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EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 08/2000

**Ms. Gibney and 70 Others
(Represented by MANDATE)**

AND

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

File No. EE 48/1996

1. DISPUTE

1.1 This dispute concerns a claim by MANDATE, on behalf of 71 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 71 named female claimants are employed by Tesco Ireland Limited in its store in the Janelle Shopping Centre in Finglas. On 25th September, 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) 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 its members in the Crazy Prices Supermarket in the Janelle Shopping Centre complained of the cold early in September, 1996. They approached the Union about the problem and were advised to approach management and ask permission to wear trousers. One of the named claimants, on behalf of all others, went to the Store Manager on Wednesday, 25th September, 1996 and asked for permission to wear trousers. This permission was refused. As a result the Union, on behalf of the claimants, wrote to management on 8th October, 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 Friday, 18th October, 1996. In the absence of any response the Union submitted a claim,

under Section 2(a) of the Employment Equality Act, 1977, to the Labour Court on 21st October, 1996.

3.2 The Union says that female staff in the Crazy Prices store in the Janelle Shopping Centre 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 female staff are permitted to wear trousers they should be told and 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. The Union 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 considers it interesting to note the Company's response in earlier identical cases namely Newbridge and Omni Park. In the Newbridge case the Company said that 'trousers were not part of the agreed uniform' while in the Omni Park case their position was that 'Management advised Mr. Archbold [the Union Representative] that the Company were looking into the matter. They at no stage made a definitive decision on the issue'. In this case, according to the Union, the Company are saying absolutely nothing.

3.4 The Union cites the Labour Court finding in the case of Pantry Franchise Ireland Limited and A worker¹ 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.'

¹ Labour Court Order No. EE0793

According to the Union, this view is significant for two reasons. Firstly it summarises the Union's view in relation to females wearing trousers and secondly, like this case, 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.

- 3.5** 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** According to the Company this case relates to the right of females to wear trousers whilst at work. The Union alleges that it is discrimination on grounds of sex to refuse females the right to wear trousers at work and the Company rejects this allegation. The Company accepts that it does have rules restricting the wearing of apparel but it says that this rule applies equally to men and women although obviously men and women, being different, the rules are not the same.
- 4.2** The Company refers to a leading U.K. case on this issue namely *Schmidt v Austicks Bookshops Limited*² in which the employer refused to allow females, who were in contact with the public, the right to wear trousers and they were obliged to wear skirts. The U.K. Employment Appeals Tribunal held that because the question of wearing skirts could not arise in relation to men, it was impossible to make a comparison between men and women because the relevant circumstances were different. The Tribunal concluded that the claimant had not

² IRLR 360, 1977

been treated less favourably than a man hence she had not been discriminated against on the basis of her sex.

- 4.3** The Company says that if one is to take the logic of the Union's argument to its ultimate conclusion then the Company would have to give males the right to wear skirts whilst at work. This, according to the Company, demonstrates the ridiculous nature of this claim. The Company also says that the right of females to wear trousers at work is totally different to a case where males seek the right to wear long hair or to wear earrings whilst at work. Refusing to allow males to wear either long hair or earrings could, according to the Company, be seen in certain cases to be discrimination on grounds of sex. The comparison in such situations can be made with females. That is females are allowed to wear long hair and earrings so therefore males should be allowed to wear them and vice versa. Furthermore it is not unusual to see males with long hair or wearing earrings to-day.
- 4.4** The Company argues that the issue of allowing females wear trousers whilst at work is very different than the example of allowing males wear long hair and earrings whilst at work. The Company says that whilst it would not be unusual to see females wearing trousers it is not customary for males to wear skirts. The refusal of the Company to wear trousers at work can be compared with the Company's refusal to allow males wear skirts while at work. On this basis the Company argues that no discrimination on grounds of sex has occurred as both males and females have been treated equally in that there is a restriction on each gender in relation to the type of clothing they can wear whilst at work.
- 4.5** The Company cites the decision in the more recent case of *Barrett v West Birmingham Health Authority*³ in which the EAT concluded that the Industrial Tribunal had not erred in finding that the respondents 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 nurses were not required to wear caps.

