

ANTI-DISCRIMINATION {PAY} ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO.EP 06/99

PARTIES

Ms.Denise Cotter and Sandra Poland
{Represented by G.P.M.U.}

and

Printech International Limited.
{Represented by I.P.F.}

File No. EP 28/97 & EP 27/98

1. Dispute

1.1 This dispute concerns a claim by the union on behalf

of Ms. Denise Cotter and Ms Sandra Poland that they are entitled under the terms of the Anti-Discrimination (Pay) Act, 1974 to the same rate of remuneration as paid to a named comparator.

2 Background

- 2.1** The complainants and the comparator involved in this claim were employed by Printech International Limited. The complainants Ms. Cotter and Ms. Poland and the comparator, Mr John Kinsella, were employed in the digital print department.

- 2.2** The complainants were being paid, at the date of the claim, at the rate of £277.09 per week, which included a weekly shift allowance of £41.00. Mr Kinsella, the comparator, at the relevant time was on the weekly rate of £475.00 (plus car), which included £63.00 night shift allowance.

- 2.3** The comparator commenced work with the Company in March 1981. When the new digital printing department was set up in 1994 Mr Kinsella, at his own request, was put on the night shift (10.00pm to 6.00am). The complainants, who joined the Company in November, 1992, were also put into the new department. They alternated on the other two shifts i.e. 2.00pm to 10.00pm and 6.00am to 2.00pm. The complainants and the comparator were the only employees working in the department up to October, 1997 when the complainants employment ended.

- 2.4** The complainants' Union by letter dated 18 August, 1997 requested the Employment Equality Agency to "commence the appropriate proceedings" in order to obtain equal pay for Ms. Cotter and Ms. Poland with Mr. Kinsella.

The Agency wrote to the Company in the matter on 2 September, 1997 and in the absence of a reply wrote again on 8 October, 1997. On 14 October, 1997 the Company responded to the Agency to the effect that the complainants had withdrawn their claims against it.

- 2.5** The complainants' claim for equal pay, under the Act of 1974, was received from the Union in December, 1997. The Equality Officer held an initial joint hearing with the parties that was adjourned at the request of the Union. He held a further preliminary hearing on the 16 June, 1998. Subsequent to that hearing he carried out inspections of the work of the complainants and the comparator. A final joint hearing with the parties was held on 18 September, 1998. This hearing was adjourned, at the request of the Company, so that it could respond to the Union's new claim of like work under Section 3(b) of the Act. As the Union had been specific that its case on like work, up to that time, lay under Section 3(a) the Equality Officer considered that the claim under section 3(b) constituted a fresh claim. This claim has been assigned case number EP 27/1998. Subsequent to receipt of further submissions from the parties a final hearing was held on 24 May, 1999.

3 Summary of the Complainants' Case

- 3.1** The Union contends that the complainants performed "like work" within the meaning of section 3(a) and (b) with the named comparator and are therefore entitled to receive the same rate of remuneration as that paid to him.
- 3.2** In support of its case that the complainants performed

like work, as defined under section 3(a) and (b) of the Act, with that of Mr Kinsella the Union refers to the descriptions of the complainants work and the comparator as at Appendix 1. In further support of its case the Union contends that the only difference in the performance of the work of the complainants and the comparator is that Mr. Kinsella was permanently on the same shift i.e. 10.00pm to 6.00am whereas the complainants alternated on the 2.00pm to 10.00pm shift and the 6.00am to 2.00pm shift.

3.3 In relation to the Company's arguments on "grounds other than sex" the Union contends:

the Production Manager offered a voluntary redundancy package to the complainants which they accepted

in the period of time up their departure the complainants were pressurised for waiver notes

the complainants wrote the letters of 10 October 1997 in order to secure a reference from the Company

the company never indicated to the Union that the comparator's rate of pay was "red circled"

3.4 The Union maintains that the complainants have not obrogated their rights to retrospection on the difference in pay between them and the comparator. It argues that the complainants had a right to the same pay because they were performing the same work as Mr Kinsella on the same machinery. The union adds that

that they had more administrative work due to being employed during day work hours when supervisors and managers would make regular calls to the digital printing area.

