

EMPLOYMENT EQUALITY ACT,1977
EQUALITY OFFICER'S RECOMMENDATION NO:EE 7/1999

PARTIES

Ms Janice Thompson
(Represented by MANDATE)

AND

Tesco Ireland
(Represented by I.B.E.C)

File No: EE45/1996

1. DISPUTE

- 1.1 The dispute concerns a claim by Ms Janice Thompson that on 7th August, 1996 Tesco Ireland (then trading as Power Supermarkets Ltd) discriminated against her within the meaning of Section 2(a), 2(b) and 2(c) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act as a result of its failure to accommodate Ms Thompson in her request to discontinue late night working on Thursdays.

2. BACKGROUND

- 2.1 The claimant is employed by Tesco Ireland as a part-time Sales Assistant in a Dublin supermarket. The claimant's normal working hours are 9am to 9pm on Thursdays and 9am to 6pm on Fridays and Saturdays. The claimant states that in July, 1996 she requested that she be allowed to finish work at 6pm on Thursdays in order to facilitate child minding arrangements. This request was refused by the branch management.
- 2.2 The claimant states that a male employee at the same supermarket branch was offered £1,000 to drop a late night whereas she was refused permission to drop a late night at no cost to the company. The claimant states that this action on the part of the employer constitutes discrimination against her in terms of Section 2(a) of the 1977 Act and contrary to Section 3 of that Act.
- 2.3 The claimant, who is single, also claims that similar requests from a number of named married female colleagues in the same branch were allowed and that as a single female employee she was discriminated against in terms of Section 2(b) of the 1977 Act and

contrary to Section 3 of that Act.

- 2.4 The claimant, represented by MANDATE, referred a claim to the Labour Court on 14th August, 1996. The claim was subsequently referred by the Labour Court to an Equality Officer for investigation and recommendation. Submissions were received by the Equality Officer from both parties to the claim and a joint hearing was held on 9th February, 1999.

3. SUMMARY OF THE UNION'S CASE

- 3.1 MANDATE alleges that the Company discriminated against the claimant in terms of Section 2(a), 2(b) and 2(c) of the Employment Equality Act, 1977.

Section 2(a) states that discrimination shall be taken to occur

‘where by reason of his sex a person is treated less favourably than a person of the other sex,’

Section 2(b) states that discrimination shall be taken to occur

‘where by because of his marital status a person is treated less favourably than a person of the same sex,’

Section 2(c) states that discrimination shall be taken to occur

‘where because of his sex or marital status a person is obliged to comply with a requirement, relating to employment... which is not an essential requirement for such employment... and in respect of which the proportion

*of persons of ... a different marital status but of the same sex able to comply
is substantially higher'*

3.2 In support of its claim that the claimant was discriminated against on grounds of her gender the Union state that the company made a payment of £1,000 to a named male employee so that he would drop a late night while refusing to allow her to drop a late night despite offering to do so without payment.

3.3 The company in its submission held that it was not possible to release the claimant early on Thursdays due to the need to maintain staffing levels. The Union states however that the claimant had arranged with a named colleague to cover for her on Thursdays after 6pm if she were allowed to finish early. The Union further states that the claimant's immediate supervisor had no objection to her request.

3.4 In support of its claim that the claimant was discriminated against on grounds of her marital status the Union cites seven examples in which six named female employees and one unnamed married female employee were allowed to reduce their working hours as follows:

Employee A in April, 1996 requested and was granted permission to give up two late nights when she became pregnant

Employee B (unnamed) in November, 1996 requested and was allowed time off to mind her children so that her husband could go to the pub

Employee C in early 1996 was allowed to reduce her working week

Employee D in early 1996 sought and was granted a reduction in her working hours

Employees E and F similar to Employee D above (no dates given)

Employee G requested and was granted release from late night duty on a number of individual nights (no dates given).

- 3.5 The claimant gave no evidence to support the claim that she was required to comply with an inessential requirement in terms of Section 2(c) the 1977 Act.

4. SUMMARY OF I.B.E.C.'S CASE

- 4.1 I.B.E.C. rejects the claimant's allegation that she was discriminated against in terms of the 1977 Act. In relation to the Union's claim that the company discriminated against the claimant on grounds of her gender when it refused her request to finish at 6pm on Thursdays, I.B.E.C. state that the claimant's request was given detailed consideration by the Store Manager and Area Manager but could not be granted due to staffing levels and trading requirements.

- 4.2 The company rejects the claimant's claim that another named worker was available to cover for her stating that this other worker was employed as a packer and regularly worked Thursday nights. She herself therefore would have to be replaced if she left her post. At the hearing the claimant rejected the company's description of this other employee as 'a packer' and argued that all of the staff in this area were employed as 'sales assistants' and as such were trained to carry out the various duties of the grade and were interchangeable with one another. The worker in question was therefore trained to operate a check-out. The company insisted that the worker was employed as a packer.

4.3 In relation to the Union's claim that the company discriminated against the claimant on grounds of her marital status when it facilitated seven married female workers who requested shorter working hours or time off, I.B.E.C.'s response in relation to each of the examples given is as follows:

Employee A requested and was granted permission to finish work at 7.00 p.m. on two nights per week in the two months prior to going on maternity leave. She resumed normal working, including 9.00 p.m. finishes on late nights, on her return from maternity leave.

Employee B (unnamed by claimant but one and the same employee as Employee A according to respondent) did not request time off so that her husband could go to a pub but was in fact sick and a copy of a medical certificate for the day in question is supplied. I.B.E.C. also state that the day in question post dated the date of the claim and is therefore irrelevant. At the hearing the claimant's side rejected this response and stated that the unnamed employee was in fact the employee referred to as Employee G in paragraph 3.4 above.

