

**THE HIGH COURT**

**[2013 No. 21 MCA]**

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACTS 1998-2011**

**BETWEEN**

**ELEANOR O'HIGGINS**

**APPELLANT**

**AND**

**THE LABOUR COURT AND UNIVERSITY COLLEGE DUBLIN**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered the 8th day of November, 2013**

1. This is an appeal brought by Dr. O'Higgins against a Determination of the Labour Court made on 11th January, 2013, on her claim under the above Acts that a 2007 decision by her employer, the second named respondent ("the University"), not to promote her to the status of professor was unlawful in that it was vitiated by discrimination on grounds of her sex contrary to the provisions of the Employment Equality legislation. The Labour Court has been named as a respondent in the proceedings but has taken no part, the opposition having been undertaken by the University.

2. The appellant was previously the holder of a tenured post as a Senior Lecturer in what is now the School of Business and Law in the University, her duties being discharged in what was formerly the Commerce Faculty of the University College and are thus on the business side of the now consolidated school. She has since retired from her tenured post but continues to teach under a fixed term contract.

3. It is important to underline at the outset that the issues which arise in this appeal concern an application for promotion to the grade or rank of professor within the University under a scheme which was not competitive with other applicants as might be the case under a procedure for the appointment of an single candidate to a particular professorship or for a selection of candidates to fulfil a limited number of posts. It was essentially a promotional exercise by reference to a number of defined and objective criteria and there was no limit upon the number of applicants that might receive promotion.

4. It appears that in the University there were two "pathways" to such promotions. In the one which is involved in this appeal, a scheme exists under which promotion rounds are held periodically in which senior academics can apply to be promoted to the rank of professor. That scheme is outlined in a document called "Promotion to Professor Internal Promotions Pathway 4B". The second pathway is one called "Competitive Retention Pathway" under which senior academics who are effectively threatening to move to another institution can be promoted to a professorship with a view to retaining their services.

5. The procedures and decisions under these schemes are in the hands of the University Committee for Academic Appointments, Tenure and Promotions which has been referred to by the first named respondent as the "UCAATP", but which will be described in this judgment as "the Committee". This body is comprised of members who are partly elected within the University and partly appointed by the President of the University. The President and the Registrar are ex-officio members. For the purposes of the 2007 promotions round under the scheme in which the appellant's application was made, the Committee was comprised of twelve men and one woman.

**The 2007 4B Pathway Round.**

6. Although not immediately relevant to the legal issues now before this Court, the background to the hearing before the Labour Court included the fact that she had previously been an applicant for promotion to professorship in 2006 but had been refused as ineligible because at that time it was a pre-condition that an applicant had held the position of associate professor for at least five years. She had subsequently applied for associate professor status but was unsuccessful. This pre-condition had been abolished for the round of promotions held in 2007.

7. In her application for the 2007 round, the applicant was supported by the recommendation from her own School of Business and Law and her own referee. As the Labour Court's impugned Determination records, external assessors appointed by the University to review her application "also reported favourably on her eligibility for promotion". The Determination also records that, in accordance with standard practice, those assessors were asked to indicate if, in their opinion, the appellant would be eligible to the promotion to professorship grade in their own university and each had given an affirmative reply.

8. There were nineteen applicants for promotion in the 2007 round of which four were women and fifteen were men. In the result, eight promotions were granted of which two were women and six were men.

9. The conditions or criteria by reference to which the Committee conducted the promotion procedure were set out in the "Pathway 4B" document referred to above as follows:-

"Applicants for promotion to professor are expected to have an international reputation. Professors will have achieved an internationally recognised leadership position in their disciplines from pioneering inquiry into important issues in that discipline, evidenced through sustained high-level activity. Assessment of promotion will be based primarily on the research and scholarship and academic leadership criteria. In exceptional circumstances, promotion may be based on the teaching and learning criterion reflecting internationally recognised peer-reviewed achievement in the applicant's scholarship of teaching and learning and/or pedagogical innovation within the discipline."

