

# **OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS**

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## **EMPLOYMENT EQUALITY ACT, 1977**

**EQUALITY OFFICER'S RECOMMENDATION NO: EE 06/2000**

**45 Named Employees  
(Represented by MANDATE)**

**AND**

**Tesco Ireland Limited  
(Represented by IBEC)**

**File No. EE 11/1996**

**1. DISPUTE**

**1.1** This dispute concerns a claim by MANDATE, on behalf of 45 named female employees, that they were discriminated against by Tesco Ireland Limited (formerly Power Supermarkets Limited) when it refused permission to the named claimants (see Appendix A) to wear trousers. This claim has been referred under Section 2(a) and Section 2(c) of the Employment Equality Act, 1977.

**2. BACKGROUND**

**2.1** The 45 named female claimants are employed by Tesco Ireland Limited in its store in the Newbridge. On Monday, 22nd January, 1996 one of the claimants, on behalf of all the named claimants, requested permission of management to wear trousers but this request was refused. The Union, on behalf of the claimants, wrote to the Company but failed to receive any response.

**2.2** Consequently the Union referred a complaint to the Labour Court under Section 2(a) and Section 2(c) of the Employment Equality Act, 1977 on 21st October, 1996. This claim was referred, by the Labour Court, to an Equality Officer for investigation and recommendation.

**3. SUMMARY OF THE UNION'S SUBMISSION**

**3.1** According to the Union many of its female members in the Quinnsnorth Supermarket in Newbridge complained of the cold over the November to January period of 1995/1996. The Union says that it had received reports that some members had asked local management for permission to wear trousers and this request had been refused. On the advise of the Union, Ms. Susan Curran, the Newbridge Shop Steward went to the store manager (Mr. Martyn) and asked, on behalf of all female staff, for permission to wear trousers. This permission was refused. As a result the Union, on behalf of the claimants, wrote to the Company's Personnel Department on 13th February, 1996 informing the Company of the manager's refusal to allow female staff to wear trousers and asking the Company for its comments in the matter by

Monday, 26th February, 1996. In the absence of any response the Union submitted a claim, under Section 2(a) and Section 2(c) of the Employment Equality Act, 1977, to the Labour Court on 29th February, 1996.

- 3.2** The Union says that female staff in the Quinnsworth Supermarket, Newbridge are supplied with a uniform consisting of a blouse, skirt, waistcoat and a jacket. Male staff are supplied with trousers, sweat-shirts, shirts and ties. This, according to the Union, is a clear indication that female staff are not permitted to wear trousers. The Union says that if, as the Company claimed in its letter of 11th March, 1996 to the Chairman of the Labour Court (see Appendix B), no discrimination took place, then all the Company had to do was inform the Union that:
- (a) Female members of staff were in fact permitted to wear trousers, or that
  - (b) Female members of staff were not permitted to wear trousers but that no discrimination was involved, or that
  - (c) Female members of staff were not permitted to wear trousers and discrimination had taken place.

The Union says that the Company failed to give a direct response but expressed the view that:

*“The female staff members in Quinnsworth Newbridge are provided with a uniform as part of their employment contract. This claim arises from a question raised by one female staff member to management about the possibility of wearing trousers. At the time management said that trousers were not part of the agreed uniform. They at no stage made a definitive decision on the matter. In fact, no direct local discussions have taken place on this subject between the company and the union”.*

- 3.3** According to the Union Ms. Curran is a Shop Steward in the Newbridge store. The Company is fully aware of her position in the Union. The Union argues that the Company knows that any approach from the Shop Steward is a formal contact on behalf of her colleagues in the store. The Union considers it misleading the suggestion that Ms. Curran was making an informal personal enquiry. The Union points out that Ms. Curran specifically asked if females in the Newbridge store could wear trousers.

- 3.4** In relation to the citation from the Company’s letter of 11th March, 1996 to the Chairman of

the Labour Court which says “*At the time management said that trousers were not part of the agreed uniform*” the Union says that as the wearing of the uniform is compulsory, we must assume that members (male and female) must wear the uniform. On that basis then the Union claims that the wearing of trousers by female staff is forbidden. The Union says that it is untrue to say that “*they (management) at no stage made a definitive decision on the matter*” rather it contends that the refusal to wear trousers by Mr. Martyn, store manager, Newbridge to Ms. Curran was a clear decision.

**3.5** According to the Union the issue here is whether or not female staff are permitted to wear trousers and if they are, they should be so informed by the Company. The Union says that failure by the Company to pass on this information is an act of discrimination against the female employees. Alternatively if they are not allowed to wear trousers, this is an act of discrimination against the female staff under the terms of the Employment Equality Act, 1977.

