

**OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS**

**EMPLOYMENT EQUALITY ACT, 1977**

**EQUALITY OFFICER'S RECOMMENDATION NO: DEC-E-2000/06**

**PARTIES**

**MR. COLM ROCHE**

**AND**

**MR. ANTONIO TALOSSO T/A WIMPY BAR  
(REPRESENTED BY ENGLISH AND ASSOCIATES, SOLICITORS)**

**File No: EE15/99**

**1. DISPUTE**

This dispute concerns a claim by Mr. Colm Roche that Mr. Antonio Talossi, t/a Wimpy Bar, discriminated against him on the basis of his sex in terms of section 2(a) of the Employment Equality Act, 1977, when he did not afford him an interview for a vacancy in his fast food restaurant.

## **2. BACKGROUND**

- 2.1** Mr. Antonio Talossi is the sole proprietor of the Wimpy Bar, Brian Boru Street, Fermoy, Co. Cork. It is a fast food restaurant employing around ten staff.
- 2.2** Sometime in early to mid-December, 1998 the respondent placed a card in the window of the restaurant stating that there was a vacancy in the restaurant and asking anybody interested in the post to apply within.
- 2.3** The claimant replied to the advertisement. He was not satisfied with the response he received and felt that his failure to secure an interview for the post was based on his sex. He referred a claim to the Labour Court on 11 June, 1999. The Labour Court referred the claim to an Equality Officer for investigation and recommendation.

## **3. SUMMARY OF CLAIMANT'S CASE**

- 3.1** On 15 December, 1998 the claimant noticed a card in the window of the Wimpy Bar which stated "Staff Required - Enquire within". The door of the shop was locked but there was a male inside who appeared to be sweeping the floor. The claimant therefore assumed that this person was an employee.
- 3.2** According to the claimant he told this man that he was responding to the advertisement in the window. The claimant says that the man asked him if he had any experience of working in a retail outlet. The claimant outlined his experience to date and gave the man a copy of his CV. The claimant alleges that this man told him that decisions on recruitment were made by the manager, whom he called Antonio or Tony. In addition, the claimant states that this man told him that the manager was not there at present but that he would be there later that day and that the claimant should phone him.
- 3.3** According to the claimant he phoned the Wimpy Bar later that morning and was told that Antonio was not there. He phoned again at lunchtime and asked for Antonio by name. The claimant states that a man came to the phone and he (the claimant) told him he had been at the restaurant earlier that morning and that he was interested in the vacancy. The claimant alleges that this man replied that the vacancy advertised was in "the front of the house and that only women worked in this area". The claimant states that in addition, this man said that if a vacancy arose in the back of the shop he would consider him.
- 3.4** The claimant provided an advertisement which appeared in the "Avondhu"- which is a local newspaper - on 18 February, 1999. This advertisement reads "Waitress Required (part-time) - Apply: Wimpy, Fermoy ...". (A copy of this advertisement is appended to this Recommendation.). The claimant argues that this advertisement supports his contention that the respondent operates discriminatory practices.

## **4. SUMMARY OF RESPONDENT'S CASE**

- 4.1** The respondent denies that he ever spoke to the claimant about a job in his business. He states that he is rarely at the premises and that at the time of the alleged discrimination his sister was manager of the restaurant.