10. Following the refusal of her application, the appellant was given the following reasons as set out in the report of the Committee:-

- Lack of evidence of a substantial volume of publications in high-impact, high-quality referred research publications;
- Limited PhD supervision;
- Limited funding;
- Limited evidence of academic leadership within UCD;
- Limited evidence of contribution to the management or direction of the University through active engagement in internal committees or other activities that fostered the development of the University as a community.

11. The appellant requested and was given what is called a "feedback session" in which she met with two members of the Committee to answer her queries as to why her application had been unsuccessful. Not satisfied with that explanation, the Appellant initiated her claim before the Equality Tribunal.

12. The appellant's claim under the Act was first heard by an Equality Officer who dismissed the claim upon the basis that a *prima facie* case of discrimination had not been made out. It was an appeal against this decision which brought the matter before the Labour Court.

### **The Labour Court Determination.**

13. The Determination of the Labour Court contains some thirteen pages which set out the background to the claim and appeal; summarise the arguments of the appellant and the University; provide a detailed expose of the law which the Labour Court is required to apply; lead to the substantive analysis under the heading "Discussion" and conclude with two paragraphs headed "Determination".

14. The summary of the evidence given by the appellant to the Labour Court concludes with that court's assessment of its effect in these terms:-

"The import of the Complainant's evidence was that in respect of each of the published criterion (*sic*) against which the application was to be considered her qualifications was (*sic*) equal to, or greater than, those of her nominated comparators who were promoted. The Complainant told the Court that, like her, comparator D had not attained the grade of Associate Professor. She acknowledged that comparator D was promoted to the Competitive Retention Pathway Scheme. She pointed out, however, that the criteria for promotion under the scheme were the same as that (*sic*) in the main scheme. On the evidence adduced the complainant contends that the most likely reason for the impugned decision of the (Committee) was related to her gender..... In advancing that contention the Complainant placed particular reliance on the following:-

- The absence of gender balance within the [Committee]
- That she in fact met all of the published criteria for promotion;
- That her qualification against those criteria equalled or exceeded those of her male comparators, who were promoted;
- The positive recommendations which her application received from the College Committee and her external referee and the assessors appointed by the Respondent;
- The absence of any transfer on the basis for the [Committee's] decision."

15. The Determination then sets out a summary of the evidence given on behalf of the respondent by Professor Scott, Dean of the School of Business and Law and a member of the Committee who had participated in the promotion exercise and the deliberations. He described how the Committee went about its deliberations and said that it normally "concentrates on the cumulative influence of the candidates' achievements to determine if they have reached the required standard of academic leadership in their particular field. In that process some criteria are weighted higher than others. Publications by the candidate in peer reviewed journals are considered particularly important as is the extent of the impact rate of their publications". He said that all candidates were expected to reach the same standard of achievement but there could be what he described as "a different intensity depending on the discipline" from which an applicant came.

16. In relation to the appellant's case, Professor Scott had given evidence that the Committee had not been satisfied "that the cumulative influence of the Complainant's achievements were sufficient to enable her to progress to the level of Professor". He maintained that the decision had been reached solely on the basis of the information provided in her application and denied that gender was a consideration in the process. He accepted that the only record of the deliberations of the Committee was the written statement of the results. No record was maintained of the discussion which lasted approximately one hour for each candidate and there was no marking system in place. The appellant had been represented by counsel who cross-examined Professor Scott.

17. The Determination then contains an extensive expose of the legal principles which the Labour Court considered to govern the analysis it was required to undertake in such a case. Having quoted extensively from case law, the court listed eight relevant principles which it derived from that jurisprudence.

### **The Prima Facie Case Finding.**

18. The Labour Court then sets out its analysis of the issues under the section headed "Discussion". This effectively comprises two parts in which the court first asked itself whether the complainant had established a *prima facie* case. On this it reaches a conclusion in the appellant's favour. It then in a second part considers the evidence offered by the University in rebuttal of the inference raised by the *prima facie* case.

19. In taking this approach the Labour Court was clearly influenced by the fact that the Equality Officer had dismissed the claim by concluding that not even a *prima facie* case of gender discrimination had been made out. That was therefore the first hurdle the appellant needed to overcome in the appeal.

