

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

ANTI-DISCRIMINATION (PAY) ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO: EP 07/2000

Ms. Grogan & Ms. Dowd
(Represented by S.I.P.T.U. & A.T.G.W.U.)

AND

Cadbury Ireland Limited

File No: EP 15/1999

1. DISPUTE

- 1.1** This dispute concerns a claim by the Unions (S.I.P.T.U. and the A.T.G.W.U.), on behalf of Ms. Pamela Grogan and Ms. Grace Dowd, that they are entitled to the same rate of remuneration as that paid by Cadbury Ireland Limited to Mr. David Sugden and Mr. Richard Yates in terms of Section 3(a), Section 3(b) and Section 3(c) of the Anti-Discrimination (Pay) Act, 1974.

2. BACKGROUND

- 2.1** Cadbury Ireland Limited employs about 1,500 people in its two locations, Dublin and Rathmore. There are around 1,000 production employees on the Dublin site of which approximately 235 are employed on the evening shift. The Unions claim that the evening shift employees (29.4 hours) should enjoy the same rate of service pay as applied to 39 hour workers.
- 2.2** In pursuit of this claim the Unions nominated two female claimants and two named male comparators under the provisions of the Anti-Discrimination (Pay) Act, 1974. According to the Unions the claimants are employed on 'like work' with the named male comparators in terms of Section 3(a), Section 3(b) and Section 3(c) of the 1974 Pay Act and they referred a claim to an Equality Officer for investigation and recommendation.
- 2.3** A preliminary hearing took place on 29th July, 1999 at which the Company indicated that 'like work is not in dispute and that it would make arguments in this claim on the basis of Section 2(3) of the Anti-Discrimination (Pay) Act, 1974 on grounds other than sex. It was, therefore, agreed that the Company would make its submission first and the Unions would be given an opportunity to respond.

3. SUMMARY OF COMPANY'S SUBMISSION

3.1 According to the Company the hours of work for the evening shift are 4.20p.m. to 10.10p.m. (Monday to Thursday) and 3.20p.m. to 9.25p.m. (Friday). This gives a working week of 29.40 hours. The evening shift is employed to take over from the day shift employees who finish at 4.30p.m. Monday to Thursday and 3.30p.m. Friday. The breakdown of production employee numbers in terms of sex is as follows:

| | Female | | Male | | TOTAL |
|----------------------------|---------------|----------|---------------|----------|-------|
| | <u>Number</u> | <u>%</u> | <u>Number</u> | <u>%</u> | |
| Evening Shift (29.4 hours) | 226 | 96 | 9 | 4 | 235 |
| Full time (39 hours) | 333 | 44 | 422 | 56 | 755 |

As part of the conditions of employment a service pay arrangement applies for 39 hour employees as follows:

| <u>Service</u> | <u>Per Week</u> |
|----------------|-----------------|
| 5 to 10 years | £ 5.50 |
| 10 to 15 years | £ 7.00 |
| 15 to 20 years | £ 8.70 |
| 20 to 25 years | £10.70 |
| 25 to 30 years | £11.65 |
| 30 years plus | £13.15 |

To qualify for service pay a 39 hour week employee must work at least 15 hours per week. In the case of the evening shift the above weekly rates for 39 hour working are pro-rated to reflect the length of their shift e.g.

$$\mathbf{\pounds 5.50 \times 29.4/39 = \pounds 4.15 \text{ p.w. after 5 years service etc.}}$$

The attendance requirement threshold is adjusted accordingly, e.g.

$$\mathbf{15 \text{ divided by } 39 \times 29.4 = 11.3 \text{ hours p.w.}}$$

In summary an evening shift employee who has between 5 to 10 years service would receive service pay of £4.15 p.w. for attending for 11.3 hours or more in any given week.