- 4.2 The respondent states that at the time of the alleged discrimination only his sister and he opened the shop. This was normally around 11.30am. He contends therefore that the claimant could not have spoken to anybody in the shop before this time. He adds however, that if his sister “opened up” he would generally attempt to arrive at the shop before lunchtime. The exception to this was Wednesdays - which was his day off.
- 4.3 The respondent agrees that there was a vacancy in his business in December, 1998. He further agrees that he placed a card in the window of the shop advertising this vacancy. This was a method of recruitment he used regularly, although he was also registered with FÁS, which he used on a fairly regular basis as a additional source for staff.
- 4.4 According to the respondent, he has only used newspaper advertisements in the Avondhu as a method of recruiting staff on three or four occasions. He agrees that he placed the advertisement which appeared in that paper on 18 February, 1999 (see Appendix) but argues that the text of the advertisement he provided to the newspaper did not contain the word waitress and contained the word staff instead. The respondent states that he did not check the advertisement when it appeared in the newspaper, that he did not recruit any staff in response to the advertisement and that he paid for the advertisement in due course.
- 4.5 The Respondent states that he alone interviews prospective employees - nobody else performs this task - including his sister during the period when she was manager of the business. He states that it has always been his policy to meet prospective employees “face to face”. If he was not available when prospective employees called to or telephoned the shop, staff would tell the person to call back later. The respondent says that as far as he is aware all staff knew that this was the policy and he assumed that if new staff were faced with somebody seeking employment, either on the telephone or in person, they would ask one of the longer serving staff what to do.
- 4.6 The respondent states that at the time of the alleged discrimination there were seven staff employed at his restaurant - four males and three females. He argues that this illustrates that he does not discriminate. The respondent says that there is no distinction between the tasks performed by female employees and male employees. All staff perform the array of duties expected in a fast food restaurant. New staff do, however, start on the more straightforward tasks such as the preparation of burgers, and gradually progress to the more difficult tasks such as the preparation of pizzas. Training is provided on the job by more experienced staff. The respondent states that male employees generally carry out the more heavy duty tasks, particularly those that require lifting.

## **5. CONCLUSIONS OF THE EQUALITY OFFICER**

- 5.1 The issue for consideration in this claim is whether or not the respondent discriminated against the claimant on the basis of his sex in terms of section 2(a) of the Employment Equality Act, 1977 when he did not consider the claimant’s application for a vacancy in his fast food restaurant. In reaching my decision in this case I have taken into account all of the submissions, both oral and written, made to me by the parties.

5.2 Under section 2(a) of the Employment Equality Act, 1977, discrimination shall be taken to occur:

*“Where by reasons of his sex a person is treated less favourably than a person of the other sex.”*

In this case the claimant has argued that he was treated less favourably on the basis of his sex when the respondent did not consider his application for employment, dismissing it because the vacancy was in the front of the restaurant and only women worked in that area.

5.3 According to the respondent he alone interviewed prospective employees and that it was his policy to meet job applicants “face to face”. Staff working at the respondent’s restaurant were aware of this policy and knew to tell job applicants to call back later if the respondent was not in the shop at the time the applicant called. The claimant’s account of events in respect of the occasion when he called to the respondent’s premises on 15 December, 1998, is consistent with the operation of such a policy.

5.4 I note from the respondent’s original submission that he claimed that he was rarely at the premises and on that basis he contends that he never spoke with the claimant. I further note from evidence given by the respondent during the course of the hearing that at the time of the alleged discrimination the shop was opened up by either the respondent or his sister, who was manager of the business at the time. On days when his sister opened up, the respondent attempted to arrive at the premises before lunchtime. The respondent acknowledged during the course of the hearing that this meant he was likely to be in the shop during lunchtime on a regular basis. There is inconsistency between the respondent’s statement in the original submission and the evidence given by him during the hearing.

5.5 The claimant contends that he phoned the respondent’s premises around lunchtime on 15 December, 1998 to discuss his application with the manager. He further contends that he asked to speak to the manager and called him by name - Antonio or Tony. According to the claimant’s evidence at the hearing the voice on the phone was male, although he could not remember if that person had introduced himself as Antonio or Tony. In light of the respondent’s argument that he alone retained control over recruitment and the likelihood that he was in the shop at lunchtime, I find on balance, the claimant’s version of events concerning this telephone conversation to be more convincing.

5.6 The respondent provided documentary evidence which showed that he employed seven employees in December, 1998 - four males and three females. He argued that this illustrated that he did not discriminate in his recruitment practices. Whilst the respondent’s workforce at the time of the alleged discrimination was reasonably split between male and females, this does not of itself support the respondent’s contention of non-discriminatory recruitment practices. The claimant alleges that the reason he was given for his application not being given consideration was that the vacancy was in the “front of the house”. The claimant believed this to mean that the job was at the front counter and entailed serving

customers and operating the till etc. The claimant also believed that the alleged comment about the back of the shop meant working in the food preparation area.