20. In answering the question it thus posed itself, the Labour Court identified three factors. First, it noted that there was independent evidence that she did meet the required standards set by the scheme's criteria. She was recommended for promotion by her own College and the independent assessors nominated by the University supported her eligibility. It also noted that Professor

Scott had said that the Committee placed considerable reliance on the report of the College Committee when making the assessment. The Determination then comments:-

"These facts are at least suggestive of a degree of irrationality in the results of the selection process."

21. The second factor was the "gender composition" of the Committee which gave "rise to considerable disquiet". The fact that the Committee was comprised of twelve men and one woman was considered "inherently inimical to the achievement of full gender equality in access to senior appointments" within the University. The third factor was the absence of any minutes or notes of the content of the deliberations of the Committee in arriving at its decision.

22. The Determination then concludes on the question of a *prima facie* case as follows:-

"While none of these considerations are (*sic*) determinative of the case, their cumulative effect must be sufficient to constitute facts from which discrimination can be inferred. The Equality Officer found that the Complainant had failed to make out a *prima facie* case of discrimination. On the evidence adduced in the course of the appeal the Court must respectfully disagree with that conclusion."

#### **Rebuttal of the Inference.**

23. The court then introduced the second stage of its analysis by saying that as the complainant "has established facts from which discrimination may be inferred, in accordance with s. 85A of the Act the onus of proving the absence of discrimination shifts to the respondent. The Court must, therefore, carefully evaluate the evidence tendered by the Respondent to explain its decision not to promote the Complainant". It then asks itself the question: "Has the respondent rebutted the presumption of discrimination?"

24. Understandably, in presenting the appeal, counsel for the appellant acknowledged that there could be no quarrel with the approach adopted by the Labour Court up to this part of the Determination and submitted that the court had been entirely correct in deciding that the three factors raised an inference which had the effect of placing on the University the onus of explaining how the promotion decision had been reached without gender bias. As explained more fully below, counsel identified the point of law which constituted the basis of the present appeal as the Labour Court's acknowledgement that its role required a careful evaluation of the evidence tendered by the University to explain its decision not to promote the appellant. The Labour Court, he submitted, erred in law in failing to do exactly that.

25. Counsel for the University on the other hand relies strongly upon the fact that the present appeal is explicitly limited to one on a point of law in accordance with s. 90(1) of the Act of 1998 (as amended). She submits that the present appeal does not raise any point of law but is, in effect, a disguised attempt to reopen issues of fact with a view to obtaining a rehearing of the matter before the Labour Court. Before addressing the legal arguments which have been made, it is necessary to set out in more detail the manner in which the Labour Court analysed the issues and then answered the question it posed for itself namely, whether the evidence given and the explanation offered by the University rebutted the inference that the decision not to promote the appellant was tainted by gender discrimination.

26. The Determination first refers to case law indicating that:-

(a) Cogent evidence of "a non-discriminatory taint" is to be required- by which this Court understands, cogent evidence of the absence of a taint of discrimination;

(b) The court must be alert to the possibility of unconscious or inadvertent discrimination so that mere denials of discrimination in the absence of corroboration must be approached with caution; and

(c) That the decision to reject the complainant's application must be shown not to have been influenced to any degree beyond the mere trivial by considerations relating to her gender.

27. The Determination then outlines its assessment of the evidence given by Professor Scott. This assessment on pp. 13 and 14 of the Determination must, in the view of this Court, be read in conjunction with the summary of the testimony he gave before the Labour Court as set out at pp. 6 and 7 of the Determination.

28. The Labour Court described Professor Scott's evidence as having been "undoubtedly honest" and explicitly accepted its veracity. It describes the evidence he gave as being "comprehensive evidence concerning the process followed by the [Committee] and the underlying rationale for its decisions". He had explained that "in order to attain the standard required for promotion, candidates must demonstrate, to the satisfaction of the [Committee] that they have attained the highest standard of excellence and international academic leadership in their particular discipline". He said that "candidates are judged against predetermined objective criteria solely on the basis of the evidence disclosed in their application". As already stated, this assessment must, in the view of the Court, be read in conjunction with the more extended summary of the evidence as to how the deliberations were conducted. Professor Scott had said that the discussion on each application lasts for approximately one hour and is normally led by the external members. The Committee "normally concentrates on the cumulative influence of the candidate's achievements to determine if they have reached the required standard of academic leadership in their particular field".

