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ANTI - DISCRIMINATION PAY ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO: EP02 /2000

Ms. Joan O'Neil
(Represented by The Equality Authority)

AND

Malahide Service Station Limited
(Represented by B. Garvan & Co. Solicitors)

File No. EP11/1999
Date of Issue 13/01/00

1. DISPUTE

1.1 This dispute concerns a claim by the Equality Authority (formerly the Employment Equality

Agency), on behalf of Ms. Joan O'Neill, that she is entitled to the same rate of remuneration as that paid by Malahide Service Station to Mr. Joe Leonard in terms of Sections 3(a), 3(b) and 3(c) of the Anti-Discrimination (Pay) Act, 1974.

2. BACKGROUND

2.1 The claimant was originally employed by Kinsealy Service Station and subsequently by Malahide Service Station following a transfer of ownership. She has left the employment of Malahide Service Station since March, 1998. The claimant contends that she was employed on 'like work' with that of the named male comparator and, therefore, was entitled to be paid the same rate of pay as that which was paid to him.

2.2 On 29th April, 1999 the Equality Authority, on behalf of the claimant, submitted a claim under Section 3(a), Section 3(b) and Section 3(c) of the Anti-Discrimination (Pay) Act, 1974 to an Equality Officer for investigation and recommendation.

3. SUMMARY OF AUTHORITY'S SUBMISSION

3.1 According to the Authority the claimant was employed as a senior cashier with Kinsealy Services Station from 16th March, 1996 to July, 1997. She normally worked 32 hours per week on a four day week. This could involve hours on Saturdays and Sundays. Shift times were 7.00a.m. to 3.00p.m., 3.00p.m. to 11.00p.m. and 10a.m. to 7.00p.m. The duties undertaken by the claimant included:

- Preparation for baking, baking cuisine de France;
- Checking fridges;
- Checking stock requirements;
- Stock rotation;
- Ordering stock;
- Packing shelves;
- Pricing Magazines;
- Completing paper returns;
- Cleaning fridges, ovens, kitchen, toilets, etc.;
- Work on tills;
- Console work on petrol pumps.

The Authority says that the claimant was engaged in precisely the same work as that

undertaken by the named male comparator. However, she was paid at a different and lesser rate of pay. The claimant was paid £3.25 per hour while the named male comparator was paid £4 per hour.

3.2 According to the Authority there were, in total, three female employees in the shop and each had various tasks assigned to them. One female was initially assigned to magazine work, the claimant and a female colleague were assigned to Cuisine de France food and the named male comparator was assigned to newspapers. In reality, however, each person was employed on a variety of duties depending on their shift times. The Authority says that one female employee received £4 per hour in respect of work undertaken in relation to computers and accounts in the office. The Authority re-iterates that the claimant did precisely the same work as the named male comparator. However the male comparator worked longer hours than the claimant.

3.3 According to the Authority there was a change of ownership in respect of the business and the name of the station was changed to Malahide Road Service Station Limited. The Authority states that the claimant did the same work as the named male comparator from the beginning of her period of employment until the change of ownership. After the change of ownership the male comparator was assigned considerably less hours and he was sent to the forecourt to operate the petrol pumps, carwash and steamwash. He also had to clean the forecourt. These duties were in addition to those undertaken in the shop. The named male comparator's duties included being available for night work and, according to the Authority, this only happened occasionally for example he may have worked nights on two or three occasions.

3.3 The Authority states that the claimant is entitled to equal pay with that of the named male comparator for a period from February, 1996 to July, 1997.

