

Employment Equality Act, 1977

DEC - E - 2000/07

Ms. Jackie Farrell & 29 Others

(Represented by MANDATE)

V

**Tesco Ireland Limited
(Represented by I.B.E.C.)**

File No. *EE 33/1998*

Date of Issue *13/11/2000*

TABLE OF CONTENTS

SECTION	PAGE
Summary	
Dispute	1
Background	1
Summary of Union's Case	1
Summary of Respondent's Case	4
Conclusions of the Equality Officer	7
Recommendation	11
Appendices	
Appendix A - List of Named Claimants	
Appendix B - Details of Claimants who were rostered to work during the store's trading hours	
Appendix C - Details of staff from other stores who worked overtime on 31/1/98	

SUMMARY

Recommendation DEC - E 2000/07

Background:

The claimants allege that they were discriminated against by the respondent in terms of Section 2(a) of the Employment Equality Act, 1977 when it was alleged that all-night overtime was reserved for male employees in the first instance.

Conclusions:

The Equality Officer found that this claim did not constitute a class action as contended by the respondent. The Equality Officer noted that the respondent was not in a position to offer a number of the claimants overtime on that night for various reasons e.g. they were on annual or sick leave, they were not employed in the store at the time, etc. The Equality Officer afforded the Union the opportunity of withdrawing these named claimants but it did not avail of this opportunity. The Equality Officer noted that a number of females from other stores did work the overtime that night as had two females who worked in the store in question. It was argued that these two females had to ask for the opportunity to work the all night overtime but this was denied by the respondent. The Equality Officer concluded that, on the balance of probabilities, the respondent had offered the overtime to all members of staff including the females.

Recommendation:

The Equality Officer found that the respondent did not discriminate against the 30 named female claimants.

Cases Cited :

In contending that this claim constituted a class action the respondent relied on the High Court Judgement of Mr. Justice Kinlen in the case of *Verbatim -v- Duffy and Others* dated 18th May, 1994.

1. DISPUTE

- 1.1** This dispute concerns a claim by MANDATE, on behalf of 30 named female employees of Tesco Ballymun, that Tesco Ireland discriminated against them on the basis of their sex in terms of Section 2(a) of the Employment Equality Act, 1977 by reserving all-night overtime for male employees in the first instance. A list of the 30 named female claimants is set out in Appendix A.

2. BACKGROUND

- 2.1** Tesco Ireland entered the Irish market following its purchase of Power Supermarkets Limited in May, 1997. It has undertaken a major investment programme which involves refurbishing and relaunching each of its 76 stores in a Store Redevelopment programme over a three year period.
- 2.2** When refurbishment work was being undertaken in the Ballymun store the staff were generally required to work additional hours. All staff members were invited to undertake these additional hours. There was a subsequent requirement on staff to work all night and, according to the Union, this work was confined to the male members of staff. The Union wrote to the Company on 15th July, 1998 about its concerns and expressed them subsequently at a meeting on 21st July, 1998.
- 2.3** Then on 23rd July, 1998 the Union, on behalf of the 30 named female employees, referred a claim to the Labour Court under Section 2(a) of the Employment Equality Act, 1977. The Labour Court referred the claim to an Equality Officer for investigation and recommendation.

3. SUMMARY OF THE UNION'S CASE

- 3.1** The Union says that, in early 1998, the Crazy Prices outlet in Ballymun was converted to a Tesco Store. Extensive internal renovation took place and, as a result, a greater volume of

overtime work became available. The Union says that this work initially took place during the 5.00p.m. to 10.00p.m. period on Saturdays only and both male and female employees participated. Overtime pay at a rate of time-and-a-half was paid on work carried out on Saturday, 17th January (5.00p.m. to 10.00p.m.) and Saturday, 24th January (6.00p.m. to 10.00p.m.), 1998. On Saturday, 31st January, 1998 all-night work was required and, according to the Union, it was at this point that the Company's approach changed. Instead of continuing the policy of making the additional work available to both male and female employees the Union says that the Store Manager specifically asked the 'shop-floor' staff (all of whom are male) to perform the overtime from 6.00p.m. on the Saturday night until 6.00a.m. on the Sunday morning with staff being paid double-time. According to the Union the female employees were excluded from such work in that they were not approached or given an opportunity to participate or decline.

