

Prison Service director loses age discrimination appeal at Labour Court

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The Labour Court has rejected an appeal by a director in the Irish Prison Service that he was discriminated against on the grounds of age, in that an older colleague director was paid €33,000 more.

Mr Don Culliton is employed as one of five directors in the IPS, which is the second management tier in the service. Directors are paid on the Principal Officer (higher scale) and also receive a director's allowance. Mr Culliton was initially employed as Director of HR and currently holds the position of Director of Custody, Security and Operations.

Outlining the facts of the case, the Court said there was no dispute that Mr Culliton performed work of equal value to his comparator, Mr Fergal Black, who was Director of Care and Rehabilitation at the material time. However, Mr Culliton (53 years) was paid a PPC rate of €131,644 against Mr Black (58 years) who was paid an equivalent PPC rate of €164,991 – some €33,000 more.

In 2007, the IPS advertised for the position of Director of Healthcare on a salary of €142,892 – well above the PO (higher) at the time. Mr Black was seconded from the HSE for the position. In July 2018 the IPS created a new role of Executive Clinical Lead, which reported directly to Mr Black while leaving him more time on strategy and oversight issues and less time on day-to-day clinical decisions. Mr Black retired from the IPS in 2023.

Mr Culliton argued that the advertisement in 2007 for Mr Black's position as Director of Healthcare was discriminatory. The advertisement stated essential requirements for the position were:

“A third-level professional qualification in the healthcare field and/or a minimum of 7 years managerial experience in healthcare/health services or related field”.

Mr Culliton argued that this was discriminatory “on the grounds of age as it excluded younger applicants and this criterion was a determining factor in setting the individual higher rate of pay for the comparator which has resulted in the ongoing less favourable treatment”.

It was also pointed out that a 2021 Grant Thornton report recommended that the salary of IPS directors should be increased to that of the comparator, Mr Black, or alternatively to that of Assistant Secretary in the civil service. A business case for such increases was made to the Department of Justice and Public Expenditure and Reform but was ultimately unsuccessful.

RED-CIRCLED

Mr Culliton told the Court that he only learnt that Mr Culliton's higher salary had been ‘red-circled’ the day before the hearing and this had not been mentioned before when he questioned the IPS about the higher salary.

Brian Purcell, who was Director General of the IPS from 2004 to 2011 and subsequently became Secretary General in Justice, gave evidence on behalf of the IPS. He said that in 2007 the IPS was decentralised to Longford and the Director of Healthcare at the time – a Mr Dooley – did not intend to relocate. Mr Purcell said that it became evident at the time that the IPS would not be able to recruit a replacement with Mr Dooley's level of expertise to a decentralised post. He said

the IPS therefore decided “to broaden the eligibility criteria to include either a relevant professional qualification in healthcare or seven years’ experience in healthcare management.

The Court said that the principal issue to be considered was whether age was a material factor leading to the difference between Mr Culliton’s salary and Mr Black’s during the cognisable period, which was February 23, 2022 to August 22, 2022. Summarising previous cases, the Court said it has to consider whether the criteria in the 2007 job advertisement “were themselves discriminatory on the age ground”.

The Court said that the complainant had offered “no explanation to the Court as to why it should accept that the insertion into the advertisement a requirement for a minimum of 7 years managerial experience in health/healthcare services or related field is an age proxy (in the sense as used by McKennie J and the European Commission) other than to assert that 7 years managerial experience was not a *bona fide* occupational requirement for the post of Director of Healthcare”.

DECENTRALISED POST

The IPS had to make the position attractive for a decentralised post and that it be commensurate with a salary such a person could command elsewhere in the public sector, the Court noted.

The respondent “did have a bona fide objective reason for the inclusion of an alternative eligibility criterion in the 2007 advertisement and that the alternative criterion was reasonably regarded by it (the IPS) as being objectively commensurate with the initial criterion to which it was an alternative, having regard to the nature of the responsibilities that would fall on the successful applicant following his/her appointment”, said the Court.

There was “no evidence” that Mr Culliton was aware of the advertisement in 2007 “let alone that he might have contemplated applying for the role had he deemed himself eligible for it (which by virtue of the interpretation he seeks to put on the qualifying criteria, he couldn’t have)”.

The Irish Prison Service was represented by Mary Paula McGuinness BL, instructed by the Chief State Solicitors Office. (*EDA256, Deputy Chairman: Alan Haugh*)