**3.6** The Union says that the Company, in its letter of 11th March, 1996 states that “*no direct local discussions have taken place on this subject between the company and the union*”. According to the Union this contradicts the Company’s earlier assertion the “*this claim arises from a question raised by one female staff member*”. It is the Union’s contention that if one female staff member (Ms. Curran) raised the issue then logically some form of discussion took place. Furthermore the Union says that it raised the matter with the Company but it was ignored. The Union says that the wearing of trousers by female members of staff is an equality issue which is not open for negotiation. It says that all contracts of employment contain an implied term in respect of equality inserted by Section 4 of the 1977 Equality Act and to prohibit the wearing of trousers by female employees is an act of discrimination on grounds of sex.

**3.7** The Union cites the Labour Court finding in the case of *Pantry Franchise Ireland Limited and A worker*<sup>1</sup> in which the Labour Court expressed the view that:

‘The Court accepts the company’s claim that it is entitled to set standards of

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<sup>1</sup> Labour Court Order No. EE0793

dress and appearance for its employees which will project the commercial image it seeks and ensure that the necessary levels of hygiene are maintained. While the requirements for such standards should be the same for male and female employees they may differ in some respects between men and women for business reasons allied to public perception. These differences do not necessarily retain their justification over time. Fashions of dress and appearance and their public acceptability are constantly changing; for example the wearing of trousers by women would not have been acceptable in past times but now the company has an identical uniform for male and female employees consisting of trousers and shirt.'

According to the Union, this view is significant for two reasons. Firstly it summarises the Union's view in relation to females wearing trousers. Fashion trends have provided for the wearing of trousers by women for some decades. The Union says that to suggest that trousers are inappropriate for women or to fail to address the question at all are both forms of discrimination against women. Secondly, the Pantry Franchise case is identical to this case, in that it is about types of dress rather than standards of dress. The Union says that it accepts that the employer is entitled 'to set standards of dress and appearance for its employees'. However it does not accept that it is entitled to dictate that two different types of dress be worn by employees based on the sex of the workers concerned.

- 3.8** The Union is requesting a recommendation that the Company changes its policy so as to allow female employees the right to wear trousers if they so require. The Union also asks that the Equality Officer recommend that the Company provide female staff with trousers as part of their uniform and finally that the Company pay each of the claimants the sum of £500 in compensation in accordance with the agreed settlement arrived at between the Company and the Union in the similar case of Ms. Anne Marie Meighan, formerly of Crazy Prices, Kilbarrack.

#### 4. SUMMARY OF THE COMPANY'S SUBMISSION

- 4.1 In its submission the Company says that the only person to approach management in the Newbridge store in relation to the matter of wearing trousers was Ms. Curran and she did not purport to represent the other claimants in making the request at the time. The Company says that the Union's contentions in this regard are simply not correct. The Company denies that, in or about 22nd January, 1996 Mr. Martyn refused a request by Ms. Curran to wear trousers.
- 4.2 The Company submits that it is simply not open to the Union to advance a class action in which a definite discriminatory act is complained of without there being evidence that in respect of each individual claimant an act of discrimination occurred. The Company cites from a submission by the Union in respect of another similar claim<sup>2</sup> in which the Union states that *"The issue was dealt with by the Mandate Trade Union and **the individuals concerned are not relevant to the claim.** What we raised was **request from the union that female staff be permitted to wear trousers**".* The Company contends that the Union has clearly indicated that their policy disregards the need for individual evidence of acts of discrimination before pursuing a claim under the Employment Equality Act, 1977 and, by their own admission, they do not see the need to have individual evidence of acts of discrimination. The Company argues that the Union is not permitted to apply the Employment Equality Act, 1977 without such evidence and it says that the Union has raised this matter and not the individuals listed as claimants. The Company says that, as the Union has advanced no such evidence, the Equality Officer is respectfully requested to refuse to entertain the claims on behalf of the 45 claims other than that of Ms. Curran. The Company says that, while the decision of Kinlen J. in *Verbatim -v- Duffy and Others*<sup>3</sup> concerned a claim under the Anti-Discrimination (Pay) Act, 1974 it is patent that the legislation does not admit of the possibility of class actions and any claim under the Employment Equality Act, 1977 must be advanced on the basis of the alleged entitlement of each of the claimants individually. As a preliminary issue the Company asks the Equality Officer to rule that the provisions of the Act have not been properly invoked and the claim must be rejected on jurisdictional grounds insofar as it purports to be a representative or class action.
- 4.3 Without prejudice to the foregoing the Company submits that the policy complained of,