4. SUMMARY OF THE RESPONDENT'S SUBMISSION

- 4.1** The respondent raised two issues at the preliminary hearing and set them out as part of its submission. Firstly, in a letter dated 4th May, 1999 signed by Ms. Deirdre Sweeney she enclosed a copy of the Equality Officer Procedures under the Anti-Discrimination (Pay) Act, 1974. In these procedures it states that “the preliminary hearing would be heard ‘in any event’ not later than 4 weeks after the employer would be notified by the Equality Officer of the request for an investigation”. According to the respondent the only notification it received of a request for such an investigation was this letter of 4th May, 1999 and the purported hearing did not take place until 29th June, 1999 i.e more than four weeks after being notified of the investigation. The respondent contends that this was in breach of the Equality Officer’s Procedures. Secondly, the respondent argues that there has been an unconsionable delay in the matter coming up for hearing given that the Equality Authority first made contact with the respondent about the potential claim in September, 1997. The respondent’s legal representative sent letters to the Equality Authority in September and October, 1997 and nothing further was heard until the said letter from Ms. Sweeney dated 4th May, 1999. The respondent re-iterates that the delay is both unconsionable and prejudicial and refers to High/Supreme Court decisions which hold that such is contrary to natural and constitutional justice and a breach of the fair procedures principle.
- 4.2** The respondent says that it is a small £100 share capital company. The respondent company has two Directors who are the sole shareholders. The respondent has no association with Tedcastles Group. Rather the respondent has a short 3 year licence, which commenced on 16th July, 1997, to operate the shop and forecourt on the property of Kinsealy rented by Tedcastles. The respondent pays the Tedcastles Group a substantial licence fee of £25,000 annually.
- 4.3** The respondent states that the claimant worked for the respondent company for a period of 11 weeks while the named male comparator worked for a period of 9 weeks. The respondent says that ‘like work’ is in dispute, on grounds other than sex. It says that the claimant worked 28 hours per week while the named male comparator worked a total of 40 hours per week. The claimant always worked between 7.00a.m. and 3.00p.m. whereas the named male comparator worked mornings, afternoons and evenings up to 11.00p.m. and held himself available for the period from 11.00p.m. to 7.00a.m., if required. The

respondent says that the claimant was employed inside the shop as a cashier and shop assistant. The named male comparator also served as cashier and shop assistant but undertook the following additional duties namely:

- the re-ordering of stock in general and travelling in his own car to the wholesaler to ensure stock control by collecting replacement stock and bringing it to the shop;
- delivering bottled gas to customer's houses using his own car;
- attending, on a strict basis, to newspaper and magazine returns - essential for ensuring credits on a continuous basis for unsold stock;
- serving petrol, checking oil and pumping tyres;
- operating the carwash and repairing it.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In making my recommendation in this claim I have taken into account all of the submissions, both written and oral, made to me by the parties and also the work inspections which I carried out on the work of the claimant as described to me by the claimant herself and the work of the named male comparator as described to me by a representative of the respondent. It should be noted that the claimant and the named male comparator are not currently employed by the respondent organisation and have not been employed there for some considerable time i.e. since 1997. Job descriptions for the claimant and the comparator are set out in Appendices A and B respectively.

5.2 At the preliminary hearing of this claim and in its submission the respondent raised two issues which I propose to deal with first. The respondent complained that the Equality Service of the Labour Relations Commission failed to abide by its own procedures which are set down in writing and which were sent to the respondent. I have set out the history of this claim in Appendix C. I attach at Appendix D a copy of the Equality Officer's Procedures under the Anti-Discrimination (Pay) Act, 1974 which issued to the respondent's representative. I accept that the language in these procedures in respect of the holding of a preliminary hearing (point 3 refers) is very definite:

“The preliminary hearing will be held at the earliest possible date but, in any event, not later than four weeks after the date on which the employer was notified by the Equality Officer of the request for an investigation.”

However point 3 of the procedures must be read in the context of all the other points in the procedures document, most notably point 14 which states:

“A failure to comply with any of the above procedures will not render the proceedings void”.

The respondent’s representative was aware of the provision at point 14 as well as the provision at point 3 and for that reason I cannot accept his argument that the preliminary hearing should have taken place within four weeks of the respondent being notified of the request for an investigation.

