

DEC-E2011-066- Full Caase Report
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Employment Equality Acts 2000 to 2008

EQUALITY OFFICER'S DECISION

NO: DEC-S2011-066

Hannon

(Represented by Ms. Siobhan Phelan BL on the instructions of the Equality Authority)

V

First Direct Logistics Limited

(Represented by Mr. Conal MacCarthy BL on the instructions of Terence Lyons and Co Solicitors)

File No. EE/2008/04

Date of Issue: 29 March 2011

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Keywords:

Employment Equality Acts - Discriminatory treatment - Failure to provide reasonable accommodation - Conditions of employment - Discriminatory dismissal - Gender - Disability - Prima Facie Case

1. Dispute and delegation

1.1 This dispute concerns a claim by Ms. Louise Hannon (hereafter "the complainant") that she was subjected to discriminatory treatment in relation to her working conditions and discriminatory dismissal by First Direct Logistics Limited (hereafter "the respondent") on the grounds of her gender and/or disability. The date of dismissal was 14 August 2007.

1.2 The complainant referred a claim of discrimination to the Director of the Equality Tribunal on 18 January 2008 under the Employment Equality Acts. On 27 May 2010, in accordance with his powers under section 75 of the Acts, the Director then delegated the case to Tara Coogan- 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 which date my investigation commenced. As required by Section 79(1) and as part of my investigation, I proceeded to hearing on 27 September 2010. A second hearing was held on 10 January 2011.

2. Case for the complainant

2.1. The complainant has been diagnosed with Gender Identity Disorder in and around 2005 and is a male to female transsexual. The complainant claimed that since she informed her employee of her true identity and her need to live in this identity her working conditions were made intolerable to such an extent that she was ultimately constructively dismissed as a result of her transition from male to female. The complainant believes that she has been discriminated against on the grounds of gender and disability contrary to the provisions of the Acts.

2.2. The complainant has been employed by the respondent as a Business Development Manager from January 2007. Prior to this, the complainant, who had been self-employed, had been working with the respondent on and off for five years in previous capacities. The complainant submitted that during this time she had a good working relationship with the respondent.

2.3. The complainant revealed her true identity to the respondent in October 2006 and informed it that she would be resigning in May 2007 as she intended to pursue her true identity and wanted to work in an open environment. The complainant submitted that the respondent's named Director asked her to reconsider her position.

2.4. In November 2006, the complainant was informed by the Director that he felt that the respondent staff would be comfortable with the complainant's transition from male to female and suggested that the complainant should speak with the named Operations Manager about it. The complainant did this and the Operations Manager, who assured the complainant that he was comfortable with the idea of the transition, undertook to tell the office staff. Two days later the complainant received a phone call from the said manager who asked the complainant to arrive in the office a few hours later as he was about to speak to the office staff about the complainant's condition. The complainant arrived at the office later that day and spoke with her colleagues who she felt were understanding and wished her well.

2.5. In December 2006 the complainant approached the Operations Manager to establish when she could begin to change over to her female identity at work. The complainant was asked to wait a couple of months as a new staff member was about to start and the respondent wanted this person to get settled first.

2.6. The complainant started taking an estrogen hormone on 15 February 2007. She also had an appointment to change her name by deed poll on Monday 5 March 2007. She stated that she had agreed with the Operations Manager that she would arrive in the office the following day in her true gender using her female identity.

2.7. The complainant arrived in the office the next day as Ms Louise Hannon. She asked if her email could be changed over to her new name. The complainant submitted that she was then told that the respondent wanted her to complete her sales over the phone in her male identity and that the Operations Manager would meet any clients personally should a need arise. The complainant was told that she may have to work using her male identity until Christmas 2007.

2.8. In around 20 March 2007, after the complainant had returned from a brief sick leave, the complainant was approached by the Operations Manager who expressed concerns with the complainant's productivity. The complainant stated that the early months of the year are traditionally slow months in the business and that despite this she had managed to secure 4 new customers since the beginning of the

year. This meant that her performance was greater than during the period leading up to Christmas. The complainant stated that she was asked if she would revert to her male identity for another three month period. The complainant stated that she broke down in tears and informed the Operations Manager that she would find such a request very difficult to comply with. The complainant submitted that the Operations Manager told her that he would always consider her as 'John' and that she would never get work elsewhere looking the way she did.