3.2 The Union contends that this deliberate act of approaching only male staff and excluding all female staff (some of whom had previously participated in the earlier overtime work) was a blatant act of discrimination contrary to the terms of the Employment Equality Act, 1977. The Union states that the Company, in endeavouring to reserve the double-time work for male employees, sought and secured male employees from their other supermarkets in Kilbarrick, Omni Park, Artane and Nutgrove when they were unable to attract sufficient males from the Ballymun store. According to the Union the only exceptions to the 'male only' rule occurred when two females in the Ballymun store were given all-night overtime because the Company was unable to attract the required number of male staff and the two females specifically requested permission to do the all-night work.

3.3 On 15th July, 1998 the Union wrote to the Company outlining details of its equality concerns in the Ballymun store and made specific reference to the issue of overtime and its distribution during the store renovations in early 1998. During the course of a follow-up meeting on 21st July, 1998 the Union outlined its view to the Company in relation to the Company's practices over the manner in which overtime was allocated and the Shop Steward recalled his own representations to the Company at local level. According to the Union the Company said that the work was a 'big move' and the requirement for night work

had not been anticipated. The Union says that the Company mentioned that, because a gondola had collapsed in the store, it was necessary to draft in extra staff from other stores and that there was an assumption made that certain staff working in that area (male staff) would want to stay within the area they normally manned during the day.

3.4 It is the Union's contention that the Company's inability to anticipate the extent of the work in question did not explain their clear preference for male employees when the true level of the work required finally emerged. The Shop Steward reminded the Company that the night work had been completed by the time the gondola collapsed. The Union noted that the staff (male and female) were all employed as sales assistants and were all liable to be transferred from one section to another. Sales assistants do not have a right to their own section or to their own work as all are liable for the full range of sales duties such as operating a cash register, packing shelves and serving customers. The Union alleges that the practice in the Ballymun store is that women and men are channelled into what are traditionally regarded as women's and men's jobs. The Union states that male employees (who were given the first option on the double-time, all-night work in Ballymun) are also given a more preferential days off arrangement whereby they are off every Saturday while female staff must apply to get a Saturday off if one is required.

3.5 The Union says that the decision to simply opt for male employees to perform overtime work to the exclusion of female employees is simply an extension of the existing discriminatory structures which run rampant throughout the respondent organisation.

3.6 The Equality Officer is asked to recommend that the respondent distribute overtime on a gender-free basis by advertising overtime openly and by allocating such overtime to both female and male employees equally. She is also asked to recommend that the claimants be generously compensated for a deliberate act of discrimination by the respondent organisation for the stress and injury to feelings involved.

4. SUMMARY OF THE RESPONDENT'S CASE

- 4.1** The respondent submits that the Union cannot advance a class action in which a definite discriminatory act is complained of without there being evidence in respect of each individual claimant that an act of discrimination occurred. The respondent says that no such evidence has been advanced and, in the circumstances, the Equality Officer is respectfully requested to refuse to entertain the claims on behalf of the 30 claimants. The respondent cites the decision of Kinlen J. in the case of *Verbatim v Duffy*¹ and says that the legislation does not admit the possibility of class actions. The respondent contends that any claim under the Employment Equality Act, 1977 must be advanced on the basis of the alleged entitlement of each of the claimants individually. The respondent asks the Equality Officer to rule that the provisions of the Act have not been properly invoked and the claim must, therefore, be rejected on jurisdictional grounds insofar as it purports to be a representative action or class action. The respondent says that a number of the claimants were, at the date of the alleged discriminatory act, on leave, not in the Company's employment or ineligible by law to work after 10.00p.m.
- 4.2** According to the respondent the refurbishment programme in Crazy Prices, Ballymun commenced on 12th January, 1998. The store opened as Tesco, Ballymun on 6th April, 1998. The respondent states that the overall employment levels in the store have increased by 30% as a result of the investment in the store and currently there are 87 persons employed in the store. According to the respondent the reorganisation of the store required staff generally to work additional hours and in the majority of cases this entailed an overtime situation which was voluntary and incurred the appropriate premium payment for the additional hours worked. The majority of staff in Ballymun availed of the opportunity to work additional hours and these additional hours were equally distributed taking into consideration personal circumstances, availability and trading requirements.
- 4.3** The respondent says that the all night work which was necessary on Saturday, 31st January, 1998 was brought to Management's attention by the building contractors at very short notice. The roster scheduling staff for work for the week had been completed well in advance. As soon as the Ballymun store management were aware of this requirement they

¹ High Court 18th May, 1994 (unreported)

checked the roster to establish staff who were already scheduled to work on Saturday, 31st January, 1998 during trading hours. The Assistant Manager requested shop floor staff to consider working through Saturday night at short notice while the Staff Manager asked sales assistants scheduled to work on checkouts if they were available to work additional hours over the weekend.

