

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

ANTI-DISCRIMINATION {PAY} ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO: EP 08/2000

PARTIES

Ms Ann Ford & Ms Mary Clancy  
{Represented by MANDATE}

and

Roches Stores  
{Represented by I.B.E.C.}

File No. EP 16/99

# 1

## **Dispute**

This dispute concerns a claim by the MANDATE on behalf of Ms Ann Ford and Ms Mary Clancy 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.

## **Background**

- 2.1 The claimants and the comparator involved in this claim are employed by Roches Stores, in its branch at Galway. The claimants are employed as Cleaners and the comparator is described by the Company as a General Distribution Worker. The claimants are on the hourly rate of pay of £4.38 and the comparator is the hourly rate of £6.02.
- 2.2 In June, 1999 the Union served a claim in respect of the claimants and nominated Mr T O'Cearbhalan as a comparator. The Equality Officer held a preliminary joint hearing with the parties. Subsequent to that hearing he received written submissions from both parties to the case. On 29 November, 1999 the Equality Officer carried out inspections of the work of the claimants and the comparator. The Equality Officer held a final joint hearing with the parties on 25 February, 2000.

## **3 Summary of the Case**

- 3.1 The Union contends that the claimants do "like work" within the meaning of section 3(a),(b) and (c) with the named comparator and they are therefore entitled to receive the same rate of remuneration. In support

of its case of "like work" the Union points to its submission, Appendix 1.

**3.2** The Company rejects that "like work" as defined by Section 3 of the Anti-Discrimination (Pay) Act, 1974 exists between the claimants and the named comparator. The Company's descriptions of the work of the claimants and the named comparator are at Appendices 2 and 3 respectively. The respondent's views on "like work" are at Appendix 4.

**3.3** The respondent submits, "without prejudice" to its arguments on like work that there are "grounds other than sex" to justify the higher hourly rate of the named comparator. The Company's main argument here is that when it was determined by the comparator's immediate superiors that he was not capable of doing certain aspects of the job the Company did not terminate his employment or reduce his rate of pay. The Company's arguments on "grounds other than sex" are at Appendix 5.

#### **4 The Conclusions of the Equality Officer**

**4.1** The Act 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 neither of the claimants perform "like work" with the comparator. The Company also argues "without prejudice" to its case on "like work" that there are legitimate "grounds other

than sex" to justify the higher rate of remuneration paid to the comparator.

**4.2** 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 claimants and the comparator.

**4.3** In order to address the question of "like work" I carried out inspections of the work of the complainants and the comparator. Having regard to the nature of the work involved it was not practical to assess the jobs purely by observation. Accordingly, I relied to an extent on the claimants 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 the jobholders, accompanied by the claimants' Union representative and the Company's representatives, to their different work locations where they each outlined their various duties.

**4.4** I am satisfied from my inspections of the work of the comparator and the work of the claimants, that the Union's descriptions contained in Appendix 1 broadly reflect the jobs of the employees concerned with this claim. I am also satisfied that the description (Appendix 2) submitted by the Company in respect of the work of the claimants fairly reflects their work.

Having regard to the information obtained from Mr O'Cearbhalan and having accompanied him to his various work areas, I consider that the Company's description of his work warrants comment.

4.5 In the course of the interview the comparator described himself as cleaner. He stated that he had been doing the job for some 20 years and that he considered himself an indoor worker. I recognise that the comparator recalled he was occasionally requested to carry out some non cleaning tasks, as contained in the Company's description of his work e.g. collection of trolleys, transport of goods from stores to shop floor and move pallets etc. at the bay. However, I am not satisfied that these tasks were carried out with such frequency as to constitute part of his normal work. It was clear, from the information supplied by the comparator and my visit to his work areas, that the vast majority of the duties and tasks contained in the Company's description of his work are not features of his actual work.

4.6 I do not propose to go through each of 10 bulletin points contained in the Company's description of the comparator's work. I note that the Company in its descriptions of his work and that of the complainants contains the heading responsibility. The responsibility shown in respect of the comparator is *"to assist in the efficient running of the stockrooms and dispatch areas and heavy duty cleaning"*. The claimants' responsibilities are shown as *"To carry out light cleaning duties in the store ensuring the store remains clean after the main cleaning done by the contract cleaners."* Having regard to views I have already expressed in relation to the comparator's actual work I am satisfied the "responsibility" attributed by the Company to him is more accurately

described by the "responsibility" it attributes to the claimants.