- 3.2** The Company says that in 1992 a new Agreement was introduced to allow greater opportunity for employees on the evening shift to apply for jobs in the 39 hour group and vice versa. As part of this arrangement it was agreed that service on the evening shift would be pro-rated for the purpose of applying for jobs in this group and vice versa. It would continue to be fully counted for all other purposes. Service is one of the factors taken into account in assessing suitability for jobs. Where all else is equal service is the deciding factor, therefore an evening shift person could have been at a disadvantage to their full time equivalent where this set of circumstances arose.
- 3.3** The Company says that following the decision in Gerster¹ it consulted the Union representatives about changing the existing method of pro-rating service to bring it into line with the ruling in Gerster. It was agreed to change the Agreement to provide that all service, whether on the evening or 39 hour shift would be taken as full years of service for job filling purposes. Following on this the Unions claimed that the 39 hour service pay rates should apply to the evening shift. The claim was based on the grounds that they are a predominately female group who perform like work with that performed by males in the 39 hour group under the terms of Sections 3(a), 3(b) and 3(c) of the Anti-Discrimination (Pay) Act, 1974. According to the Company the issue of like work is not in dispute.
- 3.4** The Company rejects this claim. It says that the basis of the claim is the judgement in the Gerster ruling. It is the Company's belief that the decision in the European Court of Justice in the Gerster case is only relevant to the non-pay aspect of equality law i.e. treatment of service for promotion purposes and that no change was made to any aspect of pay. In the Gerster case the specific question was asked as to whether the service issue fell within the scope of Article 119 of the EC Treaty and of Council Directive 75/117/EEC (10th February, 1975), both of which specifically deal with equal pay. Article 119 of the Treaty

¹ Gerster v Freistaat Bayern [1997] IRLR 699 ECJ

lays down the principle that men and women should receive equal pay for equal work. The Council Directive 75/117 covers the principle of equal pay which means “for the same work and for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration” (Gerster Judgement). The Company, in its submission, cites the European Court of Justice in the Gerster case as follows:

“A provision of national law which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours does not fall within the scope of Article 119 of the Treaty or of the Council Directive 75/117/EEC of 10th February, 1975 on the approximation of the laws of the Member State relating to the application of the principle of equal pay for men and women.”

According to the Company the ECJ has clearly stated that the basis used to calculate length of service is not a pay issue as it does not fall within the scope of either Article 119 of the Treaty of Rome or the Equal Pay Directive (Council Directive 75/117/EEC).

3.5 The Company contends that the principle of paying service pay in proportion to hours worked is not discriminatory and furthermore that this position has been upheld in decisions of the European Court of Justice. The Company says that this Court has, in a number of cases, stated that the principle of proportionality must apply in the cases when dealing with part-time and full-time workers e.g. *Kowalska v Freie und Hansestadt Hamburg*² and *Stadt Lengerich v Helmig*³. In the *Kowalska* case which was referred under Article 119 of the EC Treaty and the Equality Pay Directive the ECJ stated:

“Where there is indirect discrimination in a provision of a collective agreement, the members of the group which is disadvantaged because of the discrimination must be treated in the same way and have the same system applied to them as the other workers, in proportion to their hours of work.”

² European Court of Justice Case No. C-1/95 [1990] IRLR 447

³ European Court of Justice Case No. C-399/92 [1995] IRLR 216

3.6 The Company says that it acknowledges that the evening group is predominately made up of females but it does not accept that there is indirect discrimination with regard to service pay. There is one other part-time group (the weekend group) who work the weekend shift. This is an occasional shift that is put in place to meet with production requirements. They work a 35.5 hour week. The same pro-rata arrangement in relation to service pay applies to the weekend shift as it does to the evening shift. The weekend shift is predominately a male group. It was first introduced in July, 1988 and at that time 68% operating the weekend shift were male while 32% were female. The periods of weekend working and the male female breakdown were as follows:

| <u>Duration</u> | | <u>Number of Employees</u> | | | | |
|-----------------|----------------|----------------------------|----|---------------|----|--------------|
| <u>From</u> | <u>To</u> | <u>Male</u> | | <u>Female</u> | | <u>Total</u> |
| | | No. | % | No. | % | |
| July, 1988 | December, 1988 | 15 | 68 | 7 | 32 | 22 |
| March, 1989 | December, 1989 | 13 | 65 | 7 | 35 | 20 |
| May, 1990 | November, 1990 | 14 | 64 | 8 | 36 | 22 |
| May, 1993 | October, 1993 | 26 | 65 | 14 | 35 | 40 |
| March, 1994 | October, 1994 | 27 | 56 | 21 | 44 | 48 |
| January, 1995 | May, 1995 | 26 | 62 | 16 | 38 | 42 |
| Sept. 1996 | December, 1996 | 22 | 54 | 19 | 46 | 41 |