<sup>2</sup> Equality File Reference EE 21/1996

<sup>3</sup> Unreported, High Court 18th May, 1994

namely the dress code for staff implemented in the period up to May 1977, is not discriminatory in the sense prohibited by Section 2 of the 1977 Act. The Company says it accepts that the rules did exist up to May, 1997 governing the wearing of uniforms at work. However these rules applied equally to males and females and the different requirements as to the uniforms to be worn did not constitute discrimination within the meaning of Section 2(c) of the Act as the only requirement in question is the requirement to observe the Company's dress code which is a requirement applying equally to male and female employees. On this basis the Company argues that Section 2(c) of the Act can have no application to the facts of the instant case at all. In this regard the Company cites the English cases of *Schmidt -v- Austicks Bookshops Limited*<sup>4</sup> and later decisions of *Burrett -v- West Birmingham Health Authority*<sup>5</sup> and *Smith -v- Safeway plc (supra)*<sup>6</sup> as considerable authority in this respect.

**4.4** In *Burrett* the EAT held that the industrial tribunal had not erred in finding that that respondent did not treat the appellant nurse less favourably on grounds of sex by requiring her to wear a cap and disciplining her when she refused to wear it, even though male workers were not required to wear a cap. Since the requirement to wear a uniform applied equally to male and female nurses, the industrial tribunal was entitled to find that the fact that the form of uniform differed from men to women, and that the appellant objected to one part of the uniform did not amount to less "favourable treatment" within the meaning of the relevant UK legislation. The EAT also held that the fact that a complainant honestly considers that he or she is being less favourably treated does not of itself establish that there is "less favourable treatment" within the meaning of the legislation. The Company says that it has not treated females less favourably than males in operating its aforesaid policy. It has operated a dress code which requires both male and female employees to observe certain stipulated standards in relation to dress. The fact that the dress code for both males and females is different cannot, according to the Company, be construed as discrimination within the meaning of Section 2 of the Act.

**4.5** In this regard the Company cites the decision of the Court of Appeal in the case of *Smith -v- Safeway plc (supra)* in which it held that merely treating the sexes differently in relation to a code governing appearance was not discriminatory. The code was not required to make

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<sup>4</sup> [1977] IRLR 360

<sup>5</sup> [1994] IRLR 7

<sup>6</sup> [1996] IRLR 869

provisions which applied identically to men and women, the appropriate and sensible approach was to consider the effect of the code overall, not item by item. The Company says that the Court of Appeal further held that such an approach was not confined to dress but could extend to an employee's more permanent characteristics such as hair length and hair style and that a code which applied conventional standards was, as far as the criterion of appearance was concerned, an even-handed approach between men and women. The Company submits that the authority cited by the Union namely *Pantry Franchise Ireland Limited*<sup>7</sup> is not strictly relevant and pre-dates the Court of Appeal decision in the case of *Smith -v- Safeway plc (supra)*.

**4.6** The Company denies the Union's allegation that it stated that trousers were inappropriate for women. It says that it has a standard of dress which is equally restrictive on both males and females and no discrimination on grounds of sex has occurred as a result. The Company says that the Union's argument that the Company is not entitled to dictate that two different types of dress be worn by employees based on the sex of the workers concerned is a clear implication that the Company can operate a policy permitting males to wear skirts ignoring conventional standards of dress which is all that the Company seeks to enforce in having a dress code. The Company says that there is nothing in the 1977 Equality Act to prevent it from treating males and females differently on grounds of sex so long as it does not treat one gender less favourably than another.

**4.7** The Company submits that the claim made by Ms. Ann Marie Meighan has no relevance to this claim. It was not a claim which came before an Equality Officer and it dealt with issues other than the wearing of trousers. This claim was settled by the Company and has no precedent value. The Company asks that the Equality Officer rejects this claim.

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

**5.1** This claim concerns whether or not it is discriminatory in terms of Section 2(a) and Section 2(c) of the Employment Equality Act, 1977 not to allow females wear trousers. In making my decision in this claim I have taken into account all of the submissions, both written and oral,

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<sup>7</sup> Labour Court Order No: EE0793

made to me by the parties.