Employee C was allowed to finish work at 4.00 p.m on a month by month basis.

Employee D did not seek a reduction in her working hours in 1996.

Employee E was allowed a reduction in her working week over 5 years ago on the proviso that the Manager would choose her hours and days of work, which she agreed to.

Employee F - respondent stated in their submission that this employee did not exist at the branch. The company clarified at the hearing that this employee no longer worked at the branch but had done so some years prior to the date of the alleged discrimination.

Employee G was facilitated on a number of different occasions when she requested a late night off. It is normal company practice to allow employees to finish early for example to attend a party or wedding reception.

The respondents contend that the marital status of the claimant had no bearing on the company's decision concerning a change in her working hours.

- 4.4 At the hearing the company named two female members of staff which it states were single at the time and whose requests to vary their working hours for personal reasons were accommodated. Details were provided to the Equality Officer in writing subsequent to the hearing and copied to the Union. The first instance is that of a single female staff member who, on return from maternity leave, was allowed to move from her post at the check-outs to a post in the delicatessen department so that she could be accommodated with hours that personally suited her. The company state that the new work arrangements could not have been accommodated in the check-out area. In a written response, the Union stated that the employee in question had requested a transfer to the delicatessen department in 1994 and was working there before she went on maternity leave. The second instance is that of a single female member of the check-out staff who was allowed a later starting time so that she could take her child to school. The company state that it was possible to accommodate this request because this was a quiet period. In their written response the Union furnished a statement from this employee (who has since left the company) in which she states that she was married in 1995 and was not single at the time of the complaint and that furthermore her working hours were never changed by the company at her request. The company state that in the case of Thursday nights, four staff members are rostered for check-out duty and this is the minimum acceptable staffing level at that time. The company state that it would not therefore have been possible to release the claimant early on this night.

4.5 In relation to the Union's claim that the company discriminated against the claimant on grounds of her gender, I.B.E.C. state that in the case of the male worker who received a £1,000 payment to drop late nights, his contract of employment provided for an overtime payment in respect of late nights worked whereas in the case of a flexi-worker late nights are worked at the flat rate. In order to reduce costs the company has tried to buy-out the overtime entitlement in such cases and have late nights performed by flexi-workers. The claimant herself was originally a full-time employee and requested part-time working. As part of the arrangement in facilitating her request it was agreed that the claimant would work late nights at the flat rate. The company state that there was no question of gender discrimination.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 The matter for consideration is whether or not the company discriminated against the claimant

- on the basis of her sex
- on the basis of her marital status
- by the imposition of an inessential discriminatory requirement

in terms of Section 2 of the 1977 Act and contrary to the provisions of Section 3 of that Act. In making my recommendation in this case I have taken into account all of the evidence, both written and oral, made to me by the parties to the case.

5.2 I will firstly address the question of alleged discrimination on grounds of the claimant's gender. The claimant's case here rests on the argument that a male employee was offered a payment of £1,000 in order that he would drop his entitlement to overtime rates

in respect of late night duty while the claimant was refused permission to drop a late night without payment. The respondent has stated that the male employee was a full time employee and that his contract of employment provided for overtime payment in respect of late night duty. The company, as a cost saving measure, offered the employee a compensatory payment to drop his entitlement to overtime rates for late night working. In the event, the male employee turned down the offer. The claimant is a part-time or flexi worker whose terms of employment provide for late night working at flat rate. The claimant voluntarily changed from being a full time worker to being a flexi-worker. I find therefore that the claim of discrimination on grounds of the claimant's gender is not supported by the evidence available to me.

- 5.3 The claimant's contention that she was discriminated against on grounds of her marital status is based on the argument that several married female colleagues were allowed to vary their hours for personal reasons while she herself, a single woman, was refused permission to do so. The claimant cites seven such instances as outlined in paragraph 3.4 above. The respondents have given a detailed response as outlined in paragraph 4.3 above. The company state that one of the instances post-date the referral of the claim to the Labour Court. The company has cited two cases where single female members of staff were allowed to vary their hours for personal reasons although this evidence has been contradicted by the Union. The company has also cited operational reasons as to why the claimant could not have been permitted to finish work early on Thursdays and on balance I must accept that those operational reasons are valid. The claimant stated at the hearing that her immediate supervisor had no objection to her finishing work early on Thursdays however the company denied that this was the case. The claimant also stated

at the hearing that a letter was sent from the Regional Manager to the Branch Manager instructing him that the claimant was not to be accommodated. The company deny that any such letter was sent.

5.4 From the evidence referred to above and from clarifications received at the joint hearing I did not find that the marital status of the claimant or of the other employees referred to was a consideration when their requests to vary their working hours were being considered. I find therefore that there is no evidence to support the claim that Ms Thompson was discriminated against on grounds of her marital status when the company refused her request to finish work at 6.00 p.m. on Thursdays.

5.5 In relation to the claim that Ms Thompson was required to comply with which is not an essential requirement and in respect of which the proportion of persons of the other sex or (as the case may be) of a different marital status but of the same sex able to comply is substantially higher, no evidence was presented in support of this claim and I find therefore that no such discrimination took place.

6. RECOMMENDATION

6.1 On the basis of the foregoing, I find that Tesco Ireland did not discriminate against Ms Thompson in terms of Section 2 of the Employment Equality Act, 1997 and in

contravention of the provisions of Section 3 of that Act.

Raymund Walsh

Equality Officer

20 May