

**OFFICE OF THE DIRECTOR OF
EQUALITY INVESTIGATIONS**

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 45/1999

PARTIES

A Female Employee

AND

A Company

File No: EE34/1998

1. DISPUTE

1.1 The dispute concerns a claim by a female employee that on various dates between January, 1990 and December, 1997, the respondent company discriminated against her within the meaning of Section 2(a) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act. It is alleged that over a period of time, the Claimant was subjected to both verbal and physical harassment of a sexual nature.

2. BACKGROUND

2.1 Because of the sensitive nature of the allegations, I do not propose to name the parties to the dispute or their representatives in my recommendation. Throughout this recommendation therefore the Claimant and her representatives will be referred to as 'the Claimant'. The respondent company, which is in the packaging business, will be referred to as 'the Company' and the Company and their representative collectively will be referred to as 'the respondents'. The claimant, who is female was employed by the Company between November, 1989 and December, 1997. The claimant alleges that on various occasions throughout her employment with the Company she was subjected to sexual abuse and bullying by various male employees, some of whom were in senior management positions in the Company. It is alleged that the abuse was both verbal and physical, that her complaints to the Company were ignored and that in the end, she had to resign her position with the Company because of the abuse.

2.2 The claimant referred her complaint to the Labour Court in April, 1998 under Section 19 of the 1977 Act. As the first act was alleged to have taken place in January, 1990, some

eight years prior to the referral to the Labour Court, the Claimant was required to satisfy the Labour Court that reasonable cause existed as to why the complaint was not referred within six months of the first alleged act taking place. The Labour Court determined that reasonable cause was shown and referred the complaint to an Equality Officer for investigation and recommendation. Submissions were received from the parties to the claim and a joint hearing of the complaint was heard on 27th August, 1999.

3. SUMMARY OF CLAIMANT'S CASE

- 3.1 The claimant alleges that the Company discriminated against her in terms of Section 2(a) of the Employment Equality Act, 1977.

Section 2(a) states that discrimination shall be taken to occur

'where by reason of his sex a person is treated less favourably than a person of the other sex,'

- 3.2 The claimant started work as an invoice clerk in the Invoicing Department of the Company in November, 1989. Apart from occasional periods of relief work on the reception, this was her position up until she resigned from the Company in December, 1997. The union state that throughout her employment with the Company, the Claimant was obliged to work in an environment which was hostile to women. In addition to generalised allegations about the conduct of male staff in the Company towards her, the Claimant describes several specific alleged instances where male members of staff made offensive remarks of a sexual nature to the Claimant and in some instances made

unwanted physical contact with her. I will refer to the specific instances in my conclusions below

- 3.3 The claimant alleges that the hostile environment in the Company flourished primarily because of the failure of management to take effective action and also as a result of the active contribution of management to that environment. The claimant alleges that the Managing Director used offensive language and made offensive sex-based remarks on a daily basis.
- 3.4 It is the Claimant's contention that despite several complaints to management regarding the abusive working conditions, no action was taken to remedy the situation. The claimant's submission refers to the Company's 'Employee Handbook' which states that the Company 'takes a very serious view of the use of foul, obscene or abusive language, placing indecent or offensive writing on any part of the Company premises, and behaving in a manner that causes continued annoyance to others. Any of these practices will lead to dismissal.' The claimant contends that no action was taken by the Company management to give effect to the aspirations contained in the Handbook.
- 3.5 The claimant states that her health suffered as a result of the harassment she was receiving at work and at the hearing provided an affidavit from her medical doctor dated 11th August, 1998 stating that she attended his practice in May, 1990 in a very distressed state because of remarks made to her at work. She attended again in 1994 and 1996 because of distress caused by sexual remarks and innuendo at work. The full text of the affidavit is given in Appendix 3.
- 3.6 The Claimant's union representative explained that the union only became aware of the Claimant's situation as a result of a 'chance meeting' between herself and a union official

on the day she was leaving the Company. By way of explanation as to why she had not turned to her union at any time since the alleged harassed started in 1990, the union representative described the Claimant as a young woman who didn't know her rights and who didn't know where to turn for help.

