

ANTI-DISCRIMINATION (PAY) ACT, 1974

AND

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATIONS NO: EP 14/1999 & EE 17/1999

Mr. Gerard Middleton
(Represented by Hamilton Turner, Solicitors)

AND

Bank of Ireland
(Represented by Dr. Mary Redmond, Solicitor)

File No: EP 33/1986

1. DISPUTE

- 1.1** This dispute concerns a claim by Mr. Gerard Middleton that he is entitled, on resignation, to the payment of a marriage gratuity by his employer (the Bank of Ireland) in the same way as female staff received marriage gratuities. This claim was lodged in terms of the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977.

2. BACKGROUND

- 2.1** Female employees recruited prior to 1974 are entitled, on marriage, to claim a marriage gratuity either at the time of marriage or if they resign subsequently. Marriage gratuities are not paid to female employees recruited after 31st December, 1973 and male employees irrespective of when they were recruited.
- 2.2** The claimant commenced employment with the Bank of Ireland on 23rd October, 1972. He got married in January, 1977 and resigned his position in the bank in March, 1984. No evidence was submitted by the claimant to support his contention that he wrote to the bank requesting a marriage gratuity and that the bank formally refused to concede such entitlement.
- 2.3** On 13th December, 1986 the claimant referred a claim to the Labour Court stating his belief that he was entitled to a marriage gratuity under the terms of the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977. At this time a large number of similar claims were lodged by other male bank officials. A group was formed to represent all these claimants and it was agreed to investigate one claim as a test case. This claim was submitted by Mr. Kavanagh against the Bank of Ireland. The Equality Officer, who investigated this claim, issued a recommendation¹ which was appealed to the Labour Court² and subsequently to the High Court³. The Equality Officer and the Labour Court found in favour of the claimant (Mr. Kavanagh). The High Court, however, overturned the Labour Court's determination. Since this test case seven other marriage gratuity claims have been investigated by Equality Officers⁴, one of which was appealed to the Labour Court and a determination issued⁵.

¹ Recommendation No. EP 11/1985

² Determination No. DEP 10/1985

³ High Court Ruling (1990) CMLR 87

⁴ Mr. Brian Curran v Allied Irish Bank, Ref: EP 10/1992

Mr. William Deeney v National Irish Bank, Ref: EP 4/1991 & EE 12/1991

- 2.4 This claim was assigned to the Equality Officer here concerned for investigation on 22nd July, 1998. Submissions were sought and obtained from both parties to the claim.

3. ARGUMENTS MADE BY THE PARTIES

The Claimant:

- 3.1 The claimant argues that, as all females who were recruited prior to 1974 and who married while in the service of the bank are entitled to a marriage gratuity (in accordance with an agreement of March, 1974 entered into between the Bank and the Irish Bank Officials Association), he too should also have the same entitlement. In making his claim the claimant relies upon the provisions of the 1974 Pay Act, Article 119 of the EEC Treaty and Equal Pay Directive 75/117.
- 3.2 The claimant contends that, in the High Court case of Bank of Ireland and Kavanagh the learned Trial Judge erred in law in finding that the payment of a marriage gratuity to a female employee, employed prior to 1974, did not constitute discrimination contrary to the Anti-Discrimination (Pay) Act, 1974. In his judgement Mr. Justice Costello noted that the “marriage gratuity is not payable to all Bank’s female staff on marriage”. While the claimant accepts that this is correct, he notes that the marriage gratuity is payable to females meeting certain conditions which he too is able to meet. The claimant, therefore, contends that the only and appropriate comparison to be made is one between himself and a female in the same position i.e. who commenced employment with the bank prior to 1974 and married while in that employment.
- 3.3 In this context the claimant cites the judgement in Barber -v- Guardian Royal Exchange Assurance Group⁶ in which the Court of Justice compared a male and a female of the same

Mr. Adrian Hegarty v Bank of Ireland, Ref: EP 02/1998

Mr. Martin Horgan v Bank of Ireland, Ref: EP 03/1998

Mr. G. Murphy v Bank of Ireland, Ref: EP 04/1998

Mr. T. Keady v Bank of Ireland, Ref: EP 19/1998

Mr. P. Quigley v Bank of Ireland, Ref: EP 20/1998

⁵ Mr. Curran v Bank of Ireland, Ref: DEP 3/1994 Appeal of EP 10/1992

⁶ ECJ Case C-262/88, [1990] 1 AER 660

age. The Court of Justice stated as follows:

“It is contrary to Article 119 of the Treaty for a made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal pension age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex”

The claimant submits that, in order to give full effect to Article 119, the Equality Officer is obliged to apply the rationale set out by the European Court of Justice in the Barber decision to his claim for a marriage gratuity.