29. On p. 13 the Labour Court then gave its assessment of the effect of the evidence:

"The import of that evidence was that the Complainant's application was decided upon solely by reference to the published criteria and that the members of the [Committee] came to the conclusion that she did not meet the standard necessary to warrant promotion."

30. Contrary to what might be inferred from some of the arguments on the part of the appellant, this constitutes, in the judgment of the Court, a clear finding of fact on the part of the Labour Court as to the basis upon which the Committee arrived at its decision. It must be borne in mind that the question under consideration by the Labour Court at that point was: how had the deliberations of the Committee been conducted so as to arrive at a result which appeared, on the face of it, to be inconsistent with the *prima facie* indication that she was considered to have met the required standards by both her own college, her referee, and the external assessors? In effect, the Labour Court in finding that an inference of possible gender discrimination had been raised was concerned to know what had actually happened that enabled a group comprised of twelve men and one woman to arrive at their decision without there being element of gender discrimination given that there was no first-hand minute or note of the deliberations.

31. The Labour Court did not, however, confine itself to relying upon the veracity and honesty of Professor Scott's description of the deliberations in concluding that the inference had been rebutted. It was explicitly conscious of the inadequacy of relying solely upon a declared denial of bias on the part of the decision-maker. It takes account of the fact that of the nineteen applicants, fifteen were men and four were women; while of the eight successful applicants, six were men and two were women. "This result is inconsistent with the conclusion that the [Committee] was subconsciously disposed to appoint men in preference to women. Moreover, in examining the results of the earlier promotion round in 2006, no evidence can be found of a discriminatory disposition on gender grounds on the part of the decision-makers".

32. In the judgment of this Court, what the Labour Court is there saying is that even if, notwithstanding the honesty and truthfulness of Professor Scott's description of the deliberations, the procedure had been tainted by some subconscious or inadvertent gender-based bias, the Labour Court would expect to see it manifested in some imbalance in the outcome of the procedure. The actual result, on the other hand, it finds is inconsistent with any subconscious disposition on the part of the Committee to promote men in preference to women; nor can such a tendency or pattern be discerned when the results are taken in conjunction with the results reached in the 2006 round.

33. It is on that basis, accordingly, that the Labour Court answers in the affirmative its question as to whether it is more probable than not that the appellant's gender had nothing to do with her failure to be promoted. The overall conclusion is then summarised and given in the final paragraph:-

"For the reasons referred to herein the Court is satisfied that while the Complainant has made out a *prima facie* case of discrimination that the respondent discharged the onus which it bears and that it is more probable than not that the Complainant's gender was not a factor which influenced the decision not to appoint her to the post of Professor."

### **Grounds of Appeal.**

34. As already indicated, notwithstanding the fact that, on the face of it, the Labour Court has based that final conclusion upon its assessment of the evidence of fact as to how the deliberations of the Committee were conducted and the basis upon which the rejection of the application was decided, it is submitted on behalf of the appellant that the Labour Court has erred in law. The specific grounds raised in the notice of appeal are expressed as follows:-

(a) The Labour Court erred in law in determining that having made out a *prima facie* case of discrimination that the appellant's gender was not a factor which influenced the decision not to appoint her to the post of Professor;

(b) The Labour Court failed to carry out any or any adequate probative analysis of the decision of the respondent to refuse to appoint the plaintiff to professorial status. In particular, the Labour Court failed to test the decision not to promote by reference to the evidence adduced as to the plaintiff's suitability by reference to the stipulated criteria. The Labour Court's statement that it would not substitute its decision for the UCAATP did not discharge its obligation to carry out a proper and thorough evaluation of the evidence;

(c) The Labour Court erred in law in failing to have or any proper regard to the weight of evidence adduced on behalf of the appellant;

(d) Having found that the appellant had raised a *prima facie* case of discrimination and having set out the reasons for that finding, the Labour Court failed to then examine each of the grounds to determine that there was no gender bias in the decision;

(e) Further, the Labour Court relied on limited statistical evidence in coming to its decision that there was not gender discrimination. The Labour Court failed to engage in a proper analysis of details and statistical information relevant to its determination to permit a proper evaluation as to whether there was indirect discrimination.

