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EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: DEC - E 2000/05

**5 Named Male Employees
(Represented by Mandate)**

AND

**Power Supermarkets Limited
(Represented by I.B.E.C.)**

**File No. EE 26/1996
Date of Issue 31/10/2000**

1 DISPUTE

1.1 This dispute concerns the union's claim on behalf of five claimants that a pro rata sales post was reserved for females only. The union also alleges that the post was not advertised, consequently they were further discriminated against on the grounds of their sex because they were excluded from applying for the post contrary to the Employment Equality Act 1977.

2 BACKGROUND TO DISPUTE

2.1 A pro-rata sales assistant post arose in the Finglas store in January, 1996. This is a position where the individual is guaranteed a minimum of 18 hours work per week. At the time that this vacancy arose the claimants had been employed as part-time ancillary staff with an hourly rate lower than that of sales assistants. The claimants allege that the position was not advertised and that a female was appointed to it.

2.2 The claimants are Mr. Warren Beatty, Mr. Mark Lang, Mr. Declan Dalton, Mr. Niall Hogan and Mr. Andrew Carroll.

2.3 Following the rejection of the claim by the company the union referred the dispute to the Labour Court who referred it for investigation and recommendation by an Equality Officer.

3 SUMMARY OF THE UNION'S SUBMISSION

3.1 The union says that in April, 1996 it learned from its members that breaches of union/company agreements and of the law appeared to have occurred in the Finglas store. It says it wrote to the company twice seeking a meeting at which it intended to elaborate on the problems outlined. It says that the company's replies suggested that the issues were proper to local management/shop steward discussion. The union referred the matter to the Labour Court on 18th June 1996.

3.2 The union says that the staff structure in Crazy Prices, Finglas (which closed in December, 1996) consisted of three main categories, as follows:-

"Full time sales assistants (who perform check-out duties shelf-packing and serving customers and were paid in accordance with the agreed wage scale.)

Pro-rata staff (who are basically part-time sales assistants performing exactly the same duties as their full-time colleagues and also paid in accordance with the agreed wage scale.)

Part-time ancillary staff (who should only perform trolley and basket collection, packing bags at check-outs and cleaning duties and who were paid as per the ancillary rates).

3.3 The union says that around Christmas, 1995 a vacancy for a pro-rata position arose. It alleges that this vacancy was not advertised and as a result, no application was received from the claimants who were all ancillary employees. The union says the one female ancillary worker in the Finglas outlet, Ms. Rachel Barry, had already made it clear to management that she was seeking a pro-rata position and was interviewed for the vacancy in question. It says that Ms. Barry, however, was not successful on this occasion and the job was given to a woman, Ms. Mahon, who was not an employee of the company prior to securing the vacant pro-rata post. It says that Ms. Barry later secured a pro-rata position in another Power Supermarkets outlet when the Finglas store closed. *(Note in a later submission to the equality officer the union indicated that Ms Barry did not apply and consequently was not interviewed for the this vacancy as she was on sick leave at the time the vacancy was filled)*

3.4 The union submits that the pro-rata position which became vacant around Christmas, 1995 was deliberately filled without advertising so as to prevent the claimants from applying for the post. It says that only Ms. Mahon were interviewed for the post and she was appointed. It also says that Ms. Barry later secured a pro-rata post in another store. It claims that at all stages in the process, the claimants were excluded despite Power Supermarkets policy in this regard which was posted up in the staff canteen and states;

“The company places a major emphasis on internal promotion and the development of future management from within the company. Promotional vacancies are advertised internally and the selection for any post is based on merit.”

3.5 The union submits that this case is an “open-and-shut” example of discrimination on grounds of sex. It says that Power Supermarkets Limited recruit more female employees than male employees and always concentrate their female employees on check-out duties. It further says that this company has even gone so far as to offer some male employees the option of not operating check-outs at all. It says that it appears that on this occasion the company required a check-out employee and the recruitment activity was therefore confined to female applicants only. The union also says that contrary to the agreed company/union agreement, all male ancillary employees were given shelf-packing duties on a regular basis.