5.3 The respondent’s representative complained that there was an unconsonable delay in this claim coming up for hearing given that the claimant’s representative (the former Employment Equality Agency) had first contacted the respondent about a potential claim in September, 1997. I note that the claim was not referred to an Equality Officer for investigation until 29th April, 1999. In this instance the delay rests with the Equality Authority who offered no explanation for such a delay. It should be noted, however, that there are no time limits set down in the Anti-Discrimination (Pay) Act, 1974 in relation to the bringing of a claim. However, in making an award under the Act an Equality Officer is restricted to granting equal pay for a period of no more than three years prior to the claim being lodged. In this specific claim equal pay can be awarded from 29th April, 1996 up to the date of the claim assuming, of course, that the claimant was in the respondent’s employment in that entire period.

5.4 Throughout this investigation the respondent indicated that consideration was being given to the bringing of these issues (relating to the delay in the bringing of this case and the failure by the Equality Officer to hold the preliminary hearing within four weeks of being notified of the claim) before the High Court. However, the respondent did indicate that it would not be requesting a stay to be put on these proceedings pending an application to the High Court.

5.5 The next issue for consideration is that of 'like work' under Section 3 of the Anti-Discrimination (Pay) Act, 1974. 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”.

From the work inspections which I undertook of the work of the claimant and the named male comparator I am satisfied that the claimant and the named male comparator did not perform the same work as each other. While they both performed a number of duties which were the same e.g. operating the cash register and the petrol pumps register, cleaning the floor and toilets, preparing stock orders, etc both the claimant and the named male comparator performed other different duties. For instance the claimant was responsible for baking the Cuisine de France foods while the named male comparator repaired minor faults on the car wash machine, went to the cash and carry to collect orders for the shop, had responsibility for logging returns on magazines and newspapers and ensuring that credits etc. were obtained. The named male comparator was also left in charge when the owner was away from the premises. The bulk of the claimant's duties took place inside the shop whereas the comparator performed his duties both inside and outside the shop..

5.6 Section 2(b) of the 1974 Pay Act states that two persons shall be regarded as employed on like work where:

“the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each occur only infrequently or are of small importance in relation to the work as a whole”.

I am satisfied, from my work inspections, that the work performed by the claimant and that performed by the comparator was not of a similar nature. There were defined differences between some of the work undertaken by the claimant and that undertaken by the named male comparator for example the claimant undertook Cuisine de France baking while the named male comparator undertook forecourt duties. Further differences in their duties are apparent from both the job descriptions and the job analysis undertaken in terms of Section 2(c) of the 1974 Pay Act.

5.7 Section 2(c) of the 1974 Pay Act states that two persons shall be regarded as employed on like work where:

“where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical effort or mental effort, responsibility and working conditions”.

I examined the work performed by the claimant and the named male comparator in terms of skill, physical effort, mental effort, responsibility and working conditions. My findings under these headings are as follows:

Skill

The claimant decorated the Cuisine de France food items with icing or icing sugar. She had to know how to operate tea/coffee making machine so that she could assist customers when required. The claimant operated the petrol pumps console. At the end of the day she balanced the money received and the credits recorded with a print-out from the cash register.

The comparator needed to have the ability to drive a car to go to the cash and carry and to make deliveries. He operated the petrol pumps console. At the end of the day the comparator balanced the money received and the credits recorded with a print-out from the cash register. The comparator was able to check the air pressure in tyres when asked to do so by a customer. He was also able to rectify minor problems with the car wash machine.

I find that the work performed by the named male comparator, in terms of skill, is higher than that performed by the claimant.

Physical Effort

The claimant moved stock items from the stores area to the shopfloor and stocked them on shelves. She undertook cleaning i.e. the oven, the fridge, the shelves, the floor and the toilets.

The comparator moved stock items from the stores area to the shopfloor and he stacked them on the shelves. When delivering bottled gas to customers the comparator had to lift the cylinders of gas in and out of his car and carry the cylinders to the customer's house. He also lifted coal and brigettes out of the shop to the forecourt area. The comparator undertook cleaning namely the floor, toilets, shelves and the outside forecourt area.

I am satisfied that the demands made on the named male comparator, in terms of physical effort, were greater than those made on the claimant.

