

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 40/1999

PARTIES

**Mr. Patrick McCrum
(Represented by MANDATE)**

AND

**Duffy Group Limited
(Represented by Tom Smyth & Associates and RGDATA)**

File No: EE 29/1998

1. DISPUTE

- 1.1** This dispute concerns a claim by MANDATE, on behalf of Mr. Patrick McCrum that, on 21st January, 1998, Duffy Group Limited trading as LONDIS discriminated against him, within the meaning of Section 2(a) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act by employing him to carry out heavy physical work which the Union claims was specifically reserved for male employees.

2. BACKGROUND

- 2.1** Mr. McCrum was employed in Londis, Blakestown. According to the Union, he was employed as a Sales Assistant but his duties were confined to heavy physical packing work and he was not permitted to perform the full range of sales duties e.g. operating the cash register. Furthermore he was the only male employee in the store. The Union argues that the claimant was discriminated against by the Company because he was assigned a task which involved heavy physical work and a task which was specifically reserved for males.
- 2.2** The Union referred this claim to the Labour Court on 2nd April, 1998 and the Court referred it to an Equality Officer for investigation and recommendation. Following receipt of submissions from both parties to this claim a joint hearing took place on 20th July, 1999.

3. SUMMARY OF THE UNION'S CLAIM

- 3.1** According to the Union the claimant was employed by the Company on two separate occasions namely from August, 1995 to November, 1996 on the basis of a 35 hour week and from February, 1997 to March, 1998 for a 35.5 hour week.
- 3.2** The Union says that under the terms of his first contract of employment, the claimant was employed as a sales assistant and he carried out the full range of duties proper to the sales assistant grade and outlined in part 2 of the Retail Grocery and Allied Trades Joint Labour Committee Order and as follows:

General Sales Assistant

A worker who is wholly or mainly engaged in one or a combination of the following duties; serving customers, accepting payment for goods, operating cash register system, receiving checking and stocking merchandise, stock taking, stock listing, stock checking and price checking, preparation of food for subsequent sale, packing stock, displaying stock, pricing stock, rotating stock and merchandising stock.

The claimant's second contract of employment described him as an "Ancillary Stores Person" and outlined his duties as:

"Stacking shelves, merchandising, packing stores, checking in orders/stock control, shop floor duties i.e. pricing, etc. general maintenance duties.

- 3.3** The Union contends that the Company's second contract of employment was discriminatory in that it included a mix of duties proper to both sales assistants (stacking shelves, checking in orders, stock control and pricing) and ancillary workers (general maintenance duties). The Union also says that the Company clearly intended to confine the claimant to duties of a physical nature while female employees who progressed along the same wage scale were required to perform those duties normally associated with the post of sales assistant namely serving customers, operating a cash register and stocktaking. The Union states that the range of duties set for the claimant ensured that contact with customers through the transaction of sales would not occur and, as he was not involved in the most fundamental of sales duties, the Union argued that he would not progress along the incremental wage scale. In this regard the Union noted that the claimant was not given any credit for his previous 15 months service with the Company as a sales assistant and was paid in accordance with point 1 of the J.L.C. scale at that time.
- 3.4** The Union argues that the Company invented the new category of employee for the claimant i.e. Ancillary Stores Person, because a male worker was required to do the 'donkey work' while allowing female employees to perform the sales tasks in all outlets. The Union notes that this practice was not confined to the Blakestown store but also happened in the Tallaght and Patrick Street stores.
- 3.5** According to the Union the 'Ancillary Stores Person' duties were carried out by the claimant, the (male) manager and by a Mr. Kelly. When none of these alternatives were available the Company contacted the claimant at home and asked him to attend work even though female staff were on duty and available for such work. The Union says that, when the claimant went

on holidays, he was replaced by a male employee. Following his departure from the Company the claimant's duties were carried out by the male security guard. The Union says that female staff were instructed by the Company to confine their duties to the sales area, a position which, according to the Union, involved movement up the J.L.C. wage scale.

3.6 The Union asks that the Equality Officer find that

- the claimant was discriminated against contrary to the terms of the Employment Equality Act, 1977,
- the Company should stop the practice of recruiting and working staff on a discriminatory basis and
- the claimant be compensated for the discrimination, stress and injury to feelings involved.

4. SUMMARY OF THE COMPANY'S SUBMISSION

4.1 In its submission the Company point out that, in its original referral of this claim, the Union stated that the alleged discrimination took place on 21st January, 1998 at the claimant's place of employment i.e. Londis, Blakestown. According to the Company the claimant did not attend for work at any time on that day. Without prejudice to the foregoing the Company denies that it treated the claimant less favourably, because of his sex, than a person of another sex, or that the claimant was solely employed to perform heavy physical work.

