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## **EMPLOYMENT EQUALITY ACT, 1977**

**EQUALITY OFFICER'S RECOMMENDATION NO: EE 07/2000**

**Ms. Kelly and 40 Others  
(Represented by MANDATE)**

**AND**

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

**File No. EE 14/1997**

**1. DISPUTE**

- 1.1** This dispute concerns a claim by MANDATE, on behalf of 41 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) of the Employment Equality Act, 1977.

**2. BACKGROUND**

- 2.1** The 41 named female claimants are employed by Tesco Ireland Limited in its store in Prussia Street. Following a meeting of the Union representatives in Prussia Street the issue of female employees wearing trousers was placed on the agenda for a meeting between the Company and Union. The meeting took place on 1st October, 1996 and the Union delegation asked the company representatives to formally give permission to female staff to wear trousers. The Company's position was that the existing uniforms must be worn by all personnel.
- 2.2** Consequently the Union referred a complaint to the Labour Court under Section 2(a) of the Employment Equality Act, 1977 on 26th March, 1997. 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 it wrote to the Company on 25th September, 1996 in which it stated the following:

*“Female staff and the Wearing of Trousers*

*I understand from staff representatives that female employees in this store are not permitted to wear trousers. We regard this as discrimination on grounds of sex contrary to the Employment Equality Act, 1977. We propose to discuss this matter at our meeting of 1st October, 1996 and it would be appreciated if the company could give a clear indication of the official position”.*

The Union says that the meeting took place on 1st October, 1996 and, in response to the request that female staff be allowed to wear trousers, the Company indicated that the existing uniform which it provided must be worn by all personnel.

**3.2** The Union says that female staff in the Prussia Street store are supplied with a uniform which is compulsory to wear and which consists 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 the issue here is very simple - females either can or cannot wear trousers. The Union says that if females were permitted to wear trousers they should be so informed. Failure on the part of the Company to pass on this information is, according to the Union, an act of discrimination against female employees. It also contends that if females were not permitted to wear trousers, this too is an act of discrimination against female employees. 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.

**3.3** 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 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

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

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.

- 3.4** 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 this claim was instituted by the Union on behalf of Ms. Kelly and 40 other females employed in the store in Prussia Street. The Company said that the Union wrote to it by letter dated 25th September, 1996 alleging that the Company has discriminated against the claimants on grounds of sex pursuant to Section 2(a) of the Employment Equality Act, 1977 by refusing them the right to wear trousers. The Company says that the Union contends that the discrimination took place on 1st October, 1996 at a meeting between the Union and Company representatives. At that meeting the Company says that management confirmed that it was looking into the matter and it confirmed that the existing dress code continued to apply. The Company also says that it indicated that it would consider the request to include trousers for female staff as part of the review of the uniform design corporately.
- 4.2** In its submission the Company notes that the Union provides no evidence of any of the claimants approaching management and being directly discriminated against by the response. It says that no member of staff asked, on behalf of all females in the store, for permission to wear trousers.

4.3 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 41 claims. 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.

4.4 Without prejudice to the foregoing the Company submits that the policy complained of, 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(a) of the Act as the only requirement in question is the requirement to observe the Company’s dress

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

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

code which is a requirement applying equally to male and female employees. 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.

**4.5** 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.

**4.6** 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 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*

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

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

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

*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)*.

4.7 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.

4.8 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.

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

5.1 This claim concerns whether or not it is discriminatory in terms of Section 2(a) 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, 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

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<sup>7</sup> Labour Court Order No: EEO793

request. I note that the Union, both in writing and at a meeting with the Company, sought permission, on behalf of all its female members in the store, to wear trousers. Furthermore, the Company accepts that it received this request in writing and that the Union raised the issue with it at a subsequent meeting on 1st October, 1996. 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 .....’*

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

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 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 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.

**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. Females, through their Union representatives, sought permission to wear trousers and they were 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 the Company has introduced trousers as part of the uniform for female staff members since May, 1997.

**5.8** The Union put forward no argument in relation to its claim that the Company indirectly

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

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 meet. 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, the Union 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 levels 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 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 to argue that those claimants who opted for trousers as part of their uniform did adversely suffer as a result of the discrimination. On this basis I recommend that the Company pay each of these claimants £50 in 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 £400 to the 8 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. Linda Basset	[Ms. Lisa McAndrew]
Ms. Lisa Carroll	Ms. Pamela McCarthy
Ms. Karen Cleary	[Ms. Sharon McCarthy]
[Ms. Suzanne Connolly]	Ms. Catherine McDermott
Ms. Jane Conroy	Ms. Karen McDonnell
[Ms. Lorraine Crowley]	Ms. Bridget McNemee
[Ms. Sheila Devoy]	Ms. Cindy Monaghan
Ms. Natalie Donegan	Ms. Carmel Moorhead
Ms. Caroline Doyle	[Ms. Mary Mulvey]
Ms. Edel Fitzgerald	Ms. Alicia O'Connor
Ms. Rachel Fitzsimmons	[Ms. Lorraine O'Keeffe]
Ms. Sharon Geraghty	[Ms. Janice O'Neill]
[Ms. Anne Gray]	[Ms. Mairead O'Neill]
Ms. Patricia Grey	Ms. Lillian O'Rourke
Ms. Bernie Kelly	[Ms. Caroline Rooney]
[Ms. Karen Kidd]	Ms. Mary Scarry
[Ms. Linda Kiely]	Ms. Mary Stone
[Ms. Anne Marie Kilmartin]	Ms. Yvonne Swift
Ms. Karen Lee	Ms. Sharon Timmons
[Ms. Nicola Leeson]	Ms. Joanne White
[Ms. Sandra Lynch]	

**Note:**

According to the Company the claimant in [ ] had left the company before the date of the alleged discrimination (1st October, 1996).

According to the Company Ms. Natalie Donegan was a trainee manager and provided her own uniform.

**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 to wear trousers  
as part of their uniform

Ms. Linda Basset

Ms. Lisa Carroll

Ms. Sharon Geraghty

Ms. Bernie Kelly

Ms. Karen Lee

Ms. Pamela McCarthy

Ms. Catherine McDermott

Ms. Alicia O'Connor