

INDUSTRIAL TRIBUNAL HEARING

Claim No. 13 of 2010

INDUSTRIAL TRIBUNAL
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LILIAN MEAKINS

Complainant

-and-

GIBRALTAR COMMUNITY CARE LIMITED

Respondent

Present: Mr. Joseph Bossano for the Complainant
Mr. John Restano for the Respondent

JUDGEMENT

By letter of complaint dated the 15th March 2010 the Complainant lodged her complaint alleging that "by refusing to consider my application for part time employment as Community Care Officer they committed an act which is repugnant to the principle of equal treatment contrary to section 52 (d) (i)" of the Employment Act ("the Act").

By Notice of Appearance dated the 15th April 2010 the Respondent resists such a claim on two grounds; namely:-

- (a) the Tribunal does not have jurisdiction to deal with this complaint since the Respondent is a charity which, insofar as community care officers are concerned, is not an employer for the purposes of the Act and therefore the Act and its provisions do not apply to it; or, in the alternative;
- (b) that the Respondent has not breached the principle of equal treatment provided for in the Act since the charitable scheme is designed to address the discrepancy that exists between men and women in the social security provisions relating to pensions.

The hearing was heard on the 2nd February 2011 and two witnesses were called; namely the Complainant and Mr. John Caetano for the Respondent. The facts which lead to the Complaint were not disputed and were said, and I find them to be, as follows.

On the 2nd February 2010, whilst working full time for the Care Agency and at the age of 62 years and 4 months (stated to be 63 years in the letter

of application), the Complainant applied to the Respondent for part time employment as a Community Care Officer. At the time of the application the Complainant was not in receipt of a social security pension, since she had not contributed sufficient "stamps" to be eligible for such a pension, and had an income of less than £20,000. Her husband was an invalid for whom she also had to care for.

By letter dated the 8th February 2010 the Respondent, through its accountant, replied to the Complainant informing her that she was not eligible for "registration" as a Community Officer since:-

"The Community Officer ("CO") scheme is available only to men aged 60 or over who have contributed to the Social Insurance scheme and who:

- (a) are permanently resident in Gibraltar; and
- (b) will be entitled to a Gibraltar Government Old Age Pension ("OAP") at the age of 65. They cease to be Community Officers when they start collecting their OAP. Women cannot register for this scheme as they are awarded their OAP at the age of 60 rather than 65."

It was this reply that lead to the Complainants' complaint to this Tribunal on the 15th March 2010.

Mr. John Caetano, a director of the Respondent since the 3rd July 1996, stated the following by way of background to the Respondents' claim:-

- (i) Shortly after the dissolution of the Social Insurance Fund in 1989 a trust was created with substantial financial contributions from the Government of Gibraltar for the purposes of establishing a scheme designed to financially assist the elderly citizens of Gibraltar;
- (ii) A short while after the setting up of the Trust the scheme was moved in to a Company Limited by Guarantee and not having a Share Capital by the name of Gibraltar Community Care Limited, the Respondent, which company became a registered charity on the 7th December 1990;
- (iii) The Memorandum of Association of the Respondent provides, amongst other things, that:-

"(B) To do all such other things as are incidental or conducive to the attainment of the above object and without limiting the foregoing to provide assistance to meet the social needs of elderly individuals according to criteria determined by the Council."

- (iv) Since the scheme commenced in 1989 there had been changes to the eligibility criteria for entry into the scheme. Originally only permanently resident males aged 60 to 65 registered with the ETB as seeking employment and who had exhausted their thirteen week unemployment benefits and who would on reaching 65 be entitled to a government pension were entitled to apply for registration as a Community Care Officer. On reaching 65 the male concerned would cease to be a Community Care Officer since he would be entitled to his government pension and to apply to the Respondent for a household cost allowance. The rationale for such a scheme was to counter the discrepancy that existed between males and females at the time since men only received their government pension at 65 whilst women received it at 60. Women, however, were entitled to apply for a household cost allowance at the age of 60.

I stop to point out here that Mr. Bossano, the force behind the setting up of the original scheme, does not for a moment seek to argue that the scheme as set up, whilst potentially discriminatory to women was not anything other than the fair means of correcting the positive discrimination that then existed in favour of women insofar as pensionable age, and the payment of contributions for five years more, was concerned thereby leveling the financial disparity that then existed between men and women.