Mental Effort

The claimant monitored supplies of Cuisine de France foods and placed orders as and when necessary. She monitored the grocery stock items and made up orders as necessary. The claimant observed customers getting petrol.

The comparator monitored the supply of magazines and newspapers to identify any discrepancy between the numbers actually supplied and that which should have been supplied. He also monitored grocery supplies and made out orders when supplies were depleted. At the cash and carry the comparator would check his order before leaving and he would re-check it on his return. The comparator observed customers getting petrol.

I find that the demands made on the named male comparator, in terms of mental effort, were greater than those made on the claimant.

Responsibility

The claimant was responsible for baking the Cuisine de France foods and for ensuring that supplies were replenished. She operated the cash register and was responsible for handling money. The claimant was responsible for serving customers. When customers paid on credit she had to record the credit amount. At the end of the day that claimant had to balance the money received and the credit amounts recorded with a print-out from the cash register. The claimant made out orders for goods which were low in stock. She was responsible for operating the petrol pumps console.

The comparator operated the cash register and was responsible for the handling of money.

He was responsible for returning old newspapers and magazines to the suppliers of same. The comparator recorded the details and, if necessary, rang the Companies for credits. The comparator was responsible for serving customers. He made out orders for goods which were low in stock and he went to the Cash and Carry to collect orders and, on receipt, he checked it. In the course of his work the comparator drove his car to deliver bottled gas to customers and to go to the Cash and Carry to collect orders. At the end of the day the comparator balanced money received and credits recorded with a print-out from the cash register. On occasion the comparator set up the car wash machine at the request of a customer. He fixed minor faults with the machine. On occasion the comparator accompanied the owner to the bank. In the absence of the owner he was left in charge.

I find that the demands made on the named male comparator, in terms of responsibility, were greater than those made on the claimant.

Working Conditions

The claimant worked indoors in a shop environment.

The comparator worked both indoors and outside.

I find that the demands made on the named male comparator, in terms of working conditions, were higher than those made on the claimant.

- 5.8** In conclusion I find that ‘like work’ within the meaning of the Anti-Discrimination (Pay) Act, 1974 did not exist between the work performed by the claimant and that performed by the named male comparator. There were no arguments made under Section 2(3) of the 1974 Pay Act on the issue of grounds other than sex.
- 5.9** At the final hearing of this claim the claimant’s representative indicated that the intention in bringing this claim was to seek equal pay between the claimant and the named male comparator for the entire period of the claimant’s employment. A discussion had taken place on whether or not the respondent was in fact the employer in this claim. The respondent said that it set up a limited company and purchased the licence to operate the business. It held that it was the employer from the date of the licence i.e. 16th July, 1997

and that it was correctly named as the employer from this date. The claimant's representative said that, following the issue of the Equality Officer's recommendation in this claim it would consider seeking legal advice on the issue of the claimant's employer pre 16th July, 1997. It said that it would hope to pursue the entire claim on behalf of the claimant and without the need to undertake another detailed investigation by an Equality Officer.

5.10 In this regard I consider it incumbent on me to state that if the claimant's representative intends to take another claim under the Anti-Discrimination (Pay) Act, 1974 the period of back pay could be reduced. In this current claim if the claimant had been successful in her claim for equal pay and if she had named all of her employers as part of her original referral she could have been awarded equal pay for a period of three years up to the date of the referral. In this claim the referral date was 29th April, 1999. Hence the claimant could have sought equal pay back as far as 29th April, 1996. As the claimant was first employed on 16th March, 1996 she would not have been granted equal pay for the first six weeks of her employment. Therefore a new referral being made on, for example 1st February, 2000 where the claimant is found to perform 'like work' with the named male comparator would entitle her to equal pay back as far as 1st February, 1997. Hence the claimant would receive equal pay for the period from 1st February, 1997 to 16th July, 1997. The claimant's representative would also need to ensure that the named male comparator was employed during this period.

