

THE HIGH COURT

1987 No.311 J.R.

BETWEEN

SEAMUS MURPHY

APPLICANT

and

THE MINISTER FOR HEALTH
THE SOUTH EASTERN HEALTH BOARD
CHIEF EXECUTIVE OFFICER, SOUTH
EASTERN HEALTH BOARD
CHIEF NURSING OFFICER, ST LUKE'S
PSYCHIATRIC HOSPITAL

RESPONDENTS

J U D G M E N T

(Ex Tempore)

DELIVERED BY THE HONOURABLE MR JUSTICE DECLAN COSTELLO
ON 10 DECEMBER 1987

APPEARANCES

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For the Applicant

Instructed by

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A letter of 29 January 1987 from the Chief Executive Officer of the South Eastern Health Board and signed by its personnel officer was sent to each psychiatric nurse in the service of the Board. It dealt with the general question of supervisory nursing posts in the psychiatric hospitals.

Paragraph 7 of this letter of 29 January 1987 is the only paragraph which is challenged in these proceedings. It dealt with arrangements for what is called 'acting up', which was to come into force after 2 February 1987. This term 'acting up' was used to describe a system of temporary promotion in psychiatric hospitals.

If a senior nurse, then called a ward supervisor, was absent for a period, for example, due to illness or holidays or to temporary assignment elsewhere, the ward supervisor would be replaced by the deputy ward supervisor. If the deputy ward supervisor was similarly absent the most senior nurse would take his or her place.

This temporary filling of supervisory positions, that is acting up, was up to the time of the letter of 29 January 1987 carried out on a basis of strict seniority. The letter of 29 January 1987 changed all this.

There had been in existence a male panel and a female panel of nurses who were eligible for appointment to a supervisory position in the wards in which they were working. These separate panels had been maintained up to 1987 in the belief that the provisions of the Employment Equality Act of 1977 did not apply to psychiatric hospitals. But as a result of a requirement of the European Economic Community the 1977 Act was amended and the exemption in favour of psychiatric hospitals no longer applied. It was as a result of this that the Board came to the conclusion that it was necessary in order to comply with the provisions of the Act, as amended, firstly, to fuse the two panels and then to amend the procedures relating to temporary promotions.

The letter of 29 January 1987 stated, firstly, that the titles of supervisory nursing posts would be changed to nursing officer and deputy

nursing officer and two changes were made in the acting up procedures, namely, a single panel of male and female nurses was to be constituted and a system of appointment on rotation rather than by seniority was proposed to be adopted in the filling of temporary posts.

Paragraph 7 of the letter of 29 January 1987 reads as follows:

"All existing acting up appointments will continue in force. New acting appointments made after the 2nd February, 1987 cannot now be based on the existing male and female panels because of the law. Managements proposals on a new system were discussed thoroughly at the Forum and will be discussed with hospital staff associations. In outline, these proposals provide that:-

- (i) the Deputy Nursing Officer will act up in the absence of the Nursing Officer;
- (ii) nurses must have two years post registration experience to be eligible to act up;
- (iii) the most experienced nurse on duty in the ward will act up in the absence of the ward's Deputy Nursing Officer, subject to suitability. This period will normally continue until there is a natural break e.g. the absent nurse returns to duty. The next acting up appointment will be given to the next most senior nurse on ward etc. Existing payment procedures will apply."

There are four other subparagraphs to paragraph 7 which I need not delay in quoting in this judgment.

The Applicant in these proceedings, who is a male psychiatric nurse and an officer of the Health Board, has through his Counsel accepted the necessity for the fusion of the two panels referred to in paragraph 7 of the letter of 29 January 1987 but has objected to the abolition of the principle of promotion by seniority which the letter has proposed and he seeks in these proceedings a declaration in very general terms as follows: that the introduction of terms and conditions of employment which radically alter those terms and conditions previously in force without the consent of the Applicant or the consent of the Union which represents him and without any or any adequate compensation is ultra vires the powers conferred on the Respondents. Counsel has made it clear that the declaration sought is referable only to paragraph 7 of the

letter of 29 January 1987.

There is no doubt (a) that this circular does alter the conditions under which the Applicant holds his office under the Health Board; (b) that he did not consent nor did his Union on his behalf consent to the alteration. But does that mean that the Chief Executive Officer acted ultra vires? I do not think it does.