**5.2** The first issue for consideration in this claim is that raised by the Company in which it argued that as this claim is a class action it cannot fall to be considered under the Employment Equality Act, 1977 taking account of the ruling of Mr. Justice Kinlen in the case of *Verbatim -v- Duffy and Others*. The Company says that the Union has failed to submit evidence for each named claimant that they individually sought to wear trousers and were individually refused that request. According to the Company the Union has only submitted evidence to this effect in relation to Ms. Curran. In its submission the Company accepts that Ms. Curran did approach management requesting permission to wear trousers at work. At the time of making the request, she was the Union's shop steward in the store. She was a member of the Dublin Grocery Branch Committee and a member of the National Executive Committee. The claimant (Ms. Curran) was given time off to attend the Union's annual conferences and the Company was aware of her position in the Union. The point of dispute is whether Ms. Curran asked for permission to wear trousers, on her own behalf only, or on behalf of all females working in the store. As a Shop Steward in the store I consider it conceivable that her request was made on behalf of all female working there. On this basis I do not accept the Company's argument that this claim is a class action and, therefore, not a valid claim.

**5.3** Under Section 2(a) of the 1977 Act 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”.*

What must be decided is whether or not the Company treated females less favourably than males because they were not allowed to wear trousers whilst at work.

**5.4** Both the Union and the Company cited a number of cases in support of their arguments as set out above. The Company has argued that it provided set uniforms for its male and female staff. The uniform for the female members of staff consisted of a blouse, skirt, waistcoat and jacket while that for the male members of staff comprised shirt, tie, trousers and sweat shirt. It said that it has rules restricting the wearing of apparel which applies equally to men and

women, although obviously men and women being different, the rules for each are not the same. The rules do not specify the nature of the uniform to be worn by males and females whilst at work. For instance it does not say that women cannot wear trousers. The Company has, since 1997, provided females with the option of wearing trousers as part of their uniform.

5.5 I accept that it is the Company's right to apply rules restricting the wearing of apparel and I note that their rules relate to dress and appearance standards (see Appendix C). They do not specify the exact nature of the apparel to be worn specifically by male and female staff members. In the *Pantry Franchise (Ireland) Limited vs A worker*<sup>8</sup> the Labour Court held that:

*'Fashions of dress and appearance and their public acceptability are constantly changing; for example, the wearing of trousers by women would not have been acceptable in past times .....*

This case dates back to 1993 three years prior to the current action. The Labour Court, at that time, considered that females wearing trousers was an acceptable dress code. In 1996 the Company did not allow the wearing of trousers by its female staff members. I note that the Company did allow certain females to wear trousers when performing a defined task e.g. when doing stocktaking in the hardware section of the store. However, in general females were not allowed to wear trousers.

5.6 The Union have drawn an analogy between the wearing of trousers by females and the wearing of ear-rings or long hair by males. The Union refers to the case it brought against the same Company<sup>9</sup> in which the Equality Officer held that the Company treated the claimants less favourably than female employees contrary to Section 3 of the Employment Equality Act, 1977 in terms of Section 2(a) of that Act when it refused to allow the claimants to wear ear-rings. In its defence the Company argues that the issue of trousers and ear-rings are totally different. It says that it is not unusual to see both males and females wearing ear-rings whilst at work. However in relation to the wearing of trousers the Company accepts that it is not unusual to see females wearing trousers whilst at work but argues that it is not customary to see males wearing skirts.

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<sup>8</sup> Labour Court Order No. EEO793

<sup>9</sup> 3 Male Employees v Power Supermarkets Ltd Recommendation No. EE 09/1994

- 5.7** It is my considered opinion that the issue in this claim relates to the wearing of trousers by females, not the wearing of skirts by males. This latter issue has been put forward by the Company as an argument in its own defence. A female Shop Steward sought permission, on behalf of all females, to wear trousers and permission was refused. The wearing of trousers by females is an acceptable form of dress for females and it has been for some time (at least as far back as 1993). I am satisfied that the issue of men wearing ear-rings can be compared with females wearing trousers. As it was found that it was discriminatory not to allow males to wear ear-rings (Recommendation EE 09/1994 refers) so too I find that the Company discriminated against the female claimants when it did not allow them to wear trousers. I note that, since May 1997, females have been given the option of wearing trousers as part of their uniform.
- 5.8** The Union put forward no argument in relation to its claim that the Company indirectly discriminated against the claimants in terms of Section 2(c) of the Employment Equality Act, 1977. In making an argument of indirect discrimination the Union would have had to set out the inessential requirement for employment which the claimants were obliged to comply. It would have to support this with statistics to show that the proportion of persons of the other sex able to comply was substantially higher.
- 5.9** Having found that the claimants were discriminated against by the Company when they were refused permission to wear trousers the only remaining issue for consideration is the question of compensation. The Union have asked that the Equality Officer award the claimants appropriate compensation and it refers to a situation which arose in the Kilbarrick store in which a female employee was given £500 in resolution of a claim to wear trousers. In this case the female employee, as part of her duty, swept under the supermarket shelves and in doing this task had to stoop or go down on one or both knees to perform this task. When this female employee requested permission to wear trousers, her request was refused and she was suspended. A claim was lodged under the Employment Equality Act, 1977 but a settlement was agreed prior to the claim being investigated by an Equality Officer. I consider that there are differences between this scenario and the current claim inasmuch as the female in this scenario was suspended and this did not happen in the case of any of the claimants in this claim. Furthermore the female in this scenario was performing a defined task for which the