In the case of the weekend shift, employees who attend for 13.65 or more hours (viz. 15 divided by 39 x 35.5 hours) receive service pay after 5 years service of £5.01 (viz. £5.50 x 35.5 divided by 39).

3.7 The Company says that the Unions may argue that, in practice, it would be very difficult for an employee on the weekend shift to achieve 5 years service because to date this shift has operated for very short periods of time. However, from the time that the weekend shift working was introduced the Agreements between the Company and the Unions have specified that: *“The above rates are subject to 15 standard hours (pro-rata for part-time employees and weekend shift) attendance and will not increase for hours worked beyond this”*.

3.8 The Company contends that the claimants in this case are seeking more favourable treatment than that applied to full-time workers. If staff on the evening shift were to succeed in their claim it would mean that they would receive the same levels of service pay as 39 hour employees for a minimum weekly attendance of 11.3 hours. It is the Company's view that this would leave the way open for a claim by the 39-hour group who have to attend for a maximum of 15 hours per week for the same levels of service pay. The Company asks the Equality Officer to uphold its position that it is not discriminating against the evening shift on the grounds of sex.

4. SUMMARY OF THE SUBMISSION BY THE UNIONS

4.1 The Union states that, since the evening shift started in Cadbury, it has been predominately staffed by females. The shift was set up to take over from the day shift which currently finishes at 4.30p.m. Monday to Thursday and 3.30p.m. on Friday. These working hours were introduced as part of the 1989 production agreement which reduced the 40 hour week to 29.42 hours per week. Prior to 1992 the evening shift was a standalone shift in respect of matters such as hiring, lay-off, recall or filling of vacancies. In 1992 it was agreed that certain job vacancies would be advertised site wide. This meant that evening shift employees could, for the first time, apply for any such vacancies which arose in the 39 hours group and vice versa. However this agreement provided that service on the evening shift would be pro-rated for the purpose of applying for jobs in the 39 hour group. According to the Unions this practice remained in place until October, 1998 when the way service was calculated was changed from a pro-rata basis to a year for year basis for job applications. The Unions say that they immediately claimed that evening shift employees should be paid the same level of service pay as applies to the 39 hour group. The following are the current levels of service pay:

| Years | 39 hour group £ | 29.4 hour group £ | Difference per week £ |
|--------------|----------------------------|------------------------------|--------------------------------------|
| 5 to 10 | 5.5 | 4.15 | 1.35 |
| 10 to 15 | 7 | 5.28 | 1.72 |
| 15 to 20 | 8.7 | 6.56 | 2.14 |
| 20 to 25 | 10.7 | 8.07 | 2.63 |
| 25 to 30 | 11.65 | 8.78 | 2.87 |
| 30 onwards | 13.15 | 9.91 | 3.24 |

To qualify for service pay a 39 hour employee must work at least 15 hours per week. An evening shift employee must work at least 11.3 hours per week to qualify for service pay.

4.2 The Unions contend that the claimants are entitled to the same rate of remuneration as males who are employed in the same place by the same employer where both are employed on like work. According to the Unions the two named female claimants do perform 'like work' with the two named male comparators. The Unions note that the Company has not disputed that service pay is remuneration under the meaning of the Anti-Discrimination (Pay) Act, 1974. The Unions contend that the Company's service pay agreement is contrary to the 1974 Pay Act in that 96% of the evening shift employees are female and 56% of the 39 hour group are male. Therefore, the service pay agreement contains a provision which indirectly discriminates against the claimants as the differences in rates of remuneration are based on or related to the sex of employees. The Unions argue that, according to settled case law, a measure which, although formulated in neutral terms, worked to the disadvantage of far more women than men, is precluded from the Equality Legislation. According to the Unions a provision which adversely affects the remuneration of the 96% of female evening shift employees has discriminatory effects based on sex.