(f) The Labour Court misdirected itself on the limited statistical evidence adduced;

(g) The Labour Court failed to carry out any form/any adequate form of comparative analysis as between the different candidates in respect of the contribution to academic journals and the other stipulated criteria;

(h) The Labour Court failed to have any adequate regard for the undisputed evidence of gender imbalance in the make up of the UCAATP."

35. While the basis of the appeal has been articulated in those grounds, the central thrust of the argument made by counsel for the appellant was essentially that once the Labour Court accepted that there was a *prima facie* case that discrimination had tainted the decision, it had an obligation in law to embark upon a more detailed assessment of the actual material which had been before the Committee and to make specific findings of fact by reference to that evidence. As he put it, the Labour Court was obliged to "roll up its sleeves" and "engage with" the statistical and other evidence which the appellant had put before it and against that material to test the evidence of Professor Scott. By failing to do so, the Labour Court had erred in its approach to the evaluation of evidence and thereby committed an error of law.

36. While recognising with some reluctance that the express terms of the conclusions reached in the Determination were based upon Professor Scott's factual evidence as to how the deliberations of the Committee were conducted, counsel for the appellant sought to characterise the issue as one of law by reference to a passage in the judgment of McCracken J. in the Supreme Court in *National University of Ireland Cork v Ahern & Ors* [2005] 2 I.R. 577. The relevant passage is this:-

"The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered the labour Court or ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)." (This last reference is to the definition of "like work" in the Anti-Discrimination (Pay) Act 1974 since repealed and replaced by a corresponding provision in the 1998 Act.)

37. Counsel also called in aid an observation or admonition which appears in another judgment of the Supreme Court, that of Finlay C.J. in *North Western Health Board v. Martyn* [1987] I.R. 565 at 579:-

"If a party appealing the ruling or recommendations of an equality officer to the Labour Court seeks to put in issue any of the facts so found, they should unequivocally do so in their notice of appeal and, in turn, the Labour Court, upon the conclusion of its hearing, should in an unambiguous fashion state the facts which it has found and the evidence upon which it has found them."

38. Counsel for the appellant relies upon these authorities in submitting that the Labour Court in this instance has failed adequately to set out the facts upon which it relied in reaching its conclusion and has also erred in failing to take into account and to determine issues of fact that arose out of the conflict between the evidence and submissions made by the appellant before the Labour Court on the one hand and the evidence relied upon by the University on the other.

39. As counsel for the respondent correctly pointed out, it is important to bear in mind the context in which the statement by McCracken J. in the *NUI Cork* case was made. That case concerned a number of male security service employees of UCC who claimed discrimination upon the grounds that they were performing "like work" to that of female telephone switchboard operators employed in the college but were receiving lower rates of pay. The Labour Court, having compared the work done by the two sets of employees determined that there was "like work" and that the differences in rates of pay were not justified on grounds other than sex. In allowing the appeal and remitting the matter to the Labour Court the Supreme Court held that the Labour Court had failed to take into account all of the facts relevant to the comparison made between the duties of the male security operatives and the particular group of switchboard telephonists which had been put forward as comparators in the claim. The actual rates of pay received by the group in question were the same as those received by other fulltime telephonists, but the comparator group had had their duties reduced by the introduction of job sharing arrangements without any reduction in pay rates. It was on that basis that the Supreme Court held that there had been an error of law on the part of the Labour Court in failing to take into consideration all of the elements relevant to the issue as to whether the difference in remuneration was based on grounds of sex. At p. 584 McCracken J. explains:-

"Clearly that difference in remuneration was not based on grounds of sex but on grounds of a policy of facilitating the family obligations of the comparators. This being so, the Labour Court ought then to have considered the question whether the difference in remuneration between the respondents and the comparators might have the same basis. The Labour Court failed to give any consideration whatever to the fact that the comparators worked shorter hours and lesser duties than their fulltime colleagues."

