant the sum of €3,000 for the effects of the act of discrimination, and appoint the complainant to the post of Staff Nurse in a temporary capacity with effect from 22 October 2003 (being the initial date when health clearance was deferred) and make the necessary salary adjustments.

In reaching her conclusion, the Officer of the Equality Tribunal considered whether the respondent imputed a disability to the complainant, and whether the complainant had established a *prima facie* case of discrimination on the basis of disability. She found that the respondent imputed a disability to the claimant as a consequence of the issues with her weight. She also found that the complainant had succeeded in discharging the evidential burden for establishing a *prima facie* case of discrimination and the respondent has not rebutted the complainant's claim of discrimination on the disability ground as it did not consider if any special treatment or facilities were available by which she could become fully capable.