4 Summary of the Respondent's Case

- 4.1** In support of its case that the complainants did not perform "like work" with that of Mr Kinsella, as defined under section 3(a) and (b) of the Act, the Company refers to the descriptions of the additional duties of Mr Kinsella as Appendix 2. The Company's job description of the complainants' work and the comparator in the Digital Print department is at Appendix 3. The Company submits that even if "like work" is deemed to exist there are grounds other than sex which explain the differences in remuneration of the complainants and comparator.
- 4.2** The respondent submits that the complainants have neither the experience, expertise, skill or service of the comparator therefore they cannot claim to be engaged in the same or similar work as the comparator for the simple reason they would be incapable of carrying out engineering and maintenance duties that the comparator carries out on a regular basis outside of the Docutec area.
- 4.3** The Company maintains that the comparator is "red circled" and that never at any time did it make this publicly known. The reason for Mr Kinsella's remunerative package are clear and transparent and are in no way connected with his sex. The Company submits that:

the comparator's rate of pay is derived from his skill, expertise, status and service with the company

he carries out duties other than the operation of docutec machines

the complainants have no responsibilities beyond the Docutec areas

4.4 During the latter half of 1997, the Company explains, both complainants made claims under the Anti-Discrimination (Pay) Act, 1974 through the Employment Equality Agency. In October, 1997 both complainants, the Company submits, sought voluntary redundancy. The Company advises that it indicated a willingness to make both complainants redundant in a voluntary context and to make ex-gratia payments to them in addition to statutory payments on the clear understanding that they gave an undertaking not to pursue their claims under the 1974 act. In this regard the complainants were advised by their Shop Steward. Subsequently both gave this undertaking and committed same to writing, see Appendix 3.

5. The Conclusions of the Equality Officer

5.1 The Act of 1974 under Section 2(1) provides that a woman is entitled to the same rate of remuneration as a man where both are employed, by the same employer in the same place, on "like work" unless the employer can show under Section 2(3) that the differences in the rates of pay is justifiable on grounds other than sex. The company in this case disputes that either of the

complainants perform "like work" with the named comparator and "without prejudice" to its arguments on that issue the respondent also argues that there are legitimate grounds other than sex to justify the higher rate of remuneration paid to the comparator.

5.2 In making my recommendation in this case I have taken into account all of the submissions, written and oral, made to me by the parties to this case and also the work inspections which I carried out on the work of the complainants and the comparator. I am satisfied from my inspections of the work of the comparator and the work of the complainants that the descriptions submitted by the parties, at Appendices 1 and 3, fairly reflect the jobs of the employees concerned in the Digital Print department. In the course of the job inspections I carried out the Company informed me that it accepts that the job description submitted by the Union (Appendix 1) reflects the comparator's operational work in the Docutec area. The Company states, however, that the description does not reflect Mr Kinsella's the other responsibilities and duties, these the Company maintains are as outlined at Appendix 2.

5.3 It was not practical to assess the jobs purely by observation. Accordingly, I relied to an extent on complainants and the comparator to explain their work to me in detail through an interview format. This they did and following the interviews I went with jobholders, accompanied by the complainants' Union representative and a Company's representative, to their work locations where they each outlined their various duties.

5.4 The first question for consideration is whether or not

the work performed by either or both of the complainants is "like work" with that performed by the comparator in terms of Section 3(a) of the Act. Section 3(a) of the Act states that two persons shall be regarded as employed on "like work":-

"where both perform the same work under the same or similar conditions, or where each is in every respect interchangeable with the other in relation to the work, or"

5.5 In the course of my investigation the Company, while it stated that it would not be its method to describe the work performed in the digital printing room, it accepts that the work outlined by the Union at Appendix 1 is common to the complainants and the comparator. I note that the Company maintains that in addition to the duties at Appendix 1, and those describe in its job description (Appendix 3), the comparator has "Additional Duties/Responsibilities/Experience" which were not carried out by the complainants, Appendix 2 refers. .