³ IRLR 7, 1994

4.6 The Company rejects that the case (Pantry Franchise Ireland Limited) cited by the Union has any relevance to this claim. The Labour Court, in that case, stated that a company is entitled to set standards with dress and appearance for its employees which will project the commercial image it seeks. The Company says that it never stated that standards of dress and appearance for its employees has anything to do with projecting any commercial image. Therefore the Company argues that, when the Labour Court states that standards of dress do not necessarily retain their justification for commercial image purposes over time, it is not relevant to this case.

4.7 The Company says that there is nothing in the Act to prevent an employer from treating men and women differently on the grounds of gender so long as the employer does not treat one gender 'less favourably' than another, no discrimination under law occurs. The Company claims that the Union is, in effect, seeking preferential treatment for females over males in relation to uniform. That is, females should have a choice in relation to uniforms but males should not. The Company says that the reference by the Union to the claim by Ms. Meighan has no relevance to this claim. It was not a case which was heard by an Equality Officer and it included other issues other than the wearing of trousers. The Company points out that the case was settled. The Company asks that the Equality Officer reject 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) of the Employment Equality Act, 1977 not to allow females wear trousers. Prior to the hearing of this claim the Union made a further submission in response to the Company's submission, a summary of which is set out in Appendix B. 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 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.

5.3 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. Its rules on the wearing of apparel are as follows:

“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.”

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, at the hearing of this claim, did say that it is flexible in regard to uniforms. For instance if a majority of staff requested a change, e.g. females wanting to wear trousers, it would give this request favourable consideration as it did in 1997 when it provided females with the option of wearing trousers as part of their uniform.

5.4 I accept that it is the Company’s right to apply rules restricting the wearing of apparel and these rules, as set out in paragraph 5.3 above, relate to dress and appearance standards. 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*⁴ the Labour Court held that:

⁴ Labour Court Order No. EEO793

‘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.

5.5 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 Company⁵ 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.

5.6 Following the hearing in this claim the Company made a further submission which is attached at Appendix C. In this further submission the Company states:

“Yet no-where in its submission has it (the Union) sought to identify in respect of each individual claimant when she attempted to assert the right to wear trousers at work, save for the first named claimant, Ms. Gibney and the facts in this regard are disputed”.

At no stage throughout this investigation has the Company disputed the fact that the claimant (Ms. Gibney) asked to wear trousers at work. At the hearing of this claim the Company accepted that Ms. Gibney had made an approach to it to wear trousers. At the time of

⁵ 3 Male Employees v Power Supermarkets Ltd Recommendation No. EE 09/1994

making the request, she was a member of the house committee in this store and the Company was aware of this fact. At the hearing of this claim the Company pointed out that the 70 other claimants did not individually ask to wear trousers, rather the request came from only one claimant. It was only after the hearing that the Company argued that Ms. Gibney “*did not state that she represented 70 other females in the Janelle store*”. It is accepted that Ms. Gibney did make a request to wear trousers. The point of dispute is whether she asked on her own behalf only or on behalf of all females working in the store. As a member of the house committee I consider it conceivable that her request was made on behalf of all female working in the store. On this basis I do not accept the Company’s argument that this claim is a class action and, therefore, not a valid claim.

5.7 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 local Union representative, sought permission to wear trousers and this 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 the Company has introduced trousers as part of the uniform for female staff members since May, 1997.

5.8 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.

5.9 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 opted for trousers as part of their uniform when they became available. A list of the claimants who so opted is attached as Appendix D. I consider it reasonable to conclude that those claimants who did not opt for trousers as part of their uniform did not suffer adversely as a result of the discrimination. Therefore, I recommend that the Company pay £50 by way of compensation to each of the claimants listed in Appendix D who did opt for trousers as part of their uniform and, it is reasonable to conclude, suffered as a result of the discrimination.