4. SUMMARY OF THE COMPANY'S CASE

- 4.1 The company rejects the Claimant's contention that she was subjected to sexual harassment whilst in its employment. The respondents state that the Claimant in her referral of her complaint to the Labour Court, in addition to naming the Company, named four male employees who are alleged to have sexually harassed her at work, while in her submission to the Equality Officer she names a further four other individuals who are alleged to have sexually harassed her. The respondents argue that this calls into question the accuracy of her record of events and contend that the allegations in relation to those newly named individuals should not be dealt with as part of this investigation.
- 4.2 The company in their submission respond to the specific allegations in relation to the four individuals named in the Claimant's original referral and during the course of the hearing responded to questions in relation to the later named individuals. The company accept that one of the alleged instances took place as described by the Claimant but contend that management took the appropriate action in that instance. In the other instances the Company contend that the alleged incidents either did not take place at all or that the Claimant is wrong to describe them as instances of sexual harassment. I will deal with all of the allegations and the Company's responses in my conclusions below.

4.3 The company state that only two of the alleged instances of sexual harassment were brought to management's attention at the time, one of which they acknowledge and say was dealt with appropriately at the time, and the other which they say was misrepresented by the Claimant and did not constitute sexual harassment. The company argue that that was the sum total of alleged instances of sexual harassment brought to management's attention and that the Claimant's failure to bring the other alleged instances to their attention leads them to conclude that either nothing happened or that the Claimant did not find them offensive as claimed. The Company questioned why it was not until the Claimant's last day of service that her union became involved, apparently as a result of a 'chance meeting' between the Claimant and a union official. Surely they argue, that if the Claimant felt she was being sexually harassed since 1990 she would have gone to her union straight away. The Company's interpretation was that this was a hastily conceived attempt by the Claimant to extract financial compensation from the Company on her departure.

4.4 At the hearing the Company challenged the Claimant's contention that she was eventually forced to leave the Company because of sexual harassment. They state that the Claimant had a 25 minute meeting with the Managing Director on the day of her departure at which she outlined her reasons for leaving i.e. it was time for a change and she had offers of two other jobs. The Company state that at no point in the meeting did the Claimant refer to sexual harassment. The Claimant was given a favourable reference by the Company.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 The case referred to me for investigation by the Labour Court was that between January, 1990 and December, 1997 the Company discriminated against the Claimant in terms of

Section 2(a) of the Employment Equality Act, 1977 and contrary to Section 3 of that Act.

In making my recommendation I have taken into account all the submissions, both written and oral, made to me by the parties.

5.2 The Claimant alleges that throughout her employment with the Company she was subjected to sexually offensive remarks and innuendo on a daily basis. The Claimant has cited nine specific instances of alleged harassment and these are outlined in chronological order in Appendix 1 along with the Company response in each case.

5.3 In considering whether or not discrimination has occurred within the meaning of the 1977 Act I must consider a number of issues-

- did the act complained of actually take place as alleged
- if so, did the act constitute “...unwanted conduct of a sexual nature, or other conduct based on sex affecting dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct” (definition of sexual harassment used by Mr Justice Costello in the Health Board and BC and the Labour Court)
- is the Company vicariously liable for the act having regard to the decision of Mr Justice Costello in the above case where he found “an employer is vicariously liable where the act is committed by his employee within the scope of his employment”
- did the Company take all reasonable steps within its power to stop any such discrimination if it was brought to the attention of management

5.4 In relation to the alleged incidents numbered 1, 2, 4, 6, 7, 8 and 9 the Company rejects the Claimant's accounts of what happened in each case. The persons named in five of those incidents i.e. 1, 4, 7, 8 and 9 were present at the hearing and denied the claimant's version of events. The Claimant confirms that she did not bring these complaints to the attention of management and that she was on good terms with two of those persons in later years. I accept that the Claimant is being truthful when she claims to have suffered distress over these events, however having regard to the fact that no complaints were made to Company management in relation to those events, I do not consider that the uncorroborated evidence available in relation to these incidents supports a claim of discrimination.

5.5 There remain two incidents i.e. 3 and 5 to be considered. In relation to incident 3 there is an acceptance on the part of management that an incident took place which gave rise to a complaint from the Claimant. The Company's position is detailed in the Appendix. There is however a conflict of evidence in relation to exactly who the intended recipient of the offending remark was in this instance and I must find that there is insufficient evidence on which to conclude that discrimination took place.

5.6 In relation to incident 5 the Company accept that the offending remark was made by the Sales Office Manager to the claimant. I must therefore consider the questions referred to in paragraph 5.3 above.

Does the incident constitute sexual harassment ?

When the Sales Office Manager said 'why (Claimant' name), does he make you wet' I consider that this remark constituted sexual harassment as defined by Mr Justice Costello in the Health Board and BC and the Labour Court. I am satisfied from the evidence that

the remark caused considerable distress to the claimant and led to her complaint to the Office Manager. I note that a written apology was given by the Sales Office Manager to the claimant and that this apology, written on a small piece of note paper, was not acceptable to the claimant. The claimant sought a formal apology through the Company Secretary and this was not forthcoming. The apology as given does not appear to have mitigated the claimant's distress.