- (v) The main change to the originally set up scheme occurred on the 1st April 2009 as a result of which the number of males eligible to apply for registration as Community Care Officers greatly increased. Thus, at the present time all males aged 60 to 65 permanently resident in Gibraltar with an annual income from employment under £15,000.00 and (due to the tapering of excess formula applied) not greater than £20,000.00 approx are entitled to be registered as Community Care Officers. The eligibility criteria for household cost allowance remains the same. The rationale for this change was to cater for the small number of men who in order to qualify for a government pension at 65 had no alternative but to continue to work after 60 and therefore could not apply for registration as a Community Care Officer under the old rules.

I stop here once again to point out that it is Mr. Bossano's submission, as I have understood it, that these changes to the scheme whilst socially laudable have eroded the original justification for the positive discrimination against women and have left women theoretically worse off. Mr. Bossano argues that whilst women aged 60 to 65 are entitled to a government pension and a household cost allowance, men aged 60 to 65 are entitled to continue in employment earning upto £15,000.00 per annum whilst not paying any social insurance contributions and receiving their

Community Care Officers wage. It is therefore these changes, Mr. Bossano contends, which have left the Respondent vulnerable and without a defence to the Complaint of discrimination made against it by the Complainant.

- (vi) The Respondent does have the power to employ and does employ a small number of persons (eg accountant);
- (vii) The Respondent has very little of its own finances left and therefore relies on Government assistance to meet the cost of the scheme(s).

That then deals with the background to the case.

JURISDICTION

As previously stated it is the Respondent's contention that this Tribunal does not have the jurisdiction to determine this Complaint since the provisions of the Act do not apply to the Respondent.

Mr. Bossano resists such a contention arguing that Community Care Officers are employed by the Respondent for the purposes of the Act and that, should the Tribunal find that the Act does not apply, that the provisions of the Equal Opportunities Act do apply and that this Tribunal should continue with the Complaint under the provisions of that Act.

The Complaint was clearly made under the provisions of the Act only and at no time until the hearing commenced was any reference made to the Equal Opportunities Act. In such circumstances I do not believe that this Tribunal would be entitled to determine the Complaint on the basis of the Equal Opportunities Act and consequently I disregard its provisions save to such extent as they may assist me in interpreting the provisions of the Act.

Mr. Restano's first submission is that the Act is exclusively concerned with contracts of employment and vocational training and guidance. In this respect he points me to section 52B(1) of the Act which states:-

“Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.”

In my opinion the wording of the sub-section clearly extends the principle of equal treatment not only to persons who are employed but also, insofar as selection criteria and access is concerned, to all those applying for employment. This being the case the issue that arises is whether Community Care Officers are employed by the Respondent or simply carry out some casual activity for which they receive a specified sum each month from the Respondent. In considering such a question Mr. Restano urges me with the full weight of the authorities contained in Chitty on Contract and the case of Brook Street Bureau (UK) Dacas (2004) EWCA Cw 217 in support to look at the overall big picture and not cherry pick particular aspects of the relationship between the Respondent and the people it registers as Community Care Officers (e.g. what has been said by politicians or the wording used in forms). Accepting Mr. Restano's forceful submission and standing back momentarily from the precipice of decision I take account of the following pieces of evidence put before the Tribunal by both parties.

Mr. Bossano draws my attention to the following by way of proving that an employment relationship exists:-

- (a) The Respondents' statutes do not prevent it from employing individuals and indeed it admits that it does do so;
- (b) The application form handed to applicants by the Respondent refers to:-
 - (i) successful applicants having to perform the community care work assigned to them and to a satisfactory standard;
 - (ii) successful applicants who without reasonable excuse fail to perform their assigned duties can have their wages forfeited;
 - (iii) the remuneration paid to successful applicants is referred to as "wages";
 - (iv) successful applicants are entitled to have "2 weeks annual paid leave";
 - (v) in the declaratory part of the form it refers to "my entitlement to employment as a Community Care Officer;"
- (c) the number of Community Care Officers and the amount of wages paid are and have always been figures included within the Employment Survey Report compiled by the Statistics Office (currently in the section for part time employees) as the Respondent has always filed the annual returns;

- (d) the Government of Gibraltar has always considered Community Care Officers to be employed by the Respondent;
- (e) a Community Care Officer is in the same position as an agency worker; and
- (f) the level of Community Care Officers remuneration increases in line with the minimum wage stipulated by Government. (e.g. the increase in January of this year.)