6. RECOMMENDATION

6.1 Based on the foregoing I find that Tesco Ireland formerly Power Supermarkets discriminated against the 71 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 5.9 above I recommend that Tesco Ireland pay a total of £900 to the 18 female claimants who are named in Appendix D.

Gerardine Coyle
Equality Officer

21st March, 2000

APPENDIX A

List of the Claimants

Ms. Adrian Abbott
Ms. Liz Byrne
Ms. Louise Byrne
Ms. Lynn Byrne
Ms. Helena Carey
Ms. Elaine Carolan
Ms. Louise Carrow
[Ms. Karen Cassidy]
Ms. Josephine Cortin
Ms. Patricia Cortis
Ms. Irene Council
Ms. Ruth Cromwell
Ms. Laura Crotty
[Ms. Pamela Crowley]
Ms. Saoirse Crowley
Ms. Nicola Curran
Ms. Elaine Curtin
Ms. Aisling Curtis
Ms. Amanda Daly
Ms. Karen Daniels
Ms. Ann Downs
Ms. Kim Duignan
Ms. Michelle Duignan
Ms. Sandra Dunne
Ms. Susan Dunne
Ms. Susan Fitzgerald
Ms. Janet Fitzpatrick
Ms. Suzanne Flynn
Ms. Shirley Fortune
Ms. Celine Gannon
Ms. Sylvia Gibney
Ms. Ann Grey
Ms. Lisa Griffin
Ms. Caroline Halford
Ms. Wendy Harding
Ms. Helen Hartfort

Ms. Elaine Johnson
[Ms. Christine Kenny]
Ms. Jean Kennedy
Ms. Edel Keogh
Ms. Kathleen Kiernan
Ms. Sinead Kiernan
Ms. Colette Kitson
Ms. Linda Larkin
Ms. Sharon Leydon
Ms. Jean Lynch
Ms. Aoife McCaffrey
Ms. Belind McCarthy
Ms. Jacinta McCormack
Ms. Jackie McNeary
Ms. Carmel Murphy
Ms. Lorraine Norton
Ms. Suzanne Nugent
Ms. Catherine O'Brien
Ms. Paula O'Brien
Ms. Ann Marie O'Reilly
Ms. Fiona O'Reilly
Ms. Liz O'Sullivan
Ms. Ann Quinn
Ms. Angela Redmond
[Ms. Angela Ryan]
Ms. Karen Ryan
Ms. Sinead Ryan
Ms. Pamela Smart
Ms. Marian Smith
[Ms. Jacinta Sweeny]
Ms. Alison Tobin
Ms. Elaine Tobin
Ms. Karen Tobin
Ms. Eilish Ward
Ms. Liz Waters

Note:

According to the Company all the claimants in [] left the Company before the alleged act of discrimination (25th September, 1996).

APPENDIX B

Summary of the Union's
second submission

The Union says that I.B.E.C. appear to accept that women were refused permission to wear trousers when they say 'the company does accept that it does have rules restricting the wearing of apparel'. Such a response, according to the Union, must be seen as progress of sorts, especially when viewed in the light of the employers' failure to respond at all to the Union's original correspondence of 8th October, 1996. The Union says that further progress may be construed from the subsequent decision of Tesco to introduce trousers for female employees in all branches. The Union argues that the respondent did treat female staff 'less favourably' than male staff because some of the female staff in the Janelle store complained of the cold and the company must, it maintains, consider it acceptable for female staff to freeze but not so for male staff.

The Union says that the Pantry Franchise case, referred to in its first submission, is of greater significance and more relevance than the UK case cited by the company namely Schmidt v Austicks Bookshops Ltd given that it comes some sixteen years after the Schmidt case. According to the Union the company has ruled that the men may wear trousers but the women may not and this policy is a clear example of direct discrimination. The Union argues that to say that if women are given the right to wear trousers men would want the right to wear skirts is a nonsensical argument and reduces the equality debate to the point of farce.