Is the Company vicariously liable for the sexual harassment

The Sales Office Manager was the manager who investigated the complaint referred to as Incident 3 in the Appendix and who instructed male staff to desist from making comments of the type which gave rise to that complaint. The Sales Office Manager was acting as a manager with responsibility for junior staff when he took this course of action. He would have been directly aware of the claimant's distress at the time. I consider that when the Sales Office Manager addresses a junior employee over whom he has authority, on the Company premises during the working day he speaks as a member of Company management and would be regarded as such by a junior member of staff. I am satisfied therefore that the Sales Office Manager was acting in the course of his employment when he made the offending remark.

Did the Company take all reasonable steps to prevent the sexual harassment

The Company state that the Sales Office Manager was reprimanded by the Managing Director at the time of the complaint and at the hearing stated that he was threatened with dismissal if the conduct continued. No further complaints were made in relation to the Sales Office Manager. Nevertheless, a situation prevailed where a Company manager,

having investigated a complaint of alleged sexual harassment by junior staff some time previously, himself perpetrated an act of sexual harassment against the same employee. There is no documentary evidence of any meaningful response by senior Company management and the claimant's distress continued. In this connection I must take cognisance of the sworn affidavit submitted in evidence by the claimant's medical practitioner the text of which is included in Appendix 3. While the Company employee handbook refers to the use of obscene language (relevant extract given in Appendix 2), the Company does not have in place staff guidelines on sexual harassment. In conclusion therefore I am of the opinion that the Company through its management practices failed to prevent the sexual harassment of a junior employee, despite having been made aware from a previous incident that the victim felt that she was being sexually harassed at work and that its subsequent response to the sexual harassment was inadequate.

5.7 In considering the Company's attitude to complaints of sexual harassment, I note that the Company did not co-operate with my investigation until three days before the hearing. A response to the complaint, was requested within 21 days from 2 December, 1998. Despite many attempts to contact the Company through their representative after this date there was no response from the Company. The Company's submission was not received by the Equality Officer until three days before the hearing on 24 August, 1999. It was not until this date that the Equality Officer received confirmation that the Company would be represented at the hearing.

5.8 I consider that the Claimant experienced sexual harassment at the Company in a way which would not have occurred were she a man and that she suffered less favourable treatment on grounds of her sex within the meaning of Section 2(a) of the Employment Equality Act, 1977 which states that discrimination shall be taken to occur:-

“where by reason of his sex a person is treated less favourably than a person of the other sex”.

I consider, for the reasons outlined above, that the respondent Company is vicariously liable for the harassment.

6. RECOMMENDATION

On the basis of the foregoing I find that the Company did discriminate against the Claimant on the basis of her sex in terms of Section 2(a) and in contravention of the provisions of Section 3 of the Employment Equality Act, 1977. Having found that the Claimant was discriminated against by the Company on grounds of her sex it remains for me to deal with the question of remedial action. As the Claimant no longer works for the Company I recommend that the Company pay the Claimant £3,000 compensation for the distress she has suffered. I recommend also that the Company put in place Guidelines for dealing with Sexual Harassment in the workplace.

Raymund Walsh

Equality Officer

8 December, 1999

APPENDIX 1

Details of Alleged Instances of Sexual Harassment

Incident 1

In January 1990 the Sales Office Manager commented that he liked the look of the Claimant when she stretched to open a window. The claimant did not make a complaint to management.

Company Response

The Sales Office Manager has no recollection of making any such remark and the Company contend that the incident never happened. The claimant did not make a complaint to management.

Incident 2

In February 1990 the Claimant asked a female colleague for a cigarette. The female colleague asked her brother (who also worked in the Company) and then told the Claimant that she could have a cigarette in exchange for a 'blow job'. The claimant did not make a complaint to management.

Company Response

The Company argue that the alleged perpetrators in this instance were not named on the Claimant's original referral to the Labour Court and that the matter is not proper to this investigation. The Company have no record of any such incident having taken place.

Incident 3

In April/May 1990 the Claimant was working at the reception when she became aware of sniggering among the male Sales Office staff. A sales assistant then asked her 'do your

nipples get hard when you get excited ?'. The claimant states that she complained to the Office Manager on this occasion regarding the hostility towards her in the workplace.