40. In the judgment of the Court the position in relation to the present appeal is materially different. As already pointed out above, the issue before the Labour Court in the second part of its assessment of the appeal was effectively this. Given the apparent imbalance in the composition of the Committee and the absence of any first-hand record of its deliberations, did the actual evidence given of those deliberations suffice to rebut the inference that otherwise arose? Answering that question did not, in the view of the Court, involve or require any necessary adjudication on the merits of the judgments made by the Committee on the appellant's promotion application. It was not the function of the Labour Court to decide whether the applicant's academic achievements and publications were at the level of excellence she maintained nor whether they were superior or inferior to those of other applicants. The judgments as to the degree to which the applicants met or exceeded the standard required by each of the designated criteria were qualitative judgments delegated exclusively to the specialised appraisal of the members of the Committee. Having, as it were, had its doubts raised by the apparent imbalance in the composition of the Committee and the absence of records of the deliberations, the Labour Court's concern was to be satisfied that the deliberations had not in fact been tainted by gender discrimination. It declared itself satisfied on that point by accepting as comprehensive, truthful and honest Professor Scott's account of the conduct of the deliberations combined with the absence of any contrary indication or pattern in the outcome of the 2007 round as well as in the preceding round of 2006.

41. In her appeal submissions before the Labour Court, the appellant had submitted that the Committee had "violated the principles of equality by applying the promotion procedure in a way that was deliberately prejudicial to her". This was based upon a number of grounds identified as: Competence, Bona Fides, Composition and Balance and an alleged Arbitrary, Non-transparent Application of the Criteria.

42. Under the heading of "Competence" the appellant had argued that the Committee was unbalanced in its composition not only because it had only one woman but because it lacked the expertise to evaluate her particular achievements in the area of business ethics. Of the thirteen members, only one was a business academic while nine members were drawn from the Colleges of Life Sciences and Engineering. These colleges are, she claimed, heavily male dominated especially at the senior level so that the composition misrepresented UCD's "staff community" and this was particularly prejudiced against the School of Business which did not have a single member on the Committee. The one business academic was an extern but his role is criticised by the appellant because "he was not an expert in Business Ethics/CSR/Social Issues in Management" so that the membership of the Committee was not competent to assess her application or to properly appreciate the recommendations of the external assessors or the referee and the report of the college committee.

43. Under the heading of "Bona Fides" the appellant referred to the flawed decision of the 2006 round and maintained that the unblocking of a backlog of promotions by the removal of the five year associate professorship condition had produced a result that the Committee was imposing an additional *de facto* condition on her application by requiring applicants for promotion to go from one level to the next without skipping a level. Thus, "previous discrimination against the complainant in promotion to associate professor prevented her from fulfilling this condition and thus constituted a discriminatory criterion". On that basis she claimed that the Committee had not approached her application with an objective and open attitude and in good faith.

44. In the judgment of the Court, the points raised under these headings did not give rise to any obligation on the part of the Labour Court to "delve into" the facts relied upon for the purpose of testing them against the evidence of Prof. Scott to any extent greater than that which appears in the text of the Determination. The arguments are, in effect, an attack upon the integrity of the individual members of the Committee and on their willingness to exercise their professional judgments objectively and in good faith. The fact that senior levels in the College of Life Sciences and Engineering may be "heavily male dominated" was not one that was in dispute but of itself it did not prove that the particular composition of this Committee was incapable of reaching an unbiased judgment upon the application. If the appellant had any justiciable grievances in respect of the academic competence of the Committee or the non-gender aspects of its composition or the alleged disguised continuation of the associate professor pre condition, her remedy in law lay elsewhere and not in an appeal to the Equality Tribunal.

45. Under the heading of "Composition and Balance" the appellant made the more important and obvious argument based upon the fact that of the members of the particular Committee there was only one woman out of thirteen members. This, it was argued,

constituted a "gross contravention of nationally prescribed guidelines designed specifically to prevent the kind of discrimination exhibited by UCD". This, of course, is the very point which the Labour Court accepted in reversing the decision of the Equality Officer. As indicated above, the Labour Court correctly treated the fact of that imbalance not as determinative of the case as a whole but of raising an inference which the University was then required to rebut.