The Union says that its understanding of the principle of the Pantry Franchise case and a recent case of 3 male employees and Power Supermarkets Limited concerns a fashion trend which was traditionally associated with one sex, but has since become the norm for both, it is discriminatory to prevent either sex from availing of that fashion. So, where it was once the case that only women wore ear-rings or long hair and only men wore trousers, it is now commonplace for both sexes to wear ear-rings, long hair and trousers. In the circumstances, the Union argues that it is an act of discrimination to allow one sex to so dress, but not the other. It is not commonplace for men to wear skirts and the Union says that it is not seeking a right for them to do so.

The Union says that, in its first submission, it highlighted the instance of the company refusing to allow a female worker to wear trousers and the subsequent payment to her of £500. The Union accepts that the case was settled and withdrawn and therefore never heard by an Equality Officer, but says that it formed part of its submission as a means of assisting the Equality Officer in the area of compensation.

APPENDIX C

Copy of a further submission
made by the Company

COPY OF FURTHER SUBMISSION MADE BY THE COMPANY

It is, as previously stated, the company's contention that Mandate has failed to show that discrimination within the meaning of the Act has taken place. The Union has alleged that the claimants have been refused the right to wear trousers at work and this entitles them to compensation of £500 each "for the discrimination, the upset caused and the injury to feelings of the claimants". Yet no-where in its submission has it sought to identify in respect of each individual claimant when she attempted to assert the right to wear trousers at work, save for the first named claimant, Ms. Gibney and the facts in this regard are disputed. Further, the Union has made no attempt to identify in respect of each individual claimant the alleged "upset", "injury to feelings" and "discrimination" for which damages are now being sought before the Equality Officer.

While the company has already made its substantive submission to the effect that the policy in relation to dress code which has been impugned is not discriminatory, relying inter alia, on **Schmidt -v- Austicks Bookshops Limited (1977) IRLR 360** and **Burrett -v- West Birmingham Health Authority (1994) IRLR**. It is also respectfully submitted that the manner in which the claim has been advanced is not in compliance with the provisions of the Act as an attempt has been made by the Union to advance a class action in circumstances where no attempt has been made to identify the basis of the claim in each individual case.

It is well established in law that a class action may not be brought under this legislation. In **Verbatim Limited -v- Duffy & ors., unreported, High Court, Kinlen J., 18/05/94** the learned trial judge had no hesitation in stating that it was open to the Union to advance such a class action in a claim under the Anti-Discrimination (Pay) Act, 1974, nor was it open to the Equality Officer to consider it as such. Similarly, any claim under this Act can only be advanced on the basis of the alleged entitlement of each of the claimants individually.

The Equality Officer will recall that, at the oral hearing of this claim, the issue arose for consideration and indeed the Union was unable to identify the circumstances in which 70 of the claimants had brought forward their individual claims. The company contended that only Ms. Gibney claimed to have made any approach to management on or about 25th September, 1996 but she did not state that she represented 70 other females in the Janelle store. As already stated above, the facts in Ms. Gibney's own case are disputed by the company. The Union's contention that because she was a member of the house committee and, therefore, represented all the females in the store does not establish the basis for the claim advanced and indeed is evidence in itself that the claim has not been properly instituted under the provisions of the Act.

The company contends that, because no formal claim has ever been made in respect of the 70 claimants, the Equality Officer cannot have jurisdiction to deal with their claims.

APPENDIX D

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

Ms. Adrian Abbott

Ms. Patricia Cortis

Ms. Laura Crotty

Ms. Amanda Daly

Ms. Karen Daniels

Ms. Michelle Duignam

Ms. Susan Dunne

Ms. Janet Fitzpatrick

Ms. Suzanne Flynn

Ms. Celine Gannon

Ms. Sylvia Gibney

Ms. Kathleen Kiernan

Ms. Colette Kitson

Ms. Linda Larkin

Ms. Jean Lynch

Ms. Jacinta McCormack

Ms. Lorraine Norton

Ms. Catherine O'Brien