2.9. The next day the complainant contacted the Director and informed him that she could not return to her previous identity. She received a phone call on 22 March 2007 and was told that she could return to the office dressed in whatever way she felt comfortable. Upon the complainant's return to the office the next day the complainant was asked aside and was informed that she could not use the female toilets nor mention the subject to anyone. The complainant stated that the female toilet was occasionally used by male staff and drivers when the male toilet was occupied. She was also told that she could only dress in her female identity while in the office but that she would have to change into her previous male identity when seeing clients. The complainant stated that she found this request impossible to comply with and when asked to visit a client company the very next day she chose to deal with them over the phone instead.

2.10. The complainant did, on the request of the respondent, meet with client companies in her male identity on 11 April and 18 April 2007 and felt very uncomfortable doing so. She stated that this made her feel very drained and vulnerable. She was then asked by the Director to move to the respondent's new offices where the respondent felt she could work dressed in her female identity. As the new offices were not ready at this time, it was requested that the complainant work from home. To compensate the complainant for these new conditions she was guaranteed a commission of €1000 per month and told that her phone bill would be paid. The complainant stated that she understood this to be a brief, interim measure and that she agreed to work from home for a period of one month starting from 24 April 2007.

2.11. The complainant stated that she was unhappy working from home and that she missed the office environment and the 'leads' that a sales person would pick up while working in such an environment. She informed the Operations Manager of the fact that she was finding it impossible to work from home by phone and email a number of times and asked if she could return to the office. She was then informed that a new person had started working in the office and that there was no room for her. The complainant was then told by the Director that the new offices would not be ready until July. She stated that she was told that if she wanted to leave she could give one week's notice or alternatively she could take unpaid holiday until the offices were completed. The complainant stated that she could not afford to take unpaid leave and that she wished to continue working. The complainant stated that she was very upset by this and understood that she was moved to the new offices because of the difficulties she kept experiencing with the Operations Manager.

2.12. The complainant was informed on 4 July 2007 that there would be a delay with the new offices. She yet again reiterated that she was finding it difficult to work from home. The complainant also requested that her email address be changed to her new name and was informed that the IT person was busy but that a request would be sent.

2.13. On 19 July 2007 the Director contacted the complainant to inform her that he was not happy with her work and that she needed to produce new clients in the next weeks if she wanted to keep her job. The complainant again explained the difficulties she was having working from home and complained that her email had still not been changed. She was told that she should stop feeling sorry for herself and that if she wanted her email changed she ought to contact the IT herself.

2.14. On 25 July the complainant met with the Director and requested that she be allowed to return to the office. She also raised the issue of her phone bill that had not been paid contrary to the agreement. The Director refused her request and told her that her presence caused a bad atmosphere in the office. There would also be further delay with the new offices. The Director told her that she was free to seek alternative employment if she wanted to.

2.15. The complainant was offered a job with another company on 27 July 2007. She informed the Director and was told that she would receive her commission until it ran out. The job fell through on 9 August 2007 and the complainant contacted the Director immediately. She was offered a new contract, for a different role, with unsociable hours and low pay. The complainant refused this offer.

2.16. The complainant submitted that she believed that her job had effectively been taken away from her when she was asked to work from home in April. She was requested to hand in her letter of resignation on 14 August 2007.

2.17. It was submitted that the complainant and the respondent enjoyed an amicable working relationship which diminished dramatically after she revealed her Gender Identity Disorder in October 2006. While the respondent appeared to accept and deal with the theoretical reality of the complainant's condition, this acceptance quickly changed when the respondent had to deal with the reality of it. It was submitted that the respondent was embarrassed with the complainant's condition and wanted to isolate her to such an extent that she was forced to seek alternative employment.

3. Case for the respondent

3.1. The respondent denied any claim of discrimination and discriminatory dismissal.

3.2. The respondent accepted that the complainant and the respondent had a good working relationship and that this is supported by the fact that the respondent welcomed the complainant back on 5 different occasions. It was submitted that the respondent assisted the complainant with personal and financial matters and provided her with support when she revealed her Gender Identity Disorder.

3.3. The respondent stated that the complainant had advised it on or about October 2006 that she would have to resign as she wished to pursue her gender transformation and that the process would leave her an emotional wreck and that her hormones would make her very confused. Thereafter, the respondent met with the complainant and formulated a plan to deal with the complainant's transformation. The plan specifically included the following:

At an agreed time the respondent staff would be informed of the complainant's Gender Identity Disorder;

The complainant would change her name by Deed Poll;

The complainant would continue to contact current clients as 'John Smyth' and generate new clients in her new identity;

The complainant would continue to fulfil her transport duties whilst she remained with the name 'John';

At an agreed time the complainant would stop wearing male clothing;

The Operations Manager would assist by dealing with some of the existing clients to enable the phasing out of 'John Smyth';

The complainant would move to the new offices as a full time sales representative;

Any further decisions concerning the complainant's transformation would be made in conjunction with the respondent.