5.6 It may be useful here to point out that the digital printing operation is carried out, over three eight hour shifts, in a room that is off the main "shop floor", and that the complainants alternated on the two day shifts with the comparator fixed on the night shift. I should also point out that no other employees worked in this area in the time of the complainants employment, and that the three employees here carried out the same type of printing jobs with the use of the same machines and equipment.

5.7 The Company relies on its document "Additional Duties/Responsibilities/Experience of Mr. John Kinsella", to argue its case that the complainants did not perform "like work" with the comparator, see Appendix 2. In the course of my inspection of the work of the comparator I went through the aforementioned document with him in some detail in order to establish whether or not the alleged additional "duties/responsibilities and experience" were a feature of his work.

5.8 It is mentioned at Appendix 2 that Mr Kinsella is called upon to use his knowledge of plant and machinery. In relation to this matter Mr Kinsella informed me that because of his background in maintenance work and installation of equipment in the premises he is called, while on night shift, to assess/repair faults in machines, at which time engineering staff would not be at work. He made it clear to me that he would only be in position to help if work in the digital printing room permitted.

On further questioning he stated that he is often called upon to assess/repair machinery and that two/three weeks before my inspection he was called to a machine on the "shop floor" which he fixed. The complainants did not accept that he fixed the machine; one of the complainant's alleged that the machine was not in operation in the week in question. Mr Harris, Production Director, who was present at the time of the complainant's allegation stated that he was not in a position to say if the machine had operated the week in question.

5.9 At the final hearing held Mr O'Brien shop steward stated that maintenance are "on call", a bleeper system operates, and maintenance are called in on a regular basis. It is my opinion that Mr Kinsella may have, on the odd occasion, obliged the "shop floor" by assessing/repairing faults on a machine. However, in my view these occasions would have been so infrequent that I could not hold they constituted a feature of his work. I am also doubtful that Mr Kinsella would do this work in the knowledge that there is staff, as I understand members of the union here, "on call" to do this type of work.

5.10 In relation to the reference in Appendix 2 that he is "night shift supervisor" he stated that he did not carry out a supervisory role and that he was a supervisor on the basis that he was the only person in his area at night.

In regard to the reference that unlike the complainants who report to the Printing Manager Mr Kinsella "reports directly to the Production Manager", the comparator stated that he reported to either the Floor Manager or the Production Manager. He explained that if there was something he wanted to ensure that the Production Manager was made aware of he would inform him, however, in normal circumstances he would report to the Floor Manager.

5.11 It seems to me that section 3(a) of the Act requires me to decide whether or not the complainants and the comparator do the "same work" on the basis of the actual work performed by them. In the present case the Company contends that the comparator has additional

duties/responsibilities/experience that constitute differences in his work compared to that of the complainants. I have given my views on the main alleged differences in paragraphs 5.7 to 5.10 and having regard to these views I cannot hold that there is any difference in the work performed by Mr Kinsella than that which the complainants performed.

5.12 Section 3(a) also states that "like work" is established "*where each is in every respect interchangeable with the other in relation to the work*". In the present case it was impossible to have interchangeability on the shifts as Mr Kinsella, at his request, was fixed on the night shift (10.00pm to 6.00am). It is my view that the content of the work performed by the three workers here would have allowed for full interchangeability on operation of the shifts had rotational shifts fully operated here.

5.13 Having regard to the various views that I have expressed in the preceding paragraphs on the issue of "like work I am satisfied that the work performed by the complainants and the comparator is "like work" for the purposes of Section 3(a) of the Act. As I have so found there is no need to consider whether or not the complainants did perform like work under Section 3(b) of the Act. However, it seems to me as I have found that they performed like work under Section 3(a) it must follow that their work was at least "similar", as defined under Section 3(b) of the Act, to that performed by Mr Kinsella.

5.14 I will now consider whether or not, as maintained by the respondent Company, there are grounds other than sex

justifying the difference in pay rates between the complainants and the comparator. Section 2(3), of the Anti-Discrimination (Pay) Act, 1974, provides:

"nothing in this Act shall prevent an employer from paying to his employees who are employed on like work in the same place different rates of remuneration on grounds other than sex".

