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EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 09/2000

**Ms. M. Higgins & 80 Others
(Represented by Mandate)**

AND

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

File No. EE 21/1996

1. DISPUTE

- 1.1** This dispute concerns a claim by MANDATE, on behalf of 81 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 81 named female claimants are employed by Tesco Ireland Limited in its store in Omni Park in Santry. During the months of December, 1995 to March, 1996 a number of the Union's members reported that requests from female staff for permission to wear trousers were refused by local management. On the advise of the Union Mr. Gillanders made a formal approach to the Store Manager, Mr. Davin requesting management sanction for the wearing of trousers by female staff, but this request was refused. At a meeting between the Union and the Company on 12th March, 1996 the Company again refused female staff permission to wear trousers.
- 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 29th March, 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 female members in the Crazy Prices store in Omni Park, Santry requested permission to wear trousers during the period from December, 1995 to March, 1996. These requests were refused by local management. On its advise Mr. Gillanders, Shop Steward made a formal approach to the store manager requesting management sanction for the wearing of trousers by female staff members. The Union says that this request was also refused. On 12th March, 1996 a formal union delegation met management and again the

request that female staff be allowed to wear trousers was turned down. At that meeting the Union says that it told the Company that it considered the Company's position as constituting discrimination on grounds of sex and would refer the matter to the Labour Court under the terms of the Employment Equality Act, 1977 for investigation by an Equality Officer. The claim was referred on 29th March, 1996.

3.2 The Union says that female staff in the store in Omni Park, Santry 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 1st April, 1996 to the Chairman of the Labour Court (see Appendix B), it does 'not accept that 81 female staff members were discriminated against', then all it 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 Crazy Prices Santry are provided with a uniform as part of their employment contract. This claim arises from a question raised by Mr. Brendan Archbold in relation to their uniforms at the end of a union meeting on 12/3/96 with management representatives. Management advised Mr. Archbold that the company were looking into the matter. They at no stage made a definitive decision on the matter. In fact, the union raised this issue in an ad hoc fashion and for it to end up as a claim for 81 staff is unacceptable, especially given the company's response as above".

3.3 In response to this point of view the Union says that the matter was dealt with by the Union and the individuals concerned are not relevant to the case. Furthermore the Union argues that it is irrelevant at what stage during the meeting that the issue was raised. The Union also disputes the Company's account of the meeting and the fact that the Company allegedly said

that it was ‘looking into the matter’. The Union asks what matter had to be looked into, the simple issue was could female staff wear trousers. The Union denies that it raised the issue in an ad hoc fashion. It was formally raised by Mr. Gillanders on 8th December, 1995 and again by the Union on 12th March, 1996.

3.4 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.

3.5 The Union notes as interesting the Company’s response to a similar claim in the Newbridge store in which the Company say ‘... trousers were not part of the agreed uniform’ whereas this response is not admitted in this claim. The Union argues that females are not allowed to wear trousers in any of the Company’s outlets. It says that, at the time of its discussions with the Company on 12th March, 1996 the Company displayed a large notice in the store in Omni Park which read:

MALE APPEARANCE	FEMALE APPEARANCE
Black Shoes No Trainers <u>Black Trousers</u> No Jeans Dark Socks Clean Shaven Hair - Clean, Tidy & Short Jewellery - To Minimum Name badges to be worn at all time during working hours	Black/Navy <u>Knee Length Skirt</u> Flat/Court Shoes Sling Backs/Platform Shoes not Permitted Long Hair Tied Back Jewellery - To Minimum One ring on each hand Stud/Sleeper earrings Charms to be worn inside uniform

The Union argues that this notice indicates the Company’s position in this claim which it contends is discriminatory in terms of which sex may wear trousers. 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 the Company has clearly breached the Act by attempting to dictate ‘who wears the trousers’ in the employment relationship.

3.6 The Union cites the Labour Court finding in the case of *Pantry Franchise Ireland Limited and A worker*¹ 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 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.

3.7 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.

¹ Labour Court Order No. EE0793

4. SUMMARY OF THE COMPANY'S SUBMISSION

- 4.1 In its submission the Company says that this claim was initiated by letter dated 8th December, 1995 from the Union in which it referred to "*the provision of trousers for staff employed on the Provisions Counter*". Following a routine Union/Management meeting on 12th March, 1996 the Company says that the Union alleges that it discriminated against all female employees, in the Santry store at the time, on grounds of sex pursuant to Section 2(a) and Section 2(c) of the Employment Equality Act, 1977 by refusing them the right to wear trousers at work. The Company says that, at the meeting, it confirmed that it was looking into the matter and no definitive decision was made on 12th March, 1996 and that this was confirmed in correspondence with the Labour Court dated 1st April, 1996.
- 4.2 The Company notes that the only person who made a direct approach to it in regard to this matter was Mr. Gillanders and his request was specifically in relation to the Deli Department. The Company says that the Mr. Gillanders did not raise any other matter regarding other female staff at the time and the Union's contentions in this regard are incorrect. In particular the Company says that he did not ask, on behalf of all female staff at the store, for permission to wear trousers; his request referred only to deli staff. The Company denies that the store manager (Mr. Davin) refused the request by Mr. Gillanders for female staff in the Deli Department 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 the Union's submission in which is stated 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 and it says that the Union is not permitted to apply the Employment Equality Act, 1977 without such evidence. It further states that it is clear 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 81 claims. The Company says that, while the decision of Kinlen J. in *Verbatim -v- Duffy and Others*² concerned a claim under the Anti-Discrimination (Pay) Act, 1974 it is patent from that decision 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(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*³ and later decisions of *Burrett -v- West Birmingham Health Authority*⁴ and *Smith -v- Safeway plc (supra)*⁵ 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