3.4. The complainant's productivity reduced dramatically in early 2007. The complainant was tearful and advised the respondent that she was suicidal. It was submitted that the complainant stopped making calls to generate business for the respondent and only opened one new business account in February 2007.

3.5. The complainant's role was changed considerably in or about March 2007 as part of her ongoing issues from an active/physical position to that of sales. It was submitted that despite these efforts to accommodate the complainant, the complainant was depressed and unhappy and failed to make phone calls to generate new business. The complainant missed a number of days from work and, while the respondent does not normally pay an employee for absenteeism, the respondent paid the complainant for her time out due to the emotional circumstances arising herein.

3.6. The respondent decided in or about April 2007 that no further sales work would take place on its old premises and instead would be moved to new dedicated premises upon their completion. It was suggested that in the interim the complainant would work from her home, a proposal that she accepted, and the respondent increased the complainant's wages as a gesture of good will. It is accepted that the complainant was the only employee asked to work from home but that this was because the complainant was the only employee working in sales.

3.7. Throughout this period the complainant's productivity continued to deteriorate and she was making little, if any, sales. Ultimately, the complainant informed the respondent that she would not work at the new offices and secured alternative employment on 29 July 2007.

3.8. The respondent vehemently denied that it made any derogatory statements to the complainant concerning her identity.

3.9. The respondent submitted that it did everything in its power and control to support the complainant during her transition period.

4. Conclusion of the equality officer

4.1. In evaluating the evidence before me, I must first consider whether the complainant has established a prima facie case pursuant to Section 85A of the Employment Equality Acts 1998 to 2008. 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. Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn. The Labour Court elaborated on the interpretation of section 85A in *Melbury v. Valpeters EDA/0917* where it stated that section 85A: "places the burden of establishing the primary facts fairly and squarely on the Complainant and the language of this provision admits of no exceptions to that evidential rule".

4.2. It was accepted by parties that the complainant was suffering with a disability at all material times pertaining to this complaint. It is also clear that the respondent was notified of the complainant's condition in or about October 2006.

4.3. It is well established in law that the gender ground protects transgender persons from sex discrimination, that is, discrimination arising essentially if not exclusively on the sex of the person concerned. Such an approach was approved by the European Courts of Justice in *P v S* and *Cornwall County Council (Case C-13/9)*.

4.4. Transsexualism is a recognised medical condition. Transsexualism is treated by a combination of hormone therapy, surgery (in some cases) and 'real life experience', that is, living as a member of the other sex. To gain 'real life experience' the person must be able to live their life continuously in the other sex without the need to revert to the birth sex. It is clear that for such experience to be relevant and appropriate the person must be able to interact with the society as a whole. This also applies to the workplace and it is clear that these Acts impose an obligation on an employer to enable a person with a Gender Identity Disorder to allow, within the confines of said workplace, allowing for health and safety, uniform etc. requirements, to accommodate such 'real life experience'.

4.5. In relation to discriminatory treatment. While I note that there is considerable disagreement in relation to the facts surrounding the transition period or the 'plan' that was undertaken to phase out 'John' in favour of the complainant, it is clear that this was a unilateral approach that had not been fully explored with the complainant. It is clear that in circumstances where the complainant worked in a small office environment it was appropriate to inform her colleagues about the transition and to discuss such disclosure with the complainant. It ought to be clear however that it is a purely management matter to deal with staff concerns that may have arisen among staff about transsexualism. Such issues should not be a burden for the complainant. It should also be clear that, in most circumstances, a person diagnosed with Gender Identity Disorder does not need their employer's permission to seek and begin treatment.

4.6. I find that the approach set out by the respondent has little in relation to actually enabling the complainant to work in her female identity and is not realistic in terms of timing. The approach is more concerned with how 'John' could be phased out and does not include a specific date when the complainant, as a female, would start working with the respondent. The terms submitted by the respondent implied a process that is entirely controlled by the respondent and the facts support a similar finding. I accept that elements of this approach had been discussed with the complainant to some extent. I do not however accept that such discussions were adequate in the manner necessitated by the Acts. Furthermore, I do not accept that the complainant had agreed to continue reverting to her birth identity in the manner submitted by the respondent and find it entirely inappropriate that the respondent ever made such a request. I also find that there is no evidence to suggest that the respondent revisited or adjusted the approach when the complainant informed the respondent of the difficulties she was having in relation to this approach. I am satisfied that such an approach - requesting that the complainant switch between a male/female identity whenever the respondent felt the need for it - constitutes direct discrimination on gender and disability grounds.