5.15 The onus of proof under Section 2(3) of the Act rests with the employer to show that the difference in rates of pay is "on grounds other than sex". On this issue the Company's case centres on two main arguments (1) the comparator is "red circled" and (2) written undertakings by the complainants, on foot of monies paid to them, not to pursue this claim.

5.16 The issue I now propose to consider is the question of "red circling". In support of its case here the Company gives a number of reasons as to why Mr Kinsella is "red circled" and these include he was head hunted, his skill, expertise, status and service with the company.

5.17 The question of "red circling" was addressed in some detail by Justice Keane, in the High Court, in the Minister for Transport Energy and Communications and Catherine Campbell and Ors.(judgment delivered in January, 1996). Justice Keane in his judgment took cognisance's of Lord Denning's finding in the English case of Clay Cross (Quarry Services) Ltd -V- Fletcher (1978 I.R.L.R. 361). The following is an extract from that finding, as quoted by Keane R. in his judgment:

"the issue depends on whether there is a material difference (other than sex) between her case and his. Take heed of the words between her case and his. They show that the Tribunal is to have regard to her and to him - to the personal equation of the women as compared to the man, irrespective of any extrinsic forces which led to the variance in pay. As I said in Shield -V- E.Coomes Holdings Ltd., (1978 - I.R.L.R 263), Section 1(3) applies 'when the personal equation of the man is such that he deserves to be paid at a higher rate than the woman'. Thus the personal equation of the man may warrant a wage differential if he has much longer service or has superior skills or qualifications or gives bigger output or productivity or has been placed, owing to downgrading, in a protected pay category, vividly described as red circled or to other circumstances personal to him."

Justice Keane went on to state, in reference to the above passage, "I would adopt that passage, mutatis mutandis, as a correct statement of the law applicable to Section 2(3) of the Act".

5.18 I note the Union argues that the company never indicated to them that the comparator's rate of pay was "red circled". Justice Keane R. in the aforementioned judgment also held that:

"the Labour Court misdirected themselves in law in holding , as they did , that the onus rested on the Minister to satisfy them, not merely that this

was a genuine case of red circling, but, also to quote the words used by them, 'that a recognised, factual and acknowledged position of red circling existed'."

The Justice went to state that the Labour Court could not introduce a precondition into the operation of Section 2(3) of the Anti-Discrimination (Pay) 1974.

5.19 I note that the Union does not dispute "*what is advanced on behalf of the comparator in respect of skills, experience and knowledge.*" I am satisfied, on the evidence available to me, that Mr Kinsella was head hunted by the Company in 1981 and that he was involved, in his time as a maintenance engineer, in the installation of most of the major plant and machinery within the factory. Having regard to Mr Kinsella's background and status within the Company I have no reason to doubt the respondent's assertion that he, Mr Kinsella, was placed, on his assignment to the less demanding work in the Digital Print Department, in a protected pay category

5.20 Having regard to the evidence available to me on the issue of "red circling" and in the light of the judgment of Justice Keane R. in Minister for Transport Energy and Communications and Catherine Campbell and Ors. I find that Mr Kinsella is "red circled". As I have so found I hold that the Company has discharged the onus of proof under Section 2(3) of the Act that the difference in rates of pay is "on grounds other than sex". In view of my finding here there is no need for me to consider whether the documents signed by the complainants compromised their claims under this Act.

5.21 In summary I have found that the complainants did "like work" with the named comparator. I have also found that the employer has discharged the onus on him that there are grounds other than sex to justify the pay differential between the complainants and the comparator. I therefore find that Ms Denise Cotter and Ms Sandra Poland have no entitlement to equal pay with Mr Kinsella.

6 Recommendation

6.1 In view of my conclusions that there are grounds other than sex to justify the pay differential between the complainants and the named comparator, under Section 2(3) of the Anti-Discrimination (Pay) Act 1974, I find that Ms Cotter and Ms Poland have no entitlement to the same rate of remuneration as that paid to the named comparator.

Jim Clerkin,

Equality Officer,

24th. June, 1999