- 5.7** During the hearing the respondent argued that all employees were expected to carry out the wide range of duties that one would normally associate with a fast food restaurant. He stated that staff started on the simpler jobs, were trained by more experienced staff on each task and gradually progressed to the more difficult tasks. I note however, that the respondent added that tasks involving heavy duties such as lifting were generally performed by male employees. Whilst section 17(2) of the Employment Equality Act, 1977 provides that an employer, or prospective employer, may treat sex as a occupational qualification in certain circumstances, the subsection specifically excludes considerations of strength or stamina from this exception.
- 5.8** The claimant did not produce any factual evidence to support his contention that female employees in the respondent's restaurant worked at the front counter and that males were employed in the back areas. However, the respondent failed to produce any factual evidence to rebut the claimant's contention. In those circumstances I consider it reasonable to assume, based on what one would expect to be included in the range of tasks to be performed in a fast food restaurant, that many of the more physically demanding jobs would be associated with the food preparation area rather than the service area. I find therefore, on balance, that male employees would be more likely to work in the food preparation area.
- 5.9** At the hearing the claimant produced a copy of an advertisement which had appeared in the local newspaper "Avondhu" on 18 February, 1999. This advertisement indicates that there was a vacancy for a part-time waitress at the respondent's fast food restaurant at that time. The respondent confirmed that there was a vacancy at that time and that he had placed an advertisement in the Avondhu seeking applications for the post. However, he argued that the text of the advertisement he had provided to the newspaper contained the word "staff" instead of "waitress". He stated that he had not checked if the advertisement had appeared in the paper and that he had paid the cost of the advertisement to the paper in due course.
- 5.10** The wording of the advertisement as published includes the word "waitress". This term denotes a job which is invariably connected with females. The advertisement does not contain any phrase which would lead a reasonable person to interpret it any other way than a female was required for the post. Therefore, the advertisement raises, in my view, an inference that a generally discriminatory framework of recruitment existed in the business at that time. I am also of the view that it is likely that this framework existed in December, 1998 when the claimant applied for a vacancy in the respondent's restaurant.
- 5.11** A person making a complaint under the Employment Equality Act, 1977 must present *prima facie* evidence to support his or her allegation of discrimination. *Prima facie* evidence has been described as:

***“Evidence which in the absence of any convincing contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had probably occurred.”<sup>1</sup>***

Once a *prima facie* case of discrimination has been established by a claimant the burden of proof shifts to the respondent to show that the practice complained of is based on objective factors unconnected with the claimant’s sex.

**5.12** However, direct evidence of discrimination is rarely accessible to a claimant in equality cases. In such cases ***“the affirmative evidence of discrimination will normally consist of inferences to be drawn from the facts of the case.”<sup>2</sup>*** If ***“discrimination could not be inferred from the circumstances, the object of the legislation would be largely defeated ....”<sup>3</sup>*** The application of such an approach necessitates close examination of the totality of the evidence presented by both parties. Having adopted this approach in the current case I am satisfied, in the light of my conclusions in the foregoing paragraphs, that the claimant has, on the balance of probabilities, established a *prima facie* case of discrimination. It therefore falls on the respondent to rebut the inference of discrimination. I am satisfied in this instance that the respondent has failed to discharge that burden.

## **6. RECOMMENDATION**

**6.1** In view of the foregoing conclusions I find that Mr. Antonio Talossi t/a Wimpy Bar discriminated against Mr. Colm Roche on the basis of his sex in terms of section 2(a) and in contravention of section 3 of the Employment Equality Act, 1977.

**6.2** I recommend that the claimant be paid an amount of £1,000 to compensate him for the stress suffered as a result of the discrimination.

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**Vivian Jackson**  
**Equality Officer**  
**2 November, 2000**

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<sup>1</sup> Dublin Corporation v Gibney (EE5/1986)

<sup>2</sup> Hennessy v Edel Quinn School (EE5/1987)

<sup>3</sup> Wallace v South Eastern Education and Library Board (NI Court of Appeal - 1980 IRLR 193)

## **APPENDIX**