Company Response

The Company rejects the Claimant's version of events in this instance. They state that the Claimant overheard a conversation between a group of male workers nearby who were discussing a football match. A comment was made by a member of the group that 'his nipples stood on end' when he went to see Liverpool for the first time. The remark was laughed at by members of the group but was not heard clearly by the sales assistant in question who repeated what he thought had been said, leading to further laughter. They state that the Claimant was not in any way involved in the conversation.

The Company state that the Claimant made a complaint to the Sales Office Manager (and not to the Office Manager as stated by the Claimant) who called the males involved to his office where he advised them to desist from making comments of the kind complained of. The sales assistant at the centre of the allegation was present at the hearing and stated that he was so annoyed at the time of being accused of something he didn't do that he was about to resign there and then however his colleagues persuaded him to reconsider, which he did. The Company state and the Claimant accepts, that the Claimant and the sales assistant in subsequent years put the incident behind them and socialised and played tennis together. The claimant arranged the purchase of a tennis racket for the sales assistant through a personal contact.

Incident 4

In June/July 1993 the Claimant wore a white divided skirt to work and the Production Manager commented that he could see her underwear through it. She did not wear the

skirt the following day and the Production Manager commented that he was disappointed. The claimant did not make a complaint to management.

Company Response

The Production Manager recalls an occasion on which the Claimant wore what he would describe as a 'see through dress' but denies that he made any remarks such as those attributed to him.

Incident 5

In November 1994 the Claimant, while working at the reception, remarked that a visitor was a fine looking man. The Sales Office Manager then said to the Claimant 'Why (*Claimant's name*), does he make you wet?'. The claimant asked for an apology and received a hand written apology from the Sales Office Manager on a piece of note paper. The claimant did not regard the apology as acceptable and complained to the Company Secretary requesting a formal written apology on company headed paper. The claimant states that she was informed that she had no such entitlement and states that no action was taken by management on foot of her complaint.

Company Response

The Company accept that the Sales Office Manager made the alleged remark and that he gave the Claimant a written apology as stated by her. The Company state that the Claimant complained firstly to the Office Manager and then to the Managing Director who spoke to the Sales Office Manager and admonished him. At the hearing it was stated by the Company that the Sales Office Manager was threatened with dismissal at the time if this behaviour was continued. It is the Company contention that the Company dealt with the complaint in the appropriate manner.

Incident 6

In July 1996 the Claimant and a female work colleague pulled dividing screens around their desks, according to the Claimant in order to discourage the offensive remarks and sexual innuendo constantly levelled at them by male staff members. The claimant states that the male staff responded by remarking that they would have to pull back the screens to enable her colleague to get by because her breasts were so big.

Company Response

As in the case of Incident 2 above, the Company argue that the alleged perpetrators in this instance were not named on the Claimant's original referral to the Labour Court and that the matter is not proper to this investigation. The Company have no record of any such incident having taken place. It was suggested at the hearing by a witness for the Company that the screens were put in place in order to screen off another female member of the staff with whom the Claimant and her colleague did not get on.

Incident 7

In November 1996, following her marriage the previous month, the Claimant states that on her return to work the Production Manager came up behind her and put his arms on her sides at which point she jumped. He is then alleged to have said 'you have the face of a virgin for someone who has just come back from their honeymoon'. Both himself and another named male staff member are said to have laughed. The claimant did not make a complaint to management.

Company Response

The Company reject the suggestion that the Production Manager put his hands on the Claimant's sides or made any such remark. At the hearing the Production Manager said

that he might touch people to attract their attention but no more than that. The Company stated, and the Claimant accepts, that she subsequently did a favour for the Production Manger when she arranged a withdrawal from the credit union for him through her mother who is a credit union employee when he couldn't go to the credit union himself. The Company contend that she would not have done so if she was being sexually harassed by him. The Company add that in the eight years which the Production Manager worked with the Claimant they never had a disagreement.

Incident 8

In October 1997 the Production Manager is alleged to have approached the Claimant's desk and asked for headed paper. He then proceeded to stare at her. When she asked him what he was staring at he replied 'you legs' and said 'they don't look bad from where I'm standing'. The claimant states that this was typical of the Production Manager's behaviour towards her. The claimant did not make a complaint to management.

Company Response

The Company deny that any such incident took place.

Incident 9

On her last day of service in December, 1997 a Senior Printer is alleged to have grabbed the Claimant, despite her asking him to stop, kissed her and attempted to put his tongue in her mouth.

Company Response

The Company state that on her second last day, the Claimant met the printer in question in the canteen where he wished her well on her leaving. He said that he would have to get a kiss from her before she left and she said 'I have been waiting 10 years for it'. The