4.6. I am not satisfied, having heard the full facts of this case, that the respondent had a genuine business need for the complainant to work from home. I find that the request that she work from home was more convenient to the respondent who failed or refused to manage any issues that the complainant's transition to female may have brought about internally or with third parties. The request to work from home was way out for the respondent who did not want to deal with the complainant who was now presenting herself as female. I find that such an approach constitutes discrimination on both gender and disability grounds.

4.7. I am satisfied that the facts support such a finding. It was not disputed that the complainant had been instructed to continue meeting clients in her male identity. It was accepted that she was not provided with a new email address despite having requested one a number of times. And it was accepted that she was specifically told not to use the female toilet. I do not accept that this sudden decision to have the only sales person, who happened to be the complainant, to work from her home was made because it was deemed to be beneficial for the sales role or because there simply was no room for this position in the existing premises. I find that the complainant, had she remained in

her male identity, would not have been requested in similar circumstances to work from home. I am therefore satisfied that such treatment constitutes gender discrimination in relation to the complainant's work conditions within the meaning of the Acts. It is clear that these conditions were less favourable to the complainant and that she alerted the respondent to these facts a number of times.

4.8. It is also clear from the facts that the respondent had little, if any, understanding that the gender transition process is a form of treatment relevant to the complainant condition. I find that if it had understood the treatment aspect of the 'real life experience' then the situation is analogous to the respondent suggesting to a person with a different disability that s/he may only treat his/her condition on days that are convenient to the respondent. Such an approach is clearly ludicrous and I cannot accept that such a situation would arise in circumstances where the respondent had an understanding of a particular disability such as, for example, diabetes. I am satisfied that an employer has a duty under these Acts to obtain enough knowledge about an employee's disclosed disability to ensure that their actions do not discriminate against a person whose disability may require the person to behave or act in a certain way. I am not satisfied that the respondent fulfilled such a duty in the circumstances of this case. I find that it is important to note that the respondent did encourage the complainant to stay with the respondent at the time of disclosure and was initially supportive of her. However, the facts of this case clearly reveal how a failure to appreciate the reality of a disability and the exclusion of the person with a disability from the process that aims to integrate her, has resulted in discriminatory treatment on the gender and disability grounds.

4.9. While it is clear that the complainant did not, because of her disability, require special assistance, treatment or facilities per se, she did require a workplace that recognised her right to dress and be identified as a female. I was provided with no evidence to suggest that the complainant herself refused or neglected to carry out her duties after she took on her female identity. It is clear that she was willing to face the public as a female. The difficulties concerning the complainant's gender lay entirely with the respondent. It is apparent that the respondent itself presumed that there would be negative consequences because of the complainant's female identity. In making such an inference I am satisfied of the following facts:

The complainant was the only member of staff who was asked to work from home;

The decision to have the complainant work from home was very proximate to the beginning of the 'real life experience' treatment that the complainant was receiving;

The number of incidents concerning the complainant's female identity that had taken place prior to the decision to have her work from home. It is important to note that the complainant did not pursue a claim for harassment and therefore I have no jurisdiction to investigate such matters. I am satisfied however that allowing co-workers to address the complainant by her male name also constituted gender discrimination in the circumstances of this case;

It is an agreed fact that she was told to meet clients and to deal with such people over the phone in her previous male identity;

There was no genuine business rationale why the complainant could not remain in the offices until the new premises were available;

The respondent was aware of the fact that the complainant was finding it difficult to meet her targets from home and had made a number of requests to return to the office.

4.11. In relation to the claim of discriminatory dismissal. The complainant resigned the respondent company to take up alternative employment in late July 2007 and when this employment fell through a couple of weeks later, she sought to rejoin the respondent company. While I note that it could be argued that the circumstances imply that the conditions of work could not be found to be too bad if the complainant was willing to return, I do not accept such a premise. I am satisfied that the conditions imposed on the complainant were of such nature that she believed that alternative employment was the only option. The fact that the complainant sought to return to the respondent company when this job fell through is not illustrative of anything other than that the complainant did not want to be unemployed.