It says that the company was prepared to break the company/union agreement by giving all the claimants shelf-packing duties, it was apparently not willing to break the agreement by giving them check-out duties. The union alleges that this activity is reserved, in the main, for female staff and that it was necessary therefore to recruit a check-out operator from the female category only.

3.6 The union made the following additional remarks in a written submission presented on the day that the first hearing was held in this case.

3.7 The Union says that Tesco has taken, over Power Supermarkets since the claim was made. The union says that for some time it has been concerned at the recruitment policy of the company and alleges that these policies are sex-based. It says in an effort to address their concerns they sought negotiations with a view to securing agreement on an Equal Opportunities Policy. The union alleges that the company refused to meet with the union on this issue, pointing out that the formation of such a policy was a matter for the company and no business of the union. The union alleges that the company policy is in sharp contrast with that of that of one of its main competitors. The union referred to two cases where findings were made under the equality legislation against the company. The union also states that these recommendations were subsequently upheld on appeal. (Recommendations No EE 09/1994 and EE 23/1996 refer)

3.8 The union also alleges that an examination of the company's internal management profile will confirm the sex based nature of its structure which appears to have permeated almost every layer of the company. The union alleges that the company employs many thousands of females, has a higher management that is almost entirely male.

3.9 The union also alleges that the workers involved in this claim carry out work in addition to that of ancillary workers and that the company regularly exceed the terms of the agreement which outlines the work of an ancillary worker. The union is adamant that the ancillary workers carry out the work of a sales person on a regular basis, stacking shelves and that Ms Barry (an ancillary worker who on sick leave around the time of this claim and therefore not a party to it) often did check out duties both of which were also contrary to the agreement.

3.10 The union also referred to the submission made by the company where it explained the background to the appointment of Ms April Mahon

“that at about the same time the successful applicant’s aunt, who worked in the canteen in the store, advised Mr. Birchall (the manager) that her niece (Ms. April Mahon) would be interested in the vacancy. Mr. Birchall interviewed Ms. Mahon and was impressed by her experience as a checkout operator and opted to give her the position.”

3.11 The union argued that Ms Mahon, who was not an employee in the company and was completely unknown to Mr Birchall, was given an interview for a position she had not applied for (her aunt had applied on her behalf) while the claimants, all male and already in the company’s employment, were not afforded interviews at all. The union argues that the company deprived the claimants of an opportunity to impress management with their own case as to why they should be promoted to the pro-rata group. The union says that the only other ancillary worker in the store, Ms Barry was later given a pro-rata position and it argues that her experience working on checkout when employed as an ancillary worker assisted her in being appointed to this work

3.12 The union requests a recommendation from the equality officer that compensates the claimants for what it considers was a most deliberate act of discrimination on grounds of sex. It says that this discrimination caused great offence and distress to the claimants.

4 SUMMARY OF COMPANY’S SUBMISSION

4.1 The company says that it is alleged that a vacancy arose in its Finglas Store for a pro rata position on January 26, 1996, that it was reserved for females only and that males were excluded. It also says that it is alleged that the vacancy was not advertised and that only one female ancillary employee applied for the position and she was unsuccessful. The Company says that it is alleged that it offered the position to an outside applicant. The company says that it is alleged the claimants, all male, who were employed as ancillary workers with the Company at the time were not made aware of the vacancy and thus were not given the chance to be considered for it.

4.2 The company argues that at the time the vacancy arose the claimants were employed as part-time ancillary staff. It says that these staff only perform trolley and basket collection, packing bags at checkouts and cleaning duties and are paid at a lower rate than sales assistants. It says that a pro rata sales assistant post arose in the store. It explains that a pro rata position is a sales assistant position where the individual is guaranteed a minimum of 18 hours work per week (although in practice they tend to work more than this)

but they do not receive premia for working late nights.

4.3 The Company says that a pro rata sales assistant post arose in the Finglas store on January 26, 1996. It says that the union is alleging that the job was not advertised and that this was done deliberately to prevent males working as part time ancillary staff in the store from applying for the vacancy. This is rejected by the Company.