4.4 The respondent says that the Assistant Manager was more successful in establishing members of staff available for work. Many of the sales assistants working on the shop floor are scheduled to work from Monday to Friday as the majority of suppliers make deliveries during the week and there is little requirement to merchandise newly delivered products onto the shop floor on Saturdays and Sundays. The respondent says that the Staff Manager found it difficult to recruit volunteers, while still managing to sustain the checkout operation during trading hours. According to the respondent a number of staff who operate the checkouts were absent from work at the time causing further operational difficulties for the management team. Furthermore, in accordance with the Shops (Conditions of Employment) Acts, 1938 & 1942 management could not schedule an employee to work more than 11 hours, this being the maximum daily working hours permitted under legislation for shops. The respondent says that all available members of staff were approached and asked to volunteer to work on the evening of Saturday, 31st January, 1998. The respondent detailed the claimants who were required to perform specific duties during the store's trading hours on 31st January, 1998 and these details are set out in Appendix B.

4.5 In responding to the Union's submission the respondent stated that it was regular practice over the period of the refit that staff (both male and female) from other stores would be invited to work additional hours in the Ballymun store. This was necessary because there were not enough volunteers from within the Ballymun store to work all the additional hours required. The respondent denies the Union's claim that two female members of staff were exceptions for particular reasons as set out by the Union in paragraph 3.2 above. According to the respondent the additional hours available on the night of 31st January, 1998 were open to all staff. The Assistant Manager approached the shop floor staff (including the two named females) asking them to work the additional hours. The

respondent says that the fact that these female staff members were provided the opportunity to avail of the premium rate hours demonstrates that it did not discriminate against females. According to the respondent this matter was not raised locally by the Union but was raised by the Branch with management for the first time on 15th July, 1998 (see paragraph 3.3 above). The respondent says that the Saturday day off, paragraph 3.4 refers, is historical and based on operational requirements that the Company respects in terms of custom and practice and cannot be changed without individual agreement. Staff who work on the shop floor have Saturday off because of external factors i.e. the majority of suppliers do not deliver to our stores on Saturdays.

4.6 The respondent says that the claim has no relevance to the following claimants for the following reasons:

- Ms. Cleary and Ms. Brady were on maternity leave during the period of the claim.
- Ms. McCormack and Ms. Jenkins were on annual leave on 31st January, 1998.
- Ms. S. Tyrell commenced employment in the Ballymun store on 23rd May, 1998 and Ms. Smith left the Company's employment on 1st August, 1997. Hence neither of these claimants were in the Company's employment at the time of this claim.
- Ms. Carrick and Ms. O'Keeffe were aged 17 on 31st January, 1998 and the Company was not in a position to schedule them later than 10.00p.m. in accordance with the Protection of Young Persons Employment Act, 1977.
- Ms. Hedderman Costello is named twice as 'Ms. Hedderman and Ms. Costello'. Ms. Hedderman Costello was absent from work due to illness on week commencing 26th January, 1998 (inclusive Saturday, 31st January, 1998).
- The Company has no record of Ms. O'Carroll as an employee of the Company in Ballymun at the time of the claim.
- Ms. Prendergast and Ms. Farrell actually worked the overtime which has given rise to the complaint.
- Ms. Elaine Byrne was a Staff Manager who had responsibility to identify and approach the checkout operators and establish which of them were interested in volunteering for the additional hours.

4.7 The respondent states that the provisions of the Employment Equality Act, 1997 have not been properly invoked because where a definite discriminatory act is complained of evidence must be provided in respect of each individual claimant that an act of discrimination occurred. The respondent asks that this claim not be entertained. It is the respondent's contention that the Union has failed to substantiate the claim of discrimination under Section 2(a) of the 1977 Equality Act. According to the respondent the additional hours were equally distributed taking into account personal circumstances, availability and trading requirements. The respondent says that no grievance was raised in relation to the distribution of additional hours with local management. The issue was first raised by the Branch Secretary in July, 1998 just before the six months deadline for the referral of an equality claim under the 1977 Equality Act. Contrary to Union claims the respondent states that the Assistant Manager approached the claimants Ms. Prendergast and Ms. Farrell and requested them to work on the night in question. It is the respondent's contention that no staff member was prohibited from availing of the opportunity to work additional hours on the night of 31st January, 1998 or indeed throughout the period of the refurbishment. The respondent asks that the Equality Officer rejects this claim.