4.3 It is the view of the Unions that when the Company, following the decision of the ECJ in *Gerster v Freistast Bayern*, changed to year for year service from pro-rated service for job applications for evening shift employees, it was an acceptance by the Company that the predominately (96%) female evening shift would otherwise be discriminated against verses the predominately (56%) male 39 hour group on the basis of sex. The Unions argue that the *Gerster* case does not prohibit the concession of this claim. In fact they say that *Gerster* demonstrated that indirect discrimination of the evening shift did exist from the time of the judgement in the *Gerster* case on 2nd October, 1997 to 16th October, 1998 in respect of service for job applications. The Unions state that it follows that indirect discrimination also exists in respect of service pay. The Unions say that, in this case, an employee from a predominately male 39 hour group with 31 years service who had worked 15 hours in a week would be paid £13.15 service pay for that week. Alternatively a woman from the predominately female shift with 31 years service who has worked 29 hours in the same week would be paid £9.91 service pay for that week. The Unions suggest that this is not proportional but discriminatory.

4.4 The Unions argue that, in a more recent decision of *Hill & Stapleton*⁴, the ECJ has ruled that job-sharers have to be given full credit for incremental purposes for all part-time or job-share service. In this case the ECJ states:

“Article 119 of the E.C. Treaty & Council Directive 75/117 E.E.C. of February 10th, 1995 on the approximation of the laws of member states relating to the application of the principle of equal pay for men and women are to be interpreted as precluding legislation which provides that, where a much higher percentage of female workers than male workers are engaged in job-sharing, job-sharers who convert to full-time employment are given a point on the pay scale applicable to full-time staff which is lower than that which those workers previously occupied on the pay scale applicable to job-sharing staff due to the fact that the employer has applied the criterion of service calculated by the actual length of time worked in a post, unless such legislation can be justified by objective criteria, unrelated to any discrimination on grounds of sex.”

⁴ *Hill and Stapleton*, European Court of Justice, 17th June, 1998

4.5 In regard to the reference by the Company to the weekend group the Unions say that it should be noted that the weekend shift is occasional and has operated on seven occasions over the past eleven years for an average of less than 6 months each time. In order to qualify for service pay, according to the Unions, an employee must have five years service. No current employee on the weekend shift has even one year's service. No employee has ever been paid service pay of any level while working on the weekend shift because, under existing arrangements, it is not possible to do so. The Unions say that if any person on the weekend shift had been paid the service pay then the claimants in this case may also have cited such persons as comparators in an equal pay claim. The Unions refute the Company's assertion that by succeeding in this claim it clears the way for a claim by the 39 hour group. They say that the Company would seem to be suggesting that discrimination against the evening shift is justified solely on the grounds that avoidance of such discrimination would involve increased costs. The Unions believe that this position is in breach of the equal pay legislation and should not form a basis for rejecting this claim.

4.6 According to the Unions the vast majority of evening shift workers in Cadbury are female. They chose these hours to enable them to combine work and family responsibilities. The Union says that Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way for men, a principle which is widely regarded in the legal systems of the member states as being the natural corollary of the equality between men and women and which is recognised by community law (Hill & Stapleton Judgement). The Unions state that the onus is on the Company to establish that the present system of service pay is justified by objective factors unrelated to any discrimination on grounds of sex. The Unions strongly urge the Equality Officer to find that the Company has not done so and, accordingly, to find for the claimants.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In making my recommendation in this case, I have taken into account all the submissions (both written and oral) made to me by the parties. As 'like work' was not in dispute in this claim the parties made their arguments on the basis of Section 2(3) of the Anti-Discrimination (Pay) Act, 1974 on grounds other than sex. A joint hearing took place on 8th February, 2000.