4.4 The Company says that when the pro rata position became available the Manager of the store, Mr. Birchall, spoke to each of the claimants as well as to other staff concerning the vacancy and makes the point that there are only 25 staff in total in the Store. It says that all of the claimants with the exception of Mr. Niall Hogan were studying for their Leaving Certificate at the time and informed the Manager that they were not interested in working week days (i.e. between the hours of 9:00 a.m. and 6:00 p.m.) The Company says that Mr. Beatty left the Company's employment on February 23, 1996 in order to study for his Leaving Certificate. Mr. Long left the Company's employment on February 17, 1996 also to study for exams. Mr. Dalton left the Company's employment on January 23, 1996 to study for his Leaving Certificate. Mr. Carroll was also studying for his Leaving Certificate and was not interested in the job either.

4.5 The Company says that Mr. Hogan, who was in the Company approximately 4 months, indicated that he was interested in the vacancy. It says that at about the same time the successful applicant's aunt, who worked in the canteen in the Store, advised Mr. Birchall that her niece (Ms. Mahon) would be interested in the vacancy. Mr. Birchall interviewed Ms. Mahon and was impressed by her experience as a checkout operator and opted to give her the position. The only female ancillary worker, Ms. Barry, was absent on long term illness and therefore was not considered as a serious contender. Ms. Barry was not interviewed for the position. (A copy of her attendance record showing that she was absent at the time the vacancy arose was made available to the Equality Officer). Ms. Barry was absent from November 15, 1995 to September 15, 1996).

4.6 The Company says that Mr. Hogan had no previous experience as a checkout operator and although he was considered he was not seen as having the experience of Ms. Mahon and for this reason was unsuccessful in his application. It says that at the time the post arose Mr. Hogan was spoken to about the job but was not interviewed in the formal sense. It says that he was continuously assessed during his probation period and as the store was a small one (only 25 staff in all) the manager was well aware of the capabilities of

each staff member as he had a very close working relationship with all of the staff and thus was aware of their suitability for a vacancy without having to go through a formal interviewing process. It says that the only person interviewed was the external applicant as the Store Manager obviously needed to speak to this individual to assess her suitability.

4.7 The Company says that the union alleges the vacancy arose in January 26, 1996. Mr. Dalton left the Company's employment on January 23, 1996. It says that this is clearly prior to the vacancy arising and thus Mr. Dalton could have no claim in this case.

4.8 The Company says that the union's submission states that the vacancy for a pro rata position was not advertised and says that this is not correct. It says that whilst the vacancy was not advertised on the notice board or in a newspaper the definition of "advertisement" contained in the Employment Equality Act, 1977 is not restricted to printed advertisements only. It says that the definition of "Advertisement" contained in the Act is:

"Advertisement" includes every form of advertisement, whether to the public or not and whether in a newspaper or other publication, on television or radio or by display of a notice or by any other means, (company emphasis) and references to the publishing of advertisements shall be construed accordingly;"

It says that the above definition can be interpreted as indicating that an advertisement does not have to be in a printed format. As a result the Company does not accept that the post was not advertised. It claims that the Store Manager did inform the staff of the existence of the vacancy (which was not difficult given the small numbers of staff employed in the store). The Company contends that this is a form of advertising as defined by the Act.

4.9 The Company says that the union's submission also states that the claimants were excluded from all stages of the recruitment process and rejects this. It says that four of the claimants were told of the vacancy (one claimant was not as he had already left the Company's employment) and three of the four expressed no interest. The Company says that the staff who were not interested in the post were all studying for their Leaving Certificate and were not available to take up work as required by the position, and three out of four of those studying for exams resigned shortly afterwards for exam study reasons.

4.10 The company also rejects the union's submission statement that recruitment activity in this case was confined to female applicants only. It says that all of the claimants were informed of the vacancy. It says that it is also impossible to conclude that on the basis that

as there was only one female worker employed in an ancillary position (who was not interviewed for the position) that this implies that the vacancy was confined to females only. The company says that if it wished to exclude male applicants then obviously it would not have informed the claimants of the vacancy.