The Respondent:

3.4 The respondent made a preliminary submission in this claim. In this submission the respondent states that the Equality Officer does not have jurisdiction to proceed to determine the merits of this claim. It says that for the Equality Officer to investigate an equal pay claim there must be a dispute and in this case the claimant has never formally requested a marriage gratuity and the respondent has not formally refused it.

3.5 In support of this argument the respondent cited the case of British Broadcasting Corporation v Hearn⁷ in which Lord Denning stated that an employer must have at least an opportunity to respond to a demand before the dispute can be said to arise between the parties. The respondent says that this approach was supported to a certain extent by the decision of McWilliams J. in Coras Iompair Eireann v Darby⁸ in which it was held that, as there had been no claim for, and refusal of recognition, there was no dispute between the company and the union.

3.6 The respondent further argues that the claimant has failed to provide details of the work he performed before he resigned from the bank and he has also failed to nominate a comparator. The respondent says that the Equality Officer can not and should not be asked to decide on the basis of assumptions, or in the absence of facts or of a specific legal claim. According to the respondent the claimant expressly denies any connection between the gratuity and work when he asserts in his submission:

“It is of crucial significance to note that the payment of a marriage

⁷ [1977] ICR 689

⁸ High Court, Unreported, 16th January, 1980

gratuity to female officials is not dependent or conditional upon the rank, grade or type of work carried out by the employee”.

Given this, the respondent asks how can the claimant claim equal pay for equal work?

- 3.6** The respondent says that it cannot adequately or at all defend itself against this claim. It says that the claimant chooses to ignore the legislation and in so doing invites the dismissal of his claim, as he deprives the Equality Officer of the necessary preconditions for the exercise of her jurisdiction. The respondent asks the Equality Officer to decide on whether or not she has jurisdiction to investigate this claim.

4. CONCLUSIONS OF THE EQUALITY OFFICER

- 4.1** The issue for consideration by me is whether or not the claimant is entitled to a marriage gratuity in terms of the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977. In making my recommendation in this claim I have taken into account all the arguments made by the parties.
- 4.2** The first issue for consideration is whether or not this claim relates to remuneration and is covered by the 1974 Act or whether it relates to conditions of employment and is appropriate for consideration under the 1977 Act. Remuneration is defined in the 1974 Act as “*any consideration whether in cash or in kind which an employee receives, directly or indirectly in respect of his employment from his employer*”. As this dispute concerns entitlement to a marriage gratuity which is a monetary payment, I am satisfied that it specifically relates to remuneration and is appropriate for investigation under the 1974 Pay Act and not the 1977 Equality Act.
- 4.3** In relation to the respondent’s preliminary submission in this claim I note the ruling of the High Court, in the case of *Aer Lingus v Labour Court*⁹, which held that:

“it is not conducive to the speedy resolution of disputes if there has to be a multitude of separate decisions each of which is open to appeal to the High Court on a point of law and then to the Supreme Court”.

⁹ Judicial Review No. 237 of 1987
Judgement delivered by Miss Justice Carroll on 26/02/88

Miss Justice Carroll cited the dictum of Lord Pearson in the case of *Pearlberg v Varty*¹⁰ as follows:

“Fairness however does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply”.

On this basis I decided not to deal with this preliminary issue which was raised by the respondent in advance of issuing my recommendation in the claim.

- 4.4** The claimant’s representative indicated to me by telephone on 12th March, 1999 that he intended to submit to me a response to the preliminary submissions made by the respondent. I confirmed this by letter dated the same day to both parties. This response was to include details of the claimant’s request for a marriage gratuity and the respondent’s refusal to concede to that request. In a letter dated 13th May, 1999 (following my reminders of the 8th and 26th April, 1999) the claimant’s representative stated that he was awaiting the views of Counsel in this matter and he hoped to be in a position to make a reply within three weeks. To-date I have not received any further communication from the claimant’s representative in this regard despite numerous reminders¹¹.
- 4.5** In the absence of any response from the claimant’s representative I have considered the preliminary arguments put by the respondent. I note that this claim was made, and the respondent was aware of it, since December, 1986. It is my considered opinion that the respondent has failed to give any reason why it did not reject the claim at the time rather than make this argument more than twelve years later. By failing to reject the claim at the time it was made, the respondent has implicitly accepted the validity of the claim. On this basis I am satisfied that I have jurisdiction, in this regard, to proceed with the investigation of this claim.
- 4.6** The respondent also argued that I do not have jurisdiction to investigate this claim as the claimant has failed to nominate a comparator and to make an argument for equal pay on the basis of ‘like work’ in terms of Section 3 of the Anti-Discrimination (Pay) Act, 1974. There