46. Under the heading of "Arbitrary, Non Transparent Application of the Criteria" the appellant advanced a broad challenge to the Committee's conclusion that she did not meet the required standard of the five promotion criteria (see para. 10 above). The essential submission made was this:

"It is submitted that in each of the five alleged shortcomings, the Committee failed to accept the evidence available to it on the Complainant's achievements. It is further submitted that the failure to do so can only be explained by the fact that [the Committee] does not sufficiently understand the complainant's area of expertise and her achievements and it was biased against her because of her gender".

47. Clearly, the appellant strongly disagreed with the consensus apparently reached by the Committee as to the level and quality of her academic accomplishments and standing. On a number of grounds she impugned their ability to reach a judgment on her career inconsistent with her own assessment and with the recommendations supportive of her application. For example, she identifies one of the external assessors as coming from an institution where one of the other applicants for promotion had worked and with whom the other applicant had co-authored a chapter in a book. This gave rise she alleged to a conflict of interest and the external assessor ought not to have been used for the assessment of that candidate's application. Whatever merit that criticism of the assessment of another candidate's application may have, it had no bearing upon the Committee's assessment of the appellant's application. The various applicants for promotion were not competing with one another and there was no limit on the number of promotions that might be granted. Even it could be said that the appellant's various criticisms of the competence of individual committee members; of their lack of appropriate academic background and of the defects alleged in the University's procedures for establishing membership of the Committee, had some merit or justification, it does not follow that the Committee so constituted was either in fact or in law incapable of determining the individual applications without gender bias. That was the issue which the Labour Court was required to determine on the appeal and not whether the appellant merited promotion in accordance with the designated criteria. In effect, the appellant assumed that because of the particular composition of the Committee and because she professed not to understand how it failed to accept her own evidence of meeting the designated criteria, that this constituted proof that the rejection of her application must necessarily be attributable to gender discrimination. The Labour Court was not concerned to determine as a matter of fact whether, for example, the Committee "did not understand sufficiently the Complainant's area of expertise". It was solely concerned to satisfy itself that the basis upon which the rejection had been decided by the Committee was untainted by gender bias.

48. Unlike the *NUI Cork* case, therefore, this is not an instance in which it has been demonstrated that the Labour Court wrongly ignored some factor or a piece of evidence relevant to the application of a statutory criterion or condition in the Act of 1998 (as amended). On the contrary, it is clear from the expose of the evidence and material put before it by both sides that the Labour Court took account of all material considerations. It was argued that once the Committee had found that there was a *prima facie* case the Court was obliged to "engage with the evidence of Professor Scot" and "identify why there was no discrimination". In the judgment of the Court that is exactly what has been done in the Court's explicit finding based on its acceptance of that evidence as comprehensive, truthful and honest that the application had been decided "solely by reference to the published criteria" and that the appellant had been found not to "meet the standard necessary to warrant promotion".

49. In the terms of the Employment Equality legislation and of the well established practice and procedures of the Authority and the Labour Court in determining claims, the Court was effectively put on enquiry as to the possible presence of gender discrimination by the imbalance in the composition of the Committee combined with the absence of minutes of its deliberations. Nevertheless, in the particular circumstances of this non competitive promotion scheme, the Labour Court was correctly concerned only to satisfy itself that the specific decision by this particular group of 12 men and one woman had not in fact been tainted by gender discrimination whether overt or subconscious. It did so by considering and appraising the first hand evidence given to it of what had actually taken place and by excluding the possibility that there existed some inconsistency in a pattern of results which would make a conclusion as to the presence of some institutional bias inescapable and thereby render the Committee's decision unlawful.

50. In the judgment of the Court no error of law has been made out and no point of law for appeal has been identified. In reality the arguments advanced amount to an assertion that the Labour Court should have come to a different conclusion on the factual evidence before it. In the absence of some element equivalent to that of the *NUI-Cork* case that does not constitute a point of law. That assessment is not altered by the use of a vague neologism to characterise the alleged flaw as a "failure to engage with the evidence".

51. For these reasons the appeal is rejected.