4.11 The Company says that no discrimination on grounds of sex occurred in this case. It says that the claimants were not excluded from the post because of their gender and while the job was not advertised on paper, all of the claimants were told of the vacancy and in fact four of the five expressed no interest in the position. Furthermore, the one female employed as a part time ancillary staff member was not interviewed for the vacancy as alleged.

4.12 The company says that the onus of proof is on the claimants to substantiate an allegation of discrimination under the terms of the Employment Equality Act, 1977 and argues that no proof to date has been supplied. The Company requests that the Equality Officer reject this claim for discrimination under the Act.

5 EQUALITY OFFICER'S CONCLUSIONS

5.1 In my investigation of this case I have taken into consideration all the submissions, both written and oral submissions made at joint hearings held between the two parties.

5.2 The union has alleged that the company discriminated against the claimants who are male as it alleges that the claimants were not informed about this pro rata check out vacancy and it further alleges that the company sought a female worker for the vacancy. This appointment would have improved the employment prospects of any of the claimants. All the claimants were employed as ancillary workers and a promotion to pro rata working would have given them an increase of £1.22 per hour.

.3The company has refuted the union's allegations. It argues that it properly appointed Ms Mahon to the position under dispute.

.4I note that the company made this appointment on an informal basis. There was no advertisement placed for the benefit of staff. The company says, though this firmly denied by the claimants, that the local manager spoke to four of the five claimants (he alleges that one had left before the vacancy arose) and asked them if they were interested in the vacancy. He

says only one was interested in the vacancy, Mr Hogan. The other claimants were studying for their Leaving Certificate. I note that three of the claimants left shortly afterwards because of their studies. All of these workers worked six days a week and worked each evening from 5.00 pm until 8-9 pm or later on the late closing nights, while they were with the company.

5.5 I have carefully considered the statements of the parties to this dispute in relation to the union's allegation that the claimants were not informed that the vacancy existed and I find that there is a conflict of evidence. While the company argues that the manager told all the staff that there was a vacancy I consider from the facts placed in front of me that at most the manager may have mentioned the vacancy in general terms but was not sufficiently specific and consequently none of the claimants were aware that the vacancy was to be filled, until the new appointee arrived in the store. One of the claimants, Mr Hogan, whom the company says was considered but not found suitable due to his lack of check out experience, is quite adamant that he was not informed of the vacancy. He was working full-time hours as an ancillary worker. This claimant worked for the company in Finglas for approx one year and for a further period in Ballymun. He says that when the Finglas store closed down he moved to Ballymun because he had been promised a pro rata job by the manager there. However, subsequently he left the company employment when this did not happen. In my opinion this claimant in particular would remember if this vacancy, a pro rata one, was known generally to staff at the time and if there was a competition for it.

5.6 I also note that the company has a policy of promoting staff internally. A simple notice outlining the vacancy as used by the company in other stores would have clearly indicated beyond any possible doubt the fact that the Company was seeking to make an appointment to the check out vacancy. I consider that it did not follow these policies on this occasion and the claimants were not formally informed of the vacancy. If the company, as it claims it has, considered the claimants for the position then I consider that the company should have done this in as transparent a manner as possible. As it was it did not give the claimants the opportunity to present themselves for consideration. On balance I do not consider that the claimants were made aware that the vacancy was about to be filled. This leads me to the conclusion that the claimants were not considered for the post.