² Unreported, High Court 18th May, 1994

³ [1977] IRLR 360

⁴ [1994] IRLR 7

⁵ [1996] IRLR 869

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 Limited*⁶ 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

⁶ Labour Court Order No: EEO793

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. 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, 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 Mr. Gillanders's approach to management to ask that female staff working in the deli department be allowed to wear trousers. At the time of making the request, Mr. Gillanders was the Union's shop steward in the store. The point of dispute is whether Mr. Gillanders asked for permission to wear trousers, on behalf of deli staff only, or on behalf of all females working in the store. Given the conflict in the evidence I accept, on the balance of probabilities, that Mr. Gillander's 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.

5.3 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*⁷ 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.

⁷ Labour Court Order No. EE0793

- 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 Company⁸ 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.
- 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. Permission to wear trousers was sought by the Union's Shop Steward on behalf of all females working in the store and this request 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.
- 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 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.

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

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 has 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, Mr. Gillanders, the local shop steward, 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 during the course of their work I asked the respondent to submit details of the claimants who have opted to wear trousers as part of their uniform. A list of these claimants is set out in Appendix D. I consider it reasonable to conclude that these claimants were adversely affected by not being permitted to wear trousers during the course of their work and I recommend that the Company pay each of them £50 by way of 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 £1,500 to the 30 female claimants who are named in Appendix D.

Gerardine Coyle
Equality Officer

21st March, 2000

APPENDIX A

List of the Claimants

[Ms. Sabrina Beasley]	Ms. Kathleen Fitzpatrick	Ms. Sandra McLoughlin
Ms. Tina Brennan	Ms. Susan Fitzpatrick	Ms. Samantha Mitchell
Ms. Ger Brophy	Ms. Martha Flanagan	Ms. Marie Moore
Ms. Lorraine Brown	[Ms. Valerie Flood]	Ms. Karen Morris
Ms. Anita Burnett	Ms. Jean Greavey	Ms. Tina Morrissey
Ms. Deirdre Byrne	Ms. Marie Greavey	Ms. Sylvia Nagle
Ms. Gay Byrne	Ms. Elaine Gordan	Ms. Marsha Nally
Ms. Julie Ann Byrne	Ms. Sarah Hamilton	Ms. Gemma Nolan
Ms. Allison Clarke	Ms. Yvonne Hand	Ms. Rita O'Brien
Ms. Sinead Core	Ms. Dara Higgins	Ms. Francis O'Farrell
Ms. Lisa Corrigan	Ms. Lesley Higgins	Ms. May O'Hehir
Ms. Hilary Craigie	Ms. Lynette Hughes	Ms. Marie O'Neill
Ms. Louise Daly	Ms. Caron Keegan	Ms. Vivienne O'Reilly
Ms. Linda Dempsey	Ms. Maria Keenan	Ms. Nicola O'Sullivan
Ms. Colette Donnelly	[Ms. Rachel Kelly]	Ms. Cindy Ormsby
Ms. Maeve Donnelly	Ms. Joan Kenna	Ms. Ingrid Rath
[Ms. Lorraine Dowling]	Ms. Mary Kennedy	Ms. Una Reddin
Ms. Pauline Downes	Ms. Linda Lawlor	Ms. Suzanne Reeves
Ms. Phyllis Downes	Ms. Kate Lee	Ms. Michelle Rooney
Ms. Jenny Doyle	Ms. Catherine Looby	Ms. Lisa Selby
Ms. Therese Doyle	Ms. Sinead Lynam	Ms. Adrienne Thomton
Ms. Yvonne Doyle	Ms. Louise Mann	Ms. Linda Tyrell
Ms. Sharon Duffy	Ms. Catherine McBride	Ms. Fiona Walshe
Ms. Eileen Dunne	Ms. Sabrina McDermott	Ms. Emma Whelan
Ms. Bernadette Egan	Ms. Tracy McGowan	[Ms. Margaret White]
Ms. R. Emy	Ms. Susann McGuigan	Ms. Denise Wilders
Ms. Fiona Ferris	Ms. Kay McLoughlin	Ms. Jane Williams

Note:

According to the Company the claimants in [] left before the alleged discrimination took place (From December, 1995 to March, 1996 and specifically 12th March, 1996).

According to the Company Ms. Una Reddin is an artist and wears a uniform tracksuit with trousers.

According to the Company it has no record of Ms. R. Emy or Ms. Lousie Mann on its payroll.

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. Ger Brophy	Ms. Kate Lee
Ms. Deirdre Byrne	Ms. Sinead Lynam
Ms. Louise Daly	Ms. Catherine McBride
Ms. Linda Dempsey	Ms. Sabrina McDermott
Ms. Colette Donnelly	Ms. Susann McGuigan
Ms. Phyllis Downes	Ms. Kay McLoughlin
Ms. Yvonne Doyle	Ms. Marie Moore
Ms. Sharon Duffy	Ms. Karen Morris
Ms. Eileen Dunne	Ms. Tina Morrissey
Ms. Fiona Ferris	Ms. Gemma Nolan
Ms. Yvonne Hand	Ms. May O'Hehir
Ms. Dara Higgins	Ms. Marie O'Neill
Ms. Lesley Higgins	Ms. Adrienne Thomton
Ms. Caron Hughes	Ms. Fiona Walshe
Ms. Joan Kenna	Ms. Jane Williams