The powers of the Chief Executive Officer to determine the conditions under which officers of the Board hold their office are to be found in section 14 of the Health Act 1970. Subsection (1) of that section provides:

"In addition to the chief executive officer, there shall be appointed to a health board such and so many other officers and such and so many servants as the board from time to time determines in accordance with the directions of the Minister."

Subsection (2) provides:

"The appointment of an officer referred to in subsection (1) or of a servant of a health board shall be a function of the chief executive officer."

Subsection (3) provides:

"An officer or servant of a health board appointed under this section shall hold his office or employment on such terms and conditions and shall perform such duties as the chief executive officer from time to time determines."

The statute therefore empowers the chief executive officer to alter the conditions of service of officers, including the Applicant's conditions of service with the Board, a power which includes a power to alter a pre-existing condition entitling officers including the Applicant to temporary promotion on the basis of seniority.

This section does not restrict the exercise of the power to alter conditions of service or require that no alteration be effected with the approval of an officer or of a union of which the officer may be a member. The words of the statute are unambiguous. The conditions attached to an office may be determined by the Chief Executive Officer from time to time, and in my judgment the Chief Executive Officer is

empowered by this section to effect the alterations which were contained in paragraph 7 of the letter of 29 January 1987.

Whilst the main challenge to the letter was based on its invalidity arising from the Applicant's lack of agreement to it, it was also suggested but not, I think, with any great force, that if the power to effect the proposed alteration existed it had not been exercised in a bona fide way in the present case and the lack of bona fides invalidated the alteration. I have no hesitation in rejecting this submission.

The changes effected by the letter of 29 January 1987 were proposed because of the bona fide belief of the Chief Executive Officer that they were required in order to fulfil the Board's obligations under the Employment Equality Act 1977. This problem had been discussed at meetings between representatives of the three unions representing psychiatric nurses and representatives of the Health Boards, meetings which were chaired by a conciliation officer of the Labour Court and which became known as 'the forum'.

In a report on the deliberations of the forum prepared by the three unions for the benefit of their members the legal problems were explained. The report pointed out that to comply with the 1977 Act the two panels which heretofore had existed, that is a male and female panel, would have to be fused. The report went on to state that on the legal advice available to the unions the system of promotion by seniority "would not survive a test under the Employment Equality Act". This was the view which the Chief Executive Officer of the Board in this case also reached.

Firstly, it was decided that to comply with the Act it was necessary to fuse into a single panel the former male and female staff panels. Secondly, it was concluded that if the practice of seniority in the acting up procedure was continued in respect of the fused panel, this would not in itself eliminate imbalances because, due to historical causes, there were considerably more male nurses on the panel with longer service than female nurses.

The Chief Executive Officer, whose evidence I heard and which I accept, stated in his affidavit that the application of seniority based promotions would have a disparate impact on female employees and would impose a detriment which he believes is in breach of the express provisions of the Act of 1977.

I am quite satisfied that the alteration effected by the letter of 29 January 1987 was brought about because of the bona fide and honest belief which the Chief Executive Officer had that these changes were necessary to comply with the Board's obligations under the 1977 Act. Accordingly, the Applicant is not entitled to the declaration which he seeks.

The Applicant also seeks a declaration that promotion on the basis of seniority is not unlawful. This declaration is sought because the letter of 29 January 1987 begins by explaining:

"As a result of changes in the law of the State and certain determinations by an employment equality officer, changes in the system of appointment to certain supervisory nursing posts are now legally unavoidable."

The Applicant claims that this statement is incorrect and that there was no legal requirement to change the Applicant's conditions in the manner proposed in the letter of 29 January 1987. Again, for the purpose of this part of the claim, the Applicant limits his claim to paragraph 7 of the letter of 29 January 1987. However, as I have decided that the Chief Executive Officer had the statutory power to make the impugned alteration and as I have decided that he exercised this power in a bona fide manner, it would be wrong for me to indulge in what would be a purely academic exercise and it is not necessary for me nor am I required to express any view on whether the conclusions of law which both the Chief Executive Officer and the three unions concerned came to about the operation of the 1977 Act. Once it has been decided that the Chief Executive Officer acted lawfully, it is not the function of this Court to express an opinion on the view of the law which in my judgment the Chief Executive Officer bona fide held and so I decline to make any declaration about the operation of the 1977 Act.

In the light of the conclusions which I have given it is also unnecessary for me to express any view on the alternative submission advanced on the Respondents' behalf to the effect that the claim should in any event be dismissed because of the availability of other remedies under section 14(6) of the 1970 Act.

A. Kenny
Official Stenographer
10 December 1987

Approved: 21.1.88
AC