5.7 The company also argues that one of the claimants had left the company before the vacancy arose. That claimant, Mr Dalton, left the company on 23 January 1996 and the appointee to the disputed post commenced work on the 26 January 1996. I am satisfied that if the company notified its staff of the impending vacancy that it should have notified Mr

Dalton. In its submission the company has acknowledged that it did not. (Para 4.9 above). I consider that if/when an interview/selection process was carried out it would have been while Mr Dalton was still an employee of the company. Therefore I consider that he is properly a party to this claim. I further note in its submission the company says that all of the claimants were studying for the Leaving Certificate and it points out that some of them left around the time that this vacancy was filled. I note that in fact that while three of the claimants left in the weeks after the appointment was made one stayed for a further year with the company (Mr Hogan) and another (Mr Carroll) remained with the company until after the Leaving Cert exam (Jun/Jul). It is possible that an appointment to a pro rata post might have changed the plans of any of claimants and consequently I consider that this claim affects all of them equally.

5.8 The claimants have also alleged that the company sought only female applicants for this post. They allege that this is why they were not informed of the vacancy. I note that in whatever manner that the manager notified the vacancy the end result was that only one person, a female, was interviewed and appointed to the post. There were five members of staff who were interested in being appointed to this post had they known in advance that the company intended filling it. However they were not interviewed for it and they believe that they were not considered for it, as they were not aware, or made aware, of the vacancy until after it was filled.

5.9 The union also argues that the company only seeks to recruit females for check out duties and males for packing shelves and such like duties. I note that the company argues that even if there is a majority of one sex in a particular position that this does not indicate discrimination but rather reflects the numbers of applicants for a post. However in this instance I note that the manager only interviewed one applicant and did not discuss the job in either general or specific terms with the claimants. I also note that the company said at the hearing that if no suitably trained check out operator was available then it would have trained Mr Hogan. However Mr Hogan was not given the benefit of an interview.

5.8 As I have found that the claimants were not considered for the post the next question to be addressed is whether or not this was on grounds of their sex. I note that the company appointed a female on this occasion and subsequently appointed the remaining ancillary female worker to check out work. This worker was not included in this claim, due to a prolonged absence on sick leave. While the union has not produced proof to uphold its allegation that it is company policy to appoint females to check out work, I understand that in this case the company's actions would lead the staff involved to believe this. The fact is that

six of the seven regular check out staff were female, and only one female was interviewed by the company. On the other hand the company employed five ancillary staff who were not formally notified or interviewed. These staff stood to gain a sizeable increase in their take home pay were they appointed to this post. In my opinion the company in its submissions has not rebutted these allegations.

5.9 I consider that the company in not ensuring that the vacancy was advertised, in such a manner as to leave no doubt that the vacancy was to be filled and thereby not affording the claimants with an opportunity to apply for the vacancy, discriminated against the claimants. I note that in this branch only one male had operated the check out and only the female worker of the group of ancillary workers ever worked on the check out thereby gaining experience on check out work. Further, as the ancillary staff that were not informed of this vacancy were males I consider that they were discriminated against on grounds of their sex.

5.10 There was only one position to be filled. I note the company's argument that it required the appointee to work a minimum of 18 hours per week during any of the company's trading and that four of these workers were attending school and could not work day time hours. However the claimants worked upwards of 25 hours per week at a minimum and I am sure that they could have been rostered to take advantage of these hours. One of the workers was to all intents and purposes working full time and another worker was working with the company up to and including examination time and had to take holidays to get time off to sit his exams. These facts would have emerged if the company had given all the claimants the benefit of an interview.

5.11 In view of my conclusions in the preceding paragraphs I find that the claimants were discriminated against on grounds of their sex when they were not afforded an opportunity to apply for the vacancy in lines with the company's stated policy. I note that the union is seeking compensation in relation to the alleged discrimination. Had any of the claimants been promoted to pro-rata work he would have received £1.22 per hour in addition to what he was being paid at the time. I consider that monetary compensation is the most suitable method of redress in this case.

6 RECOMMENDATION

6.1 In view of my findings in the previous paragraph that the claimants were discriminated against contrary to the provisions of the Employment Equality Act, 1977 I recommend that the

company (now owned by Tesco) pay the five claimants £350 each in respect of this claim.

Mary Solan Avison

Equality Officer

October 2000

APPENDIX 1

Names of Claimants

**Warren Beatty
Mark Laing
Declan Dalton
Niall Hogan
Andrew Carroll**