wearing of trousers may have been more appropriate, based on the information to hand, than the wearing of a skirt. In this current claim I note that the Union said that some of the claimants were complaining of the cold and, as a result, one of the claimant approached management about all females wearing trousers. The Union were unable to quantify this in terms of the actual numbers of females complaining of the cold.

- 5.10** Compensation is awarded to cover the stress which claimants suffer as a result of the discrimination. In order to assess the level of stress suffered by the claimants as a result of not being allowed to wear trousers I asked the respondent to submit details of the claimants who have opted for trousers as part of their uniform. A list of the claimants who so opted is attached as Appendix D. I consider it reasonable that those claimants listed in Appendix D were adversely affected by not being allowed to wear trousers. I, therefore, recommend that the Company pay each of them £50 compensation for the stress suffered as a result of the discrimination.

## **6. RECOMMENDATION**

- 6.1** Based on the foregoing I find that Tesco Ireland formerly Power Supermarkets directly discriminated against the 45 named female claimants in terms of Section 2(a) of the Employment Equality Act, 1977 and contrary to Section 3 of that Act when it refused to allow

them to wear trousers whilst at work.

- 6.2** In accordance with paragraph 5.10 above I recommend that Tesco Ireland pay a total of £800 to the 16 female claimants who are named in Appendix D.

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Gerardine Coyle  
Equality Officer

21st March, 2000

**APPENDIX A**

List of the Claimants

Ms. Imelda Barnaby  
Ms. Tracey Boland  
Ms. Catherine Brogan  
Ms. Carol Byrne  
Ms. Karen Clarke  
Ms. Emear Coll  
Ms. Stella Conlon  
Ms. Carol Culhane  
Ms. Tracey Cullen  
Ms. Susan Curran  
Ms. Phyllis English  
Ms. Karen Fagan  
Ms. Audrey Fennell  
Ms. Catherine Flynn  
Ms. Christine Hackett  
Ms. Catherine Harris  
Ms. Philomena Heffernan  
Ms. Ciara Herbert  
Ms. Colette Houlihan  
Ms. Gillian Keogh  
Ms. Sandra King  
Ms. Paula Kirwan  
Ms. Mary Lee

Ms. Stephanie McCormack  
Ms. Adrienne McDonagh  
Ms. Mary McDonald  
Ms. Denise McGann  
Ms. Colette McNally  
Ms. Audrey McTeague  
Ms. Caroline Moran  
Ms. Laura Moran  
Ms. Celine Murphy  
Ms. Margaret O'Connor  
Ms. Noreen O'Connor  
Ms. Sinead O'Connor  
Ms. Fiona O'Neill  
Ms. Eileen Phelan  
Ms. Claire Raleigh  
Ms. Martina Raleigh  
Ms. Natasha Ramsey  
Ms. Christine Ryan  
Ms. Ciara Smith  
Ms. Jean Snell  
Ms. Amanda Tyrrell  
Ms. Arlene Whelan

**APPENDIX B**

Copy of letter  
from the Company  
to the Labour Court

**APPENDIX C**

Extract from the Company's  
Handbook on  
Uniforms

*“You must wear the uniform or clothing provided and ensure that it is clean and in good repair at all times, that it is well pressed with all buttons, hems and pockets in good order. For this, you may be asked to pay for a replacement.*

*If you leave the Company you must return your uniforms or other clothing which has been provided. Failure to do this will result in the deduction of their value from your final earnings pay.*

*Jeans are not allowed. Female staff must wear flesh coloured tights with their uniform. Your own clothing must blend with the uniform/ clothing provided.”*

**APPENDIX D**

List of Claimants  
who opted for trousers  
as part of their uniform

Ms. Tracey Boland  
Ms. Carol Byrne  
Ms. Stella Conlon  
Ms. Susan Curran  
Ms. Karan Fagan  
Ms. Catherine Harris  
Ms. Mary Lee  
Ms. Audrey McTeague  
Ms. Margaret O'Connor  
Ms. Noreen O'Connor  
Ms. Sinead O'Connor  
Ms. Claire Raleigh  
Ms. Martina Raleigh  
Ms. Natasha Ramsey  
Ms. Ciara Smith  
Ms. Jean Snell