¹⁰ 1972 2 AER 6 (Page 17 refers)

¹¹ Reminders issued on 4th June, 17th June and 7th July, 1999

are at least two schools of thought on this issue. The first relates to the case of Mr. Ronald Devir v Insurance Corporation of Ireland PLC¹² in which the Equality Officer held that it was sufficient for the claimant to compare his situation with that of all females employees without the need to specify individual comparators. The second concerns the ruling in the High Court case of Verbatim v Duffy¹³ in which Mr. Justice Kinlen held that, having regard to Section 3 of the Anti-Discrimination (Pay) Act, 1974, we are dealing with two people namely a claimant and a comparator. I note that both these cases differ from the current claim. However, I consider that the details of this claim bears greater similarity to the former than the latter and, for that reason, I am satisfied that, in this claim, it was not necessary for the claimant to name a comparator. On this basis I am satisfied that I have jurisdiction to proceed with the investigation of this claim.

4.7 A number of recommendations and determinations along with a High Court ruling have issued under the 1974 Act in similar disputes. The first of these disputes concerned a claim for a marriage gratuity by Mr. Kavanagh from the Bank of Ireland. His claim was allowed by both the Equality Officer and the Labour Court, but the High Court (on appeal) found that the claimant was not entitled to a marriage gratuity. In his findings Mr. Justice Costello said:

“It is obvious that a simple contractual stipulation to the effect that all women married should be granted a gratuity would attract the operation of sections 2 and 4 of the 1974 Act in favour of men doing like work because the Bank could not claim that it was paying higher remuneration to women on grounds other than their sex. But that is not what the Bank is doing in this case. A female employee who qualifies for the gratuity and thus gets paid a higher pay not because she is a woman, but because she is a woman who has fulfilled certain conditions, namely, that she has (a) married and (b) had entered the Bank’s employment before the year 1974. Her higher pay is not based on her sex but on grounds other than her sex, a point convincingly demonstrated by the fact that all of her female colleagues who marry and who are doing like work will be treated differently from her on the same footing as men if they had entered the Bank’s service after 1st January, 1974.

The point can be illustrated by an example. Let us suppose that there was three employees doing like work in a branch of the Bank of Ireland, A, a female employee who entered the Bank’s service fourteen years ago in 1973, B, a female employee who recently joined the Bank and C, a male employee who joined the Bank at the same time as A. Let us suppose that all three

¹² Equality Officer Recommendation No. EP 01/1990

¹³ [1994] 5 ELR 159

marry on 19th June, 1987. Only A will qualify for the marriage gratuity. It cannot be said that on her marriage she qualified for the marriage gratuity because she was a woman - if that was the case B should also have qualified. Clearly there are grounds other than her sex which explain the higher pay which she will enjoy over her two colleagues. And so I think that the Bank has been able to establish that the differences in remuneration between their male employees and some of their female employees doing like work fall within the exemption contemplated in subsection (3) of section 2 and that the determination of the Labour Court that there should be imported into Mr. Kavanagh's contract by virtue of sections 2 and 4 of the 1974 Act a term entitling him to the marriage gratuity was incorrect. The appeal, therefore, succeeds."

In all subsequent investigations by Equality Officers in similar disputes they found in line with the High Court ruling i.e. that the claimants had no entitlement to a marriage gratuity. In any of these recommendations which have been appealed to the Labour Court, the latter has upheld the Equality Officer's recommendations.

4.8 It is a well established practice of Equality Officers to follow a decision of the High Court unless the case can be distinguished on the basis of the facts. I am satisfied that this case cannot be so distinguished from the case considered by the High Court. On this basis I find that the claimant in this case does not have an entitlement to a marriage gratuity under the terms of the Anti-Discrimination (Pay) Act, 1974.

4.9 In view of my findings above it is not necessary for me to consider in detail any of the arguments advanced by the parties.

5. RECOMMENDATION

5.1 1974 Pay Act:

In view of my conclusions above I find that the Bank of Ireland did not discriminate against Mr. Gerard Middleton and that he is not entitled to the payment of a marriage gratuity under the terms of the Anti-Discrimination (Pay) Act, 1974.

5.2 1977 Equality Act:

I find that this claim relates to remuneration and it is, therefore, excluded from the application of the provisions of the Employment Equality Act, 1977 by virtue of Section 3(1) of that Act.

Gerardine Coyle
Equality Officer

10th August, 1999