5.11 I note that the claimant's representative said that it hoped that, in bringing another claim following legal advice, another full investigation would not have to be undertaken. I wish to point out that the claimant's representative, in its submission in this claim stated that the duties of the claimant and the named male comparator changed when the named respondent in this claim took over on 16th July, 1997. On that basis I consider that, in any further claim, it would be necessary to undertake work inspections.

5.12 Finally I wish to state that the delay in bringing this claim made it difficult to undertake work inspections and to rely on people's memory as to the duties that were performed a number

of years previous. It was also unfair to the respondent who was obliged to defend itself against a claim of pay discrimination when it had considered that the issue raised by the former Employment Equality Agency in September, 1997 had been replied to satisfactorily given that there was no communication to the contrary until notification of the referral of a claim under the Anti-Discrimination (Pay) Act, 1974 in May, 1999.

6. RECOMMENDATION

- 6.1** In view of the foregoing I find that Malahide Service Station did not discriminate against Ms. Joan O'Neill on the basis of his pay in terms of Section 3 of the Anti-Discrimination (Pay) Act, 1974.

Gerardine Coyle
Equality Officer

13th January, 2000

Equality Officer's
Job Description
for the
Claimant

Name: Ms. Joan O'Neill
Job Title: Console Operator
Company: Malahide Road Service Station
Salary: £3.25 per hour
Hours of Work: 28 hour week over a 7 day week
(Working the 7.00a.m. - 3.00p.m. shift)

Duties:

◆ Baking Cuisine de France Foods*

The claimant turned on the ovens. She put on to bake whatever items took the longest and whatever items had the biggest demand. The claimant had a sheet setting out the length of time it took to bake the various items. On removing the various items from the oven the claimant would decorate some of them with either icing or icing sugar. The claimant would then put the baked items into the display counters. She would record the details of what she baked onto a stock control sheet i.e. name and quantity of the items baked. The claimant would also check the quantity of items in the Fridge and where the stock of an item was low the claimant would ring Cuisine de France and order more.

◆ Cash Register Duties

The claimant checks her float in the cash register till. She serves customers, takes in money and gives change. Some customers pay on credit and the claimant would record credit amounts in a book.

◆ Assisting Customers

The claimant would assist customers where necessary. Inside the shop there is a tea/coffee making facility and the claimant may have to assist customers who would not know how to operate the machine.

◆ Magazines and Newspapers

The claimant would put out new magazines on the stands and price them individually. She would remove the old ones and record them as returns in a book. The claimant would top the newspapers not sold the previous day and record them as returns.

◆ Stocking Shelves

As the claimant is behind the counter most of the time she would stock the display counters with Cuisine de France food. She would also stock the shelves with cigarettes and sweets.

* According to the respondent the night shift staff did the main baking of the Cuisine de France foods and the claimant only baked that which was required to replenish the display counters.

She would make out orders of cigarettes and sweets for the cash and carry. The claimant would also make out cash and carry orders for other grocery stock items which would be required. The claimant would bring the items from the stores area to stock up the shelves.

◆ Cleaning

The claimant would clean the kitchen and make sure to the baking trays and oven thoroughly. She would also clean shelves, the floor, the toilets and the fridges.

◆ Console Operation

The claimant would operate the console which monitors the petrol pumps. On occasion (if a forecourt attendant was not available) the claimant would assist a customer who was having difficulty filling petrol into the petrol tanks of their car.

◆ Balancing Accounts

At the end of her shift the claimant would count her cash register till. She would balance the money received and the credits she recorded with the printout from the register. She would also deduct her float from the total. The claimant would sign her balancing statement. At various stages during her shift the claimant would have put money from the till into a container which she then put down a chute to go automatically into a safe.

Equality Officer's
Job Description
for the
Named Male Comparator

Name: Mr. Joe Leonard
Job Title: Console Operator and Forecourt Attendant
Company: Malahide Road Service Station
Salary: £4.00 per hour
Hours of Work: 40 hour week over a 7 day week
(Working morning or afternoon shifts)

Duties:

◇ Cash Register Duties

The comparator would take over the cash register from whoever was on and he would have his own float. While on the cash register he would be responsible for all monies taken in and paid out when serving customers.