**4.7** I note that while the Union, at the final hearing, took issue with the Company's description of the comparator's work, the Company took no issue with the union's single description of the work of the claimants and the comparator. I further note that the Union's assertion that there is staff employed to do such tasks as the collection of trolleys and sweeping the yard was not contradicted by the respondent. It may be useful here to state that at the final hearing I ascertained from the Company that nine other employees are on the General Distribution Workers rate; four work in the stockroom, 2 non food stockroom, two on Trolleys and one in the parcel depot (first floor).

**4.8** I note that the Company maintains that the comparator was recruited as a General Distribution worker. I consider that the passage of time prevents me from making any comment as the actual work performed by the comparator on recruitment. However, the question of whether or not either or both the claimants perform "like work" with the comparator requires me to look at the actual work that constitutes their normal work. Having regard to the view I have expressed in paragraphs 4.5 to 4.7, it is my opinion, that the job description submitted by the Company in respect of the work of Mr Cearbhalan does not represent the actual work he carries out.

**4.9** The Union's claim in respect of like work lies under Section 3(a),(b) and (c) of the Act. I note that the claimants here are designated as Cleaners and that they are on the same hourly rate. I further note that the

Company accepts that they do like work with each other. I am satisfied with the benefit of my work inspections that they perform like work with each other in terms of section 3(b) of the Act. Accordingly for the purposes of my comparisons it is sufficient firstly to compare the work of one of the claimants with the work of the comparator. I selected the work performed by Ms Ford for comparison purposes.

**4.10** In order to address the question of whether or not the work of Ms Ford and that of the comparator is like work within the meaning of Section 3 of the Act, I considered, in the first instance, whether the work performed by Ms Ford is the same work to that of the comparators in terms of Section 3(a) of the Act. Section 3(a) 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"*

**4.11** I interpret Section 3(a) to mean that like work is performed where two persons do exactly the same work (under the same or similar conditions) or there is full interchangeability between them.

I note that that Ms Ford and the comparator both carry out cleaning and tidying duties, however, the claimants work almost exclusively indoors, while the comparator's work occasionally takes him outdoors. I further note that the comparator once a week uses a ladder to clean the chrome metal on the outside

windows/doors of the store. I am satisfied that these differences are such that I could not hold that the claimants perform like work with the comparator under Section 3(a) of the Act.

**4.12** As I found that the comparator and the claimants do not perform like work within the meaning of Section 3(a), I then considered whether or not the work performed by the claimants is of a similar nature to that performed by the comparator in terms of Section 3(b) of the Act.

Section 3(b) of the 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 infrequently or are of small importance in relation to the work as a whole,"*

**4.13** As already stated it is my opinion that the claimants and the comparator in the present case are employed to carry out light cleaning duties. Having compared the work of Ms Ford with that of the comparator, it is my opinion, that *"the work performed by one is of a similar nature to that performed by the other"* in that the main work of both is made of such common duties as:

pick up litter

empty refuse bins/bags

replace refuse bags

place refuse bags in skip

sweep floors

mop floors

use equipment

keep toilets clean/tidy

replace soap/toilet rolls

sign off time sheet

**4.14** Section 3(b) permits differences between the work provided the differences occur "*infrequently or are of small importance in relation to the work as a whole*". I note, that there are differences in the work of the complainant and the comparator here. The main differences I found in their work are that the comparator carries out two duties outdoors i.e cleaning metal surround on the stores doors/windows, with the use of a ladder and washing bins with the use of a power hose. The comparator informed me that he carries out these tasks once a week and it takes him approximately one hour in total to do so. The claimant cleans all the outer glass etc on display cabinets at the supermarket counters. She uses a "step up" to clean mirrors at the fresh bread display.