4.2 According to the Company the claimant was employed from August, 1995 to November, 1996 as a part-time sales assistant at a rate of £2 per hour to work evenings and weekends (approx. 25 hours per week). In June a dispute arose in the store between MANDATE and the Company which resulted in strike action being taken. As part of the resolution of this dispute the Union cited three individual employees (one of whom was the claimant) whom it considered to be on the wrong rate of pay for the job they were doing. Specifically in relation to the claimant, the Union had asked that he be paid in accordance with point 1 of the J.L.C. General Sales Assistant's Scale. The Company conceded this point and a lump sum back payment was agreed and paid to the claimant. In November, 1996 the claimant left the

Company's employment.

- 4.3** The Company says that the claimant re-applied for a job with the Company in February, 1997 and was offered the position of Ancillary Stores Person on a part-time basis (in the region of 25 hours per week). The claimant was offered point 1 of the J.L.C. scale of £2.41 per hour and given the specific duties of checking-in goods, packing, merchandising, stacking, price-marking, stock control and general maintenance. The claimant commenced employment in March, 1997. The Company states that the word 'Ancillary' was inadvertently used on the contract of employment, but the rate of pay applied to the job was that of General Retail Assistant and not that which applied to the job of Ancillary Worker. According to the Company the general duties outlined are those commonly applied to store persons in the Symbol and Independent retail outlets nationally who are wholly or mainly engaged in checking-in goods to the premises and packing them either in the back stores itself or on the shop floor. The Company says that it is estimated by RGDATA that, at least, 95% of Symbol and other Retail Grocery outlets have a male employee (often the only one other than the Butcher, Manager/ Owner) checking-in goods and packing/price-marking/merchandising same.
- 4.4** The Company says that, on 15th June, 1997 three months after the claimant re-joined the Company, it agreed to re-designate the claimant's position as General Sales Assistant and increased his rate to £2.73 per hour i.e. point 2 of the J.L.C. rate. On 30th June, 1997 this rate increased to £2.82 per hour in accordance with a revision of the J.L.C. rates. The claimant resigned his position in January, 1998 and on three separate occasions, since then, has re-applied to the Company for a position.
- 4.5** According to the Company the first Employment Regulation Order (ERO) for the J.L.C. (Retail Grocery and Allied Trades Joint Labour Committee) clearly defines the duties involved in the definition of a General Sales Assistant. The key words of that definition are as follows:
- “A worker who is wholly or mainly engaged in **ONE** or a **COMBINATION** of the following duties: - serving customers, accepting payment for goods, operating a cash register system, receiving, checking and stocking merchandise, stock-taking, stock listing, stock checking, price checking, preparation of goods for subsequent re-sale, packing stock, pricing stock, rotating stock and merchandising stock”.*

To ask any employee to carry out any one of the above or to limit them to a set combination of duties is not, according to the Company, discrimination irrespective of one's sex. The Company, in its submission, lists fourteen females who it says has carried out the so-called "physical work". The Company says that it was a matter of all hands on deck and when the claimant was called in it was to assist members of management or staff with a delivery of beer.

4.6 According to the Company both male and female staff lift all types of cases when the need arises. The emphasis on heavy physical work stems from the fact that the store has a high off-licence throughput in terms of canned beers. In terms of weight a 24 x .33 litre weighs 8.46kg or a 24 x .5 litre weighs 12.59kg, a 4 x 2 of soft drink or bottled water weighs 12.78kg or a 4 x 3 litre is 19.02kgs and a tray of canned peas or beans is 6.0kg. According to the Company the bacon hands, deli or meat staff, preparation room staff, back store operatives, price checkers in the aisles, shelf packing teams, (male or female) normally have no experience of check-outs and very little customer contact. In the smaller stores it is usually one or two employees who find themselves in this position. The Company asks if these people are being discriminated against.

4.7 In conclusion the Company makes the following points:

- The second contract given to the claimant in March, 1997 contained an error in the job title but this was rectified 3 months later and the claimant did not suffer either financially or in the duties requested of him.
- Everyone who work on the floor and certainly who pack shelves or merchandise have a physical content in their jobs.
- The claimant progressed along the incremental scale in the same way as if he were a female retail assistant.
- Once the claimant resigned from the Company in November, 1996 the Company had no obligation to recognise his previous service when re-employing him some three months later.
- Ms. Kenny, the then manager and Ms. Jameson the current manager have carried out the same physical duties as the said Mr. Kelly.