◇ Magazines and Newspapers

The comparator would remove old magazines or previous day's newspapers from the shelves and replace them with current ones. He would record the number of each magazine or newspaper which was out-of-date on a sheet which he would sign. The comparator would divide them into four bundles by the Company to which they would have to be returned and he would put them into envelopes or boxes depending on the numbers involved. On occasion the comparator would have to ring a Company if a credit was not received or if there was a discrepancy in the number of magazines actually supplied and what should have been supplied.

◇ Stock Shop

The comparator would have to stock the shop with whatever was required on the shelves. He would take this stock from the stores area. He would also pull stock forward on the shelves and put the new stock behind it.

◇ Ordering Stock

The comparator would make out lists of stock which would be required. He would ring in the order and he would then go in his own car to the Cash and Carry to collect the order. At the Cash and Carry the comparator would check the order and on his return from the Cash and Carry he would re-check the order.

◇ Deliveries

The comparator, driving his own car, would deliver bottled gas to customers at their homes.

◇ Cleaning

The comparator would clean the toilets and canteen, when required. He would sweep and mop the shop floor and the floor in the stores area. In the back stores the comparator would segregate stock and put it in its right place.

◇ Console

When serving behind the counter the comparator would monitor the forecourt using the console. He would observe customers getting petrol.

◇ Balancing Accounts

At the end of his shift the comparator would count his cash register till. He would balance the money received and the credits he recorded with the printout from the register. He would also deduct his float from the total. The comparator would sign his balancing statement. At various stages during his shift the comparator would have put money from the till into a container which he then put down a chute to go automatically into a safe.

◇ Forecourt

The comparator would take out coal and brigettes from the shop to the forecourt. He would serve customers with petrol or diseal. On occasion the comparator would check the air pressure in the tyres for a customer. The comparator would clean around the area of the forecourt and he would also clean down the pumps.

◇ Car Wash

If there was a problem with the car wash machine the comparator would attempt to rectify it. The comparator would have the ability to sort out minor faults on the machine. He would have learnt this from the Company who maintains the machine. The comparator would, on occasion, set up the car wash machine at the request of a customer who wanted to wash their car.

◇ Other Duties

The comparator would, on occasion, accompany one of the owners to the Bank. In the absence of the owners the comparator would check in deliveries of petrol and diseal. When the owners would be absent the comparator would be left in charge.

History of the Claim

- 29th April, 1999 - Claim lodged by the Employment Equality Agency with the Equality Service of the Labour Relations Commission.
- 4th May, 1999 - Ms. Sweeney, Head of Equality Service, Labour Relations Commission notified the respondent of the dispute.
- 28th May, 1999 - Ms. Sweeney notified the parties that the claim had been assigned to Ms. Coyle, Equality Officer for investigation.
- 31st May, 1999 - Ms. Coyle wrote to the parties proposing 15th June, 1999 for a preliminary hearing in the claim.
- 9th June, 1999 - Respondent's representative rang Ms. Coyle to say that the preliminary hearing should have taken place within four weeks of the respondent having been notified of the claim in accordance with the Equality Officer's Procedures. As the hearing was not held within these four weeks the respondent considered that this hearing would be null and void. Ms. Coyle agreed to postpone the preliminary hearing to afford the respondent an opportunity to raise this issue directly with the Head of Equality Service as the delay had been with the assignment of the claim for investigation. The respondent's representative wrote to Ms. Sweeney in this regard.
- 16th June, 1999 - Ms. Sweeney wrote to the respondent's representative and informed him that she had passed his letter to Ms. Coyle for her attention as she was the Equality Officer assigned the claim for investigation.
- 17th June, 1999 - Ms. Coyle wrote to the parties notifying them that the preliminary hearing would take place on 29th June, 1999.
- 29th June, 1999 - Preliminary hearing took place.

Equality Officer's Procedures
under the
Anti-Discrimination (Pay) Act, 1974