5.2 At the hearing of this claim the Company, in response to the submission of the Unions, noted the distinction between part-time working and job-sharing as set out in the Opinion of the Advocate General in which he stated:

“... the particular character of job-sharing distinguishes it from part-time work: job-sharing, they say, is the sharing of work and the related responsibilities between two employees. The difference in kind between job-sharing and part-time work provides justification for taking account of job-sharing for the purposes of calculating length of service in accordance with the rules as apply to full-time work”.

The Unions referred to the European Court of Justice ruling in the Bilka case⁵ in which it was held that exclusion from an occupational pension scheme was discriminatory where it affected more women than men. The Company, in its defence, again mentioned the Kowalska case (see paragraph 3.5) which concerned the exclusion of females from severance grants. The Court held that females should receive severance grants and should receive them in proportion to the number of hours worked. According to the Company the payment of service pay is related to the number of hours work and, therefore, is not discriminatory.

5.3 In short the Unions' claim that the claimants who work on the night shift working 29.4 hours per week are entitled to equal service pay with the named male comparators who operate the day shift working 39 hours per week. Service pay is based on years of service and the number of hours worked per week as detailed in paragraphs 3.1 and 4.1 above. According to the Unions the evening shift staff are predominately female whereas the day shift staff are predominately male. On the basis of the statistics presented by the Company

⁵ Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 ECJ

and accepted by the Union 96% of females work the evening shift while 56% of males work the day shift. Having considered the claim made by the Unions and the evidence available to me I am satisfied that this is a case of indirect discrimination.

5.4 I consider that the first test to be established is that the evening shift is predominately female and the day shift predominately male. The European Court of Justice in the case of Enderby⁶ held:

“Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominately by men, Article 119 of the Treaty requires the employer to show that the difference is based on objective justification unrelated to any discrimination on grounds of sex”.

The Labour Court, in the case of Irish Aviation Authority and Irish Municipal, Public and Civil Trade Union⁷, considered the issue of gender imbalance amongst those carrying out the two jobs. It accepts that the Court of Justice considered that the degree of gender imbalance in both jobs must be particularly marked before a prima-facie case of discrimination can arise. The Court had regard to the opinion of the Advocate General Leger on the point of the degree of gender imbalance in the case of Nolte v Landesversicherungsamt Hannover⁸. In that opinion it was suggested that a figure of 60% imbalance, per se, would probably be quite insufficient, whereas based on Rinner-Kuhn⁹, an imbalance of 89% would be sufficient.

5.5 In this case both the Union and the Company agree that 226 females (96%) and 9 males (4%) work the evening shift. I am satisfied that these statistics constitute an evening shift where the work is performed almost exclusively by females. In accordance with the European Court of Justice ruling in the Enderby case the day shift must be carried out predominately by men. On the day shift there are 333 females and 422 males employed. This translates into 56% males and 44% females working that shift. Applying the rules of

⁶ Enderby v Frenchay Health Authority [1991] C-127/92 (IRLR 43)

⁷ Labour Court Determination No. DEP 993

⁸ C-317/93 [1995] ECR I-4625 (Opinion delivered on 31st May, 1995)

⁹ Rinner-Kuhn v Fww Spezial-Gebaudereinigung GmbH [1989] IRLR 493 ECJ

thumb set out in the opinion in Nolte and the ECJ ruling in Rinner-kuhn (see paragraph 5.3 above) I am satisfied that the day shift is not staffed by men predominately. Therefore, whilst the females are in an almost exclusively female group, the comparators are not in a predominately male group hence the gender imbalance is not sufficient to establish a prima-facie case of indirect discrimination. It is only if such a prima-facie case is made that the Company is required to show objectively justifiable grounds for the difference in pay. In these circumstances the case made by the Unions fails.

6. RECOMMENDATION

- 6.1** In view of the foregoing, I find that Ms. Grace Dowd and Ms. Pamela Grogan do not have any entitlement to the same rate of remuneration in terms of service pay as that paid by Cadbury Ireland Limited to each of the two named male comparators.

Gerardine Coyle
Equality Officer

2nd March, 2000