5. **CONCLUSIONS OF THE EQUALITY OFFICER**

5.1 The issue for decision in this claim is whether or not the respondent discriminated against the 30 named female claimants, in terms of Section 2(a) of the Employment Equality Act, 1977 and contrary to Section 3 of that Act in relation to overtime on the night of 31st January, 1998. In making my decision in this claim I have taken into account all of the submissions, both oral and written, made to me by the parties.

5.2 The Company, in its submission, has firstly argued that this claim is a class action and that the legislation does not admit the possibility of class actions. The Company contends that any claim under the Employment Equality Act, 1977 must be advanced on the basis of the alleged entitlement of each of the claimants individually. The Company asks the Equality Officer to rule that the provisions of the Act have not been properly invoked and that the

claim must, therefore, be rejected on jurisdictional grounds so far as it purports to be a representative or class action. In this argument the Company takes account of the ruling of Mr. Justice Kinlen in the case of *Verbatim -v- Duffy and Others*². I note that, in this claim, the Union has named 30 female employees hence I am satisfied that the claim is in respect of 30 separate individuals not a group of unnamed or unidentified workers. Furthermore the Union had indicated to the Company its concern, on behalf of these named individuals, that it (the Company) had discriminated against them individually when it failed to offer them the option to do overtime during the night of 31st January, 1998. I do not accept the Company's argument that this claim is a class action and, therefore, not a valid claim.

- 5.3** In this case the Union contends that the claimants were not afforded the opportunity to work overtime on the night of Saturday, 31st January, 1998 whereas the male employees were asked if they would be prepared to work that night. The Union also points out that when there was a shortfall in the numbers prepared to work that night the Company sought male employees from other stores to work the overtime in the Ballymun store.
- 5.4** The Company, in its submission, pointed out that a number of the named claimants could not have been offered overtime on the night in question. This is detailed by the Company in paragraph 4.6 above. Set out in Appendix B is a list of claimants who were rostered to work daytime on the particular Saturday. At the hearing in this claim the Company said that these people were offered the opportunity to work overtime on the night in question and the Company would have organised relief for them for the day shift. According to the Company these people did not opt for the overtime work on the basis that they would earn more by working all day Saturday and all day Sunday. The Union did not dispute this or present any evidence to contradict this. I am, therefore, satisfied that the Company did not discriminate against any of the named claimants who opted to work daytime Saturday and Sunday or who, for some other reason (e.g. on maternity leave, annual leave, etc.), could not have been asked to work the overtime. In effect this accounts for all of the claimants named by the Union and set out in Appendix A with the exception of Ms. Farrell and Ms. Prendergast who are the subject of paragraph 5.6 below.

² High Court 18th May, 1994 (unreported)

- 5.5** The Union, in its submission, stated that the Company had offered the overtime to other male employees working in other stores. The Company has named the persons from other stores (see Appendix C) who were offered the opportunity to work the overtime. I note, from this list, that the majority of persons from other stores who were offered the overtime were in fact female.
- 5.6** It is the Union's contention that the two named female claimants who did in fact work the overtime on the night of 31st January, 1998 were discriminated against because they were not offered the overtime but had to ask to be allowed work that night. It is the Company's contention that all staff who were eligible to be offered the overtime were in fact offered it including staff who were rostered to work during the day. Shop floor staff were also offered the overtime because many of them had the weekend off. This was because deliveries are made during the week as opposed to being made at weekends. In attempting to decide on this issue I must base my decision on whether the balance of probabilities tips in favour of the Union's version of events or the Company's version of events. Given that there have been so many inaccuracies in the Union's claim e.g. a number of named female claimants who were not present to be offered the opportunity of doing overtime, I find that the balance of probabilities tips in favour of the Company and hence I am satisfied that the Company did offer the overtime to the two named female claimants (i.e. Ms. Jackie Farrell and Ms. Paula Prendergast) who did actually carry it out.
- 5.7** Following the hearing in this claim on 20th October, 2000 the Union made a further submission. In this submission the Union allege that all-night overtime took place on more than one night namely 31st January, 1998 (as already stated) and again on 21st January, 1998. According to the Union one male employee was offered and accepted all-night work for one full week during the period of the renovations. It should be noted that, while the Union in its referral mentioned that the alleged discrimination was "*31st January, 1998 and other subsequent dates*", it only referred to 31st January, 1998 in its subsequent submission and the respondent set out its defence on that basis. The Union failed to attend the original hearing of this claim and at the reconvened hearing it was unaware of the basis of