Mr. Restano on the other hand draws my attention to the following by way of proving that no employment relationship exists:-

- (a) the application form refers to "registration" as a Community Care Officer;
- (b) Mr. Caetano had in evidence stated that:-
 - (i) some community care officers only do 2 or 3 hours a week service whilst others do no service whatsoever and about 11% of community care officers are exempt completely from doing any service, on medical grounds;
 - (ii) some community care officers only look after their sick or needy immediate family relatives;
 - (iii) with the increase in the number of Community Care Officers the Respondent is increasingly finding it difficult to find anything for them to do;
 - (iv) no formal record of absences exists and the respondent has never refused a Community Care Officer his remuneration. If a person fails to provide the service assigned to him the directors of the Respondent simply seek to verbally persuade him to change his ways;
 - (v) Community Care Officers have never paid social insurance;
 - (vi) Community Care Officers do not pay income tax on the monies received from the Respondent;
 - (vii) Community Care Officers are not registered with the Employment and Training Board ("ETB") and do not enter into ETB contracts.
 - (viii) Community Care Officers are assigned to charitable/community orientated organisations and the Respondent does not supervise and/or manage on a daily

basis in any manner the service provided to such organisations by the Community Care Officers;

- (ix) the leave of Community Care Officers is liberally applied so that upto four weeks in every year and in special circumstances is given to each officer; and
- (x) no deductions are made from the monies received by Community Care Officers.

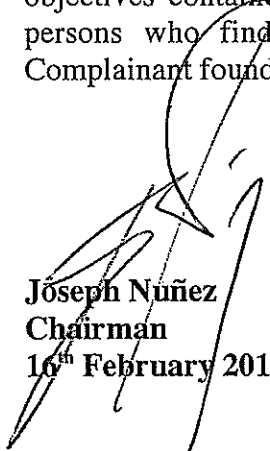
I fully take on board the arguments for and against presented by Mr. Bossano and Mr. Restano and looking at the picture painted from a global stand point I come to the conclusion that Community Care Officers are not employed by the Respondent.

There is no single path to a correct decision in cases such as these but in reaching such a conclusion I have considered the following matters (not set out below in any order of priority) to be of material relevance in tipping the balance towards the Respondents contention that there is no employment situation; namely:-

- (a) not all Community Care Officers are required to undertake any service since some are exempted on the basis of the honorary posts they hold whilst others are excused on medical grounds and therefore the monies they receive cannot be said to be pay for work done. Moreover, of those that are required to undertake a service they are either required to look after a family member, a moral responsibility which the person concerned was probably already undertaking and continues to undertake for unlimited hours and which the Respondent would be in the dark as to whether they did do so or not and in what manner and/or time, or, provide a service to a third party for as little, in some cases, as two to three hours per week. In either case it can hardly be said that the person concerned is providing skill and/or labour to anything that can be said to equate to a value of £437.52 a month. Moreover, it is also significant to note that all Community Care Officers receive exactly the same amount of monies each month irrespective of whether they are exempted or excused or being at the service of third parties for differing length of hours;
- (b) As far as the Respondent is concerned Community Care Officers cannot be dismissed or disciplined and their time as such terminates automatically at 65;
- (c) Persons become Community Care Officers on meeting certain criteria and not on whether the Respondent can in point of fact either afford their services and/or have any service for them to perform;

- (d) The Employment and Training Board do not consider Community Care Officers to be employees since otherwise they would apply the relevant provisions of the Act to the Respondent:- a state of play which has serious implications;
- (e) The Respondent clearly does not have any or hardly any infrastructural, administrative, procedural or disciplinary procedures in place to either control and/or enforce either what the registration forms profess a Community Care Officer should adhere to and/or what in point of fact the person concerned actually does, all of which indicates that the Respondent does, itself not consider Community Care Officers to be its employees; and
- (f) No deductions at all (e.g. tax) are made from the amounts payable to Community Care Officers at the end of each month.

Having decided that Community Care Officers are not employees of the Respondent, it follows that the Act does not apply to the Complainants case and that this Tribunal does not have jurisdiction to deal with the Complaint made and therefore I have to, and indeed I do, dismiss the Complaint made. There is consequently no need for me to go on to consider the issue of whether the Respondent had breached the principle of equal treatment afforded by the Act in refusing the Complainants application for registration. Had I gone on to consider such an issue I may well have found Mr. Bossano's arguments to be at the very least most compelling and therefore, without hesitation, I would urge that the Respondent give serious consideration as to whether in line with the objectives contained in its statutes it should find a formula for assisting persons who find themselves in the unfortunate position which the Complainant found and continues to find herself in.



Joseph Nuñez
Chairman
16th February 2011