4.12. It is clear that this was a challenging time for the complainant. I note that the complainant began her 'real life experience' in early March 2007 and had resigned from the company in late July/early August 2007. This is a five month period during which the complainant was receiving treatment and adjusting to her female identity. It is clear from the facts that she received no relevant support, including any consideration for what is a statutory duty (reasonable accommodation), from her employer. She was isolated in her home from late April 2007 and was refused the right to use her legal name in emails and threatened with losing her job if her performance did not improve dramatically. I am satisfied that the respondent's approach in such circumstances amounts to discriminatory dismissal on the gender and disability grounds.

4.13. An issue of victimisation was raised at the hearing, arising from the facts put forward by the complainant in her oral evidence. The respondent objected to such a claim referring to notification requirements set out in the Acts. I am satisfied that provided that facts supporting a claim of victimisation is made during a hearing - facts relating to matters that have occurred after an initial complaint has been made - that I have jurisdiction to extend an investigation provided that such extension does not unfairly prejudice the respondent. I placed both parties under notice that I would hear the facts and ensure that the respondent would have an opportunity for reply. I was assured by the respondent Director that there was no difficulty in responding to the claim.

4.14. The claim relates to an agreement between the parties whereby the respondent undertook to pay the complainant a sum of €1000 for a period of six months. These monies relate to ex-gratia payments that the respondent undertook to make to the complainant. The complainant submitted that she received five such payments and that after she lodged her complaint under these Acts the respondent refused to make the last payment.

4.15. A reply in relation to this matter was received on 1 November 2010. The respondent submitted that the complainant was paid commission for the six months post to the making of her last sale. The Director had given this undertaking to the complainant at their last meeting in August and as the last sale had been in June this meant that the last payment would be made in November 2007. It was submitted that it was not the respondent's policy to continue to pay the employee when an employee has left the employment but that in this instance, as a good will gesture, the respondent did so knowing the financial problems that the complainant often experienced and out of genuine concern for the complainant.

4.16. Having considered the matter and examined the supporting documentary evidence, I am satisfied that payments were made up to November 2007. The complainant stated that she believed that a further payment ought to have been made in December. The payments were made in the middle of each calendar month and therefore I am not satisfied that even if a further payment was due in December it was not paid because the complainant had lodged her complaint with the Tribunal. The complainant lodged her complaint on 20 December and therefore I am not satisfied that the facts give rise to a claim of victimisation within the meaning of the Acts.

4.17. The matter of the complainant's remuneration was much in dispute. Having considered the issue, I find that the most acceptable approach is to consider the complainant's weekly gross payments to determine an annual salary. The respondent objected to this approach as it allows for multiplication of factors such as commission, etc. However, having considered the wording of the Acts, I am satisfied that any taxable income constitutes the grounds for which an annual salary can be calculated. In circumstances where the period of employment is less than 104 weeks, the calculation is made based on the taxable income that the complainant would have received at that date but for the

act of discrimination in question. In circumstances where a complainant's salary is partly dependent on performance it is impossible to determine what her income would have been but for the discrimination. I am satisfied that the actual commission paid can be added to the estimate her actual losses. Such figure does not include mileage, expenses or ex-gratia payments. I note that the respondent submitted that the complainant had failed to mitigate her losses after her resignation. It ought to be clear that there is no duty under these Acts to mitigate loss by reason of Section 34 of the Civil Liability Act, 1961. The redress awarded under these Acts is for compensation for the effects of discrimination.

4.18. The calculation of the complainant's gross basic pay thus amounts to a €20,540 per annum. In addition she received €1537.57 for commission in a six month period. This calculated for a period of 79 weeks (18 months) amounts to €35422.71.

5. Decision

5.1. Having investigated the above complaint, I hereby make the following decision in accordance with section 79(6) of the Employment Equality Acts:

5.2. I find that the complainant has established a prima facie case of discriminatory treatment on the gender and disability ground. The respondent has not rebutted this claim.

5.3. I find that the complainant has established a prima facie case of discriminatory dismissal on the gender and disability ground. The respondent has not rebutted this claim.

5.4. I find that the complainant has not established a prima facie case for victimisation.

5.5. Accordingly, I am compelled in the circumstances of this case to award the complainant redress of 79 weeks in accordance with section 82(4)(b) of the Acts. The amount is €35422.71.

5.6. Furthermore, pursuant to S. 82(5)(b) of the Acts, I order the respondent to pay the complainant interest at the Courts Act rate in respect of the amount above in respect of the period beginning on 20 December 2008 (being the date of the reference of the claim) and ending on the date of payment.

5.7. These awards are made in compensation for the distress suffered by the complainant in relation to the respondent's unlawful conduct and are not in the nature of pay and therefore not subject to tax.

Tara Coogan
Equality Officer
29 March 2011