its claim. None of the claimants were present and the Union disputed the contents of its original submission as outlined for it by the Equality Officer. In the circumstances I find it totally unacceptable for the Union to be redefining the basis of its claim at this late stage of the investigation and I have not taken account of this additional information in reaching a decision in this claim. The names of the claimants in Appendix A that are marked in **square brackets** were withdrawn by the Union in its second submission.

- 5.8** On the basis of the foregoing I find that the Company did not discriminate against the 30 named female claimants based on the allegation that it did not afford them the opportunity of working overtime during the night of 31st January, 1998.

6. RECOMMENDATION

- 6.1** I find that Tesco Ireland Limited did not discriminate against the 30 named female claimants (listed in Appendix A) as alleged by the Union MANDATE in terms of Section 2(a) of the Employment Equality Act, 1977 and contrary to the provisions of Section 3 of that Act.

Gerardine Coyle
Equality Officer

15th November, 2000

APPENDIX A

List of the Named Claimants

Ms. Rachel Barry
Ms. Sinead Boyd
[Ms. Ciara Brady]
Ms. Elaine Byrne
[Ms. Amanda Carrick]
[Ms. Brigid Cleary]
Ms. Bernie Corcoran
Ms. Leona Corcoran
[Ms. Marie Costello]
Ms. Ann Cronin
Ms. Jackie Farrell
Ms. Lily Feighry
Ms. June Fitzgerald
Ms. Catherine Goggins
Ms. Maria Hedderman
Ms. Liz Herbert
Ms. Emma Jenkins
Ms. Debbie Keegan
Ms. Bernie Keogh
Ms. Treacy Lyons
Ms. Paula McCormack
Ms. Michelle Murphy
[Ms. Suzy O'Carroll]
[Ms. Julie-Ann O'Keeffe]
Ms. Veronica O'Rourke
Ms. Paula Prendergast
Ms. Debbie Smart
[Ms. Rachel Smith]
Ms. Lisa Tyrell
[Ms. Sabrina Tyrell]

[] The eight claimants marked in square brackets were withdrawn by the Union in its submission which was received on 10th November, 2000.

APPENDIX B

Details of claimants
who were rostered to work
during the store's trading hours

Name	Day-Time Duties	Needed on 31/1/98
Ms. Elaine Byrne	Staff Manager	9.00a.m. - 6.00p.m.
Ms. Ann Cronin	Customer Services Desk	9.00a.m. - 6.00p.m.
Ms. Bernadette Corcoran	Checkout Operation	12 noon - 6.00p.m.
Ms. Elizabeth Herbert	Checkout Operation	9.00a.m. - 6.00p.m.
Ms. Deborah Smart	Checkout Operation	10.00a.m. - 6.00p.m.
Ms. Sinead Boyd	Checkout Operation	9.00a.m. - 6.00p.m.
Ms. Michelle Murphy	Checkout Operation	10.00a.m. - 2.00p.m.
Ms. Rachel Barry	Checkout Operation	10.00a.m. - 6.00p.m.
Ms. Leona Corcoran	Checkout Operation	2.00p.m. - 6.00p.m.
Ms. Lisa Tyrell	Checkout Operation	9.00a.m. - 2.00p.m.
Ms. June Fitzgerald	Checkout Operation	10.00a.m. - 6.00p.m.
Ms. Veronica O'Rourke	Checkout Operation	9.00a.m. - 6.00p.m.
Ms. Bernie Keogh	Checkout Operation	10.00a.m. - 6.00p.m.
Ms. Lily Feighry	Canteen	
Ms. Catherine Goggins	Cash Office	
Ms. Debbie Keegan	Cash Office	
Ms. Treacy Lyons	Relief Supervisor	

APPENDIX C

Details of staff
from other stores
who worked overtime
on 31/1/98

Branch	Employee's Name
Rathfarnham	Ms. Christine Murphy Ms. Rose Murphy Ms. Bernie Murphy Ms. Joan Murphy Ms. Moira Raethorn
Sandymount	Mr. Ken Reilly Mr. Peter Johnston
Santry	Ms. Mary Farrell Mr. Steven Darcy