- There is no evidence whatsoever that females were instructed to confine their duties to the sales area only.

- The Company says that it has never set out to discriminate against the claimant or any other male employee. The reality is that it would welcome a more even gender balance in its staff. The Company points out that, since this claim, the shopsteward in the Blakestown's store has been encouraging the current two male employees to look for training and experience on the checkout but they are simply not interested and wish to remain with their current duties.

5. CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1** The issue for decision in this claim is whether or not the Duffy Group Limited directly discriminated against Mr. Patrick McCrum in terms of Section 2(a) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act when it assigned him duties of a physical nature as is alleged by the Union. In making my recommendation in this claim, I have taken into account all the submissions, both written and oral, made to me by the parties.
- 5.2** In the referral form of this claim the Union stated that the alleged discrimination in this claim took place on Wednesday, 21st January, 1999. The Company pointed out that the claimant was not at work on this particular day and could, therefore, not have been discriminated against. At the hearing of this claim the Union accepted that the claimant may not have been present at work on that day but stated that the claim related to his employment in the Company. It could legitimately be argued that this is not a valid claim. However, in the interests of natural justice I intend to examine the details of this claim and make a decision based on the facts.
- 5.3** The Union's argument is that the Company employed the claimant for the job of Ancillary Stores Person or Stores Person simply because he was male. It also says that the Company, by placing him on the first point of the pay scale on his return to their employment, treated him less favourably than other employees who would have been placed on a higher point on the pay scale. The Company denies that it discriminated against the claimant. It says that, when he re-joined the Company, the claimant was paid on the basis of the General Retail Assistant rate of pay and was assigned duties associated with the Stores area. The Company also says that, after the claimant's probationary period of three months, he was placed on the second

point of that salary scale. At the hearing of this claim the Company indicated that, on the two separate occasions when the claimant was in its employment, he carried out the same duties.

5.4 I note that the Retail Grocery and Allied Trades Joint Labour Committee defined the job of ‘General Sales Assistant’ as follows:

“A worker who is wholly or mainly engaged in one or a combination of the following duties: serving customers, accepting payment for goods, operating cash register system, receiving checking and stocking merchandise, stock taking, stock listing, stock checking and price checking, preparation of food for subsequent sale, packing stock, displaying stock, pricing stock, rotating stock and merchandising stock.”

The duties assigned to the claimant included a number of the duties described in the definition outlined above. They did not include all the duties described above and I would contend that it would not be possible to employ one person to carry out all of the duties or indeed to allow one person undertake all of these duties. For example a member of staff may be dedicated to the task of operating the cash register and serving customers.

5.5 In this case it is noteworthy that the claimant left the Company’s employment and some time later re-applied to the Company for a job. The job he had undertaken in the store in Blakestown had not been filled and the Company offered him this position. Therefore, I cannot accept the Union’s argument that the Company had the clear intent of confining the claimant to duties of a physical nature. Rather it could be argued that the Company did the claimant a favour by re-employing him. The Union have argued that the physical work undertaken by the claimant should also have been undertaken by the female staff. The Company said that the female staff did undertake physical work similar to that carried out by the claimant. It is interesting to note that, prior to resigning the second time, the claimant was irate because a consignment of goods had arrived in the store and he had not been contacted to come in and move the goods from the shopfloor to the stores area. Instead the goods had been moved by the staff on duty including female staff members. This, according to the Company, was the main reason behind the claimant’s decision to resign and following that resignation the claimant has sought employment with the Company on three separate occasions.

- 5.6** I note the Union's argument that the claimant should have been put on the second point of the pay scale. The Company did say that it is normal practice to put staff on a higher point of the scale to that which they were on when they left. In this case the claimant was initially put on the same point of the scale as he had been on when he left and after the probationary period of three months he was put on the second point of the pay scale. In making this argument of alleged discrimination the onus is on the Union to substantiate its claim and it has made no attempt to do this. The Company, however, submitted pay details to me for staff (1 male and 4 females) who left the Company and returned subsequently. I note that all of these staff were put on the same point of the pay scale as they had been on before they resigned. There is no evidence from this that the Company discriminated against the claimant because he was not put on a higher point on the pay scale from that which he received before he left the Company.
- 5.7** In conclusion, I find that the Union has not substantiated its claim of direct discrimination in terms of Section 2(a) of the Employment Equality Act, 1977. I further find that the Company did not act improperly or with the clear intention of discriminating against the claimant.

6. RECOMMENDATION

- 6.1** On the basis of the foregoing, I find that the Duffy Group Limited trading as LONDIS did not directly discriminate against Mr. Patrick McCrum 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

12th August, 1999