**4.15** The question to be addressed and answered now, under Section 3(b), is whether or not the differences in the work of Ms Ford and that of Mr O'Cearbhalan are "*of small importance in relation to the work as a whole*". In Kavanagh and Toyota Motor Distributors Ltd (EP17/85,

DEP1/86) the Labour Court has held that this question shall be decided by reference to whether the differences were sufficiently important to justify the payment of a higher rate in respect of one of the jobs concerned. Applying this test to the comparison here, it is my opinion, having regard to the nature of the claimant's and the comparator's work as Cleaners, the duties common to them, as highlighted at 4.13 and the differences in their work as shown at 4.14, that the differences are of small importance to the work as a whole. Accordingly I hold that Ms Ford performs similar work to that of Mr O'Cearbhalan, within the meaning of Section 3(b) of the Act. As the claimants perform "like work" with each other it must follow that Ms Clancy also performs "like work" with the comparator.

**4.16** As I have found that Ms Ford performs "like work" with the comparator, under Section 3(b), there is no need for me to consider whether or not she performs like work with him under the terms of Section 3(c) of the Act.

**4.17** As I have found that the claimants do perform "like work" with the named comparator I will now consider whether, as maintained by the respondent Company, there are grounds other than sex justifying the difference in pay rates between the claimants and this 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".

**4.18** 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. In regard to its case here the Company submits that prior to 1993 there was no assessment of staff and that once an individual joined the Company that individual was not dismissed unless for gross misconduct. When it was determined by the immediate superiors of Mr O'Cearbhalan that he would not be capable of doing certain aspects of the job, the Company, in accordance with its policy, did not terminate his employment or reduce his pay. The respondent maintains that *"there are numerous examples of females employed by Roches Stores who are not able to perform the full range of the job yet their employment was not terminated and there was no reduction in their hourly pay."* The Company states that no discrimination on grounds of gender is applied when implementing this policy. The employer's full written submission on this issue is at Appendix 5.

**4.19** It seems to me that the Company adopts a somewhat contradictory position in relation to the work of the comparator. It uses the description of a General Distribution Worker, on the one hand, to justify its claim that like work does not exist between the comparator and the complainants and on the other hand its case on "grounds other than sex" is based the contention that the comparator is not capable of all the duties proper to that job.

**4.20** In relation to the operation of the Company's policy, in regard to pre 1993 employees, I ascertained in the

course of the hearing that the three employees in examples given by the Company are employed in the same store and that they continued to carry out work within their respective grades. I note that two of the employees are in the grade of Catering Assistant and the other is a Sales Assistant. Having regard to all the evidence available to me and my finding that the actual work performed by the complainant is not proper to the grade of General Distribution Worker I am satisfied that his position is not similar to the positions pertaining in the examples furnished by the Company.

**4.21** Having regard to the views I have expressed in paragraphs 4.19 and 4.20 I am satisfied that the defence put forward by the Company under Section 2(3) does not amount to grounds other than sex justifying a pay differential between the complainants and the comparator in the present case. I therefore hold that Ms Ford and Ms Clancy have entitlements to equal pay with Mr O' Cearbhalan.

**4.22** In summary I have found that Ms Ford and Ms Clancy do "like work" with the named comparator Mr O'Cearbhalan. I have further found that the employer has not discharged the onus on it that there are "grounds other than sex" to justify the pay differential between the claimants and Mr O'Cearbhalan. Accordingly I have found that Ms Ford and Ms Clancy have entitlements to equal pay with Mr O'Cearbhalan.

## **5. Recommendation**

**5.1** In view of my conclusions that Ms Ann Ford and Ms Mary Clancy perform like work with the work performed by the named comparator Mr O'Cearbhalan, in terms of Section 3(b) of the Anti-Discrimination Act, 1974, and as I have also found that there are no "grounds other than sex" to justify the difference in their remuneration I find that they are entitled to the same rate of remuneration as that paid to him.

The claim for equal pay were received on the 18th June, 1999. Section 8(5) of the Act provides for the payment of arrears of remuneration up to a maximum of three years from the date on which the relevant dispute was referred. I therefore recommend that the appropriate retrospection be paid to Ms Ford and Ms Clancy.

Jim Clerkin,  
Equality Officer,  
23 March, 2000.