

INTO Conference 1 October 2016

Anne Lyne, Partner with Hayes solicitors

WORKSHOP

Scenarios for Discussion

Please read the below scenarios together in your groups and discuss the following:

- Do you believe that the teacher in question has been (a) discriminated against (b) harassed (c) victimised or (d) simply treated unfairly?
- Do you believe he/she could bring a claim under the Employment Equality Acts on the grounds of gender? If so, why?
- Do you think he/she would be successful?
- What could the school do here to remedy the situation/ or prevent discrimination on the grounds of gender from occurring?

SCENARIO 1:

Angelina and Brad have both applied for the position of Principal with Hollywood NS.

Angelina has 15 years' experience as a teacher and held the position of Deputy Principal in her last school. In 2014 she decided she needed to "see the world" and left Ireland. She spent the last 2 years travelling and she has just returned. Angelina has a Master's degree in Positive Behaviour Management.

Brad has 6 years' teaching experience in Hollywood NS and has never held a post. Brad has a diploma in business studies that he did a year after leaving school and before he started teaching went to St Pat's. Brad is a keen sportsman and won 2 inter-county medals during his former GAA days playing for Dublin. Brad no longer plays inter-county football but remains a keen footballer and is very active in the local GAA club. He is well regarded by the Hollywood community.

When Angelina receives a copy of the selection criteria, prepared for the interview, they read:

1. Professional qualifications
2. Registration with the Teaching Council
3. Teaching experience
4. Sporting interests/achievements

During Angelina's interview, the panel asked her very few questions about her extensive teaching experience and appeared generally disinterested when she was discussing her suitability for the role. She was asked several questions about her sporting interests and achievements. One of the panel members also queried whether, as a woman, Angelina feels she could meet the demands of the role, which at times may be physical given the strong emphasis that the school places on sport.

Brad was delighted when he was appointed principal.

Angelina feels that she outranked Brad as regards almost all of the above criteria save for number 4 where Brad clearly outshone her. She did a data access request for her interview notes. Only one panel member kept notes but it is clear that considerable importance was placed on criteria number 4 and 30 per cent of the overall marks went for this. Brad scored highly in all criteria. The other panel members had thrown the notes in the bin. She recalls again the panel members' question about her ability "*as a woman*" and is concerned at the very strong emphasis being placed on sport.

Discussion points:

SCENARIO 2:

Rhianna has worked in St. Peter's School for the last two years. St Peter's is an all-boys school and there are only three female teachers out of a staff of fifteen. Rhianna teaches sixth class and really enjoys teaching her class.

On one occasion in late May, where it was a particularly hot day, Rhianna wore a red sun dress with cap sleeves and tan coloured heels to school. Rhianna's dress was to the knee and her shoes were a respectable height and practical for working in a classroom.

In the staff room, Jim, the Principal, commented to Rhianna that she shouldn't be wearing a dress like that into school as it will "*excite the boys*" and that she was "*looking for inappropriate attention walking around in a dress like that.*" Mike, another teacher was in the staff room at the time and openly sniggered at the principal's comment and gave him the thumbs up sign. Rhianna noted that Mike was wearing ripped shorts, a Mayo jersey, sunglasses (indoors) and a baseball cap to school that day which she believes is far more unprofessional than her choice of attire. Rhianna was quite upset by Jim's comments.

The following week as Jim was passing Rhianna on the corridor, he winked at her. This was seen by several of her pupils who descended into laughter, leaving Rhianna feeling mortified.

That weekend Jim sent Rhianna a text message saying that she "*has been looking very pretty recently*".

Rhianna feels vulnerable in respect of Jim's comments about her physical appearance (particularly in circumstances where he made no remarks to Mike). She is also uncomfortable by the fact that Jim's comments to her seem to be ongoing and the fact that he is now communicating with her via text message.

Discussion points:

SCENARIO 3:

Katie and Conor (who is transgender) work together as teachers in Realt Na Mara Primary School. Realt Na Mara is made up entirely of female staff save for two male teachers. Many staff have remarked over the years that there is a general climate of favouring the appointment of female teachers within the school. When Conor was hired three years ago he was in fact the first male teacher to be appointed for several years previous. The Principal, Mary and the School Board are aware that Conor was formerly a woman and on his successful appointment Mary commented to Conor that the School was thrilled to be "*diversifying*".

Mary and Katie both go for drinks together after a school function on a Thursday. After a few glasses of wine, Mary said to Katie that she feels "*Conor is a bit out of place in the school generally*" and "*this diversity business isn't really working out*". Katie, who is very friendly with Conor felt that Mary's comments were entirely motivated by the fact that Conor is one of the very few male teachers working in a predominantly female school and the fact that Conor is transgender. She did not say anything to her principal as she felt uncomfortable.

The next day Conor is called in by Mary at short notice. Mary advised Conor that she has serious concerns about his performance and competence and that she intends to commence a formal disciplinary process beginning with a disciplinary meeting under Circular 60/2009 on the basis that he "*does not connect well with the needs of the children*". This comes as a complete shock to Conor who has received nothing but consistent positive feedback. He believes he is well liked by parents.

When Conor meets Katie later that day, she updates him on her conversation with Mary the previous evening. Conor is now convinced that Mary's issues with him relate solely to the fact that he is transgender. He feels vulnerable and disappointed.

Discussion points:

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Scenario Answers

Scenario 1

Discussion points:

The Employment Equality Acts 1998-2015 outlaw discrimination in employment on 9 distinct grounds; in this case Angelina may claim that she has experienced discrimination in the form of Gender Discrimination.

Several decisions have dealt with Gender Discrimination in relation to selection/promotions.

Note the decision in **Galway City Partnership v. O'Halloran** – "where a better qualified candidate is passed over in favour of a less qualified candidate, an inference of discrimination can arise"

Note also **Micheline Sheehy Skeffington's claim against NUIG**.

Is it right to put such an emphasis on sport for a NS? Could the school's concerns re physicality for the role be legitimate?

Could the school legitimately place so much reliance on Brad's sporting achievements? If Angelina had objectively better qualifications and experience is it right that Brad got the job based on his sporting achievements.

In respect of the other criteria, it would be difficult for the panel to justify its decision to appoint Brad. While Brad's business diploma may be of some value it would seem that Angelina's Masters in Positive Behaviour Management is more relevant.

To succeed in her claim she would have to show that she was treated less favourably than a suitable comparator (i.e. Brad) and that this less favourable treatment relates to the fact she is a woman.

Was the comment about physical nature discriminatory?

From the School's perspective, in order to ensure transparency & fairness, the job spec should clearly identify the criteria/qualifications which have to be satisfied by candidates in order to successfully obtain a given role. As recommended by the Equality Officer in **Lynsky v. Board of Management of Coolmine Community School** schools should utilise a formal marking scheme for candidates and retain comprehensive written notes of the interviews for a minimum period of twelve months following the conclusion of the recruitment/promotional process.

Schools should also have regard to the rules as set out at Appendix D of the *Boards of Management of National Schools Constitution of Boards and Rules of Procedure* regarding the appointment of Principals and teachers.

Schools should ensure that decisions as regards hiring/promotion/selecting candidates for promotion should not be motivated on any of the 9 grounds which are protected under Employment Equality law.

Scenario 2:

Discussion Points:

Nicola Thorp/PWC. The complainant was sent home for wearing heels and felt discriminated against because of this.

Discrimination can be said to occur on the basis of negative comments related to a person's gender.

Rhianna could consider bringing a claim on the basis of the discriminatory comments made to her. To do so, she would have to show that she was treated less favourably than a suitable comparator (i.e. Mike) and that this less favourable treatment relates to the fact she is a woman.

If schools have a dress code for staff, it should be practical and unisex in terms of fairness. Allowing one staff member to dress inappropriately (in this case Mike) and berating another (Rhianna) for wearing her usual attire could give cause to a discrimination claim under the Employment Equality Acts.

Remember it might also be open to Rhianna to bring a claim for Harassment:

Harassment = any form of unwanted conduct related to any of the 9 grounds

Sexual harassment = any form of unwanted verbal, non-verbal or physical conduct of a sexual nature

Harassment can include acts, requests, words, gestures, display or circulation of written material, text messages etc.

The alleged harassment is examined from point of view of recipient – how it made Rhianna feel as distinct from how Jim intended it to make her feel.

The WRC may take into account the broader picture – what were Jim's intentions? What was their relationship like generally? Have they had flirty/joking conversations in the past to which Rhianna has not raised any issues?

Remember principle of vicarious liability – employer will be held liable for acts of employees and the harassment.

Scenario 3:

Discussion Points:

The Employment Equality Acts 1998-2015 outlaw discrimination in employment on nine distinct grounds; in this case Conor appears to have experienced discrimination in the form of Gender Discrimination.

Conor could be in a position to bring a claim alleging that he was discriminated against for being transgender – decision in *P v S and Cornwall Council*

Katie's evidence as to her conversation with Mary will be key. There are also protections available for Katie as regards harassment by association - harassment of a person as a result of their association with a person who falls under 1 of 9 protected grounds

Conor could bring a claim alleging that he has been discriminated against on the grounds of gender and that his principal was looking to discipline or dismiss him on these grounds. In order to be successful, he would have to show that he was treated less favourably than a suitable comparator who is not transgender.

Should a formal disciplinary process be commenced in circumstances where this is the first occasion on which Conor has been advised of his inadequacies, given no information as to what "does not connect well with the needs of the children" means and has been given no reasonable opportunity to improve? Was there a need to escalate this to formal stage? Could it not have been considered at informal stage initially and reconsidered within a reasonable period?

Schools should ensure that decisions re hiring/promotion/or disciplinary/performance matters should not be motivated on any of the 9 grounds protected under Employment Equality law.

Protection against victimisation - Under employment equality legislation Conor is protected against victimisation if he brings a claim or is involved in a complaint of unlawful discrimination against his employer. This means that his employer may not penalise him by dismissal, unfair treatment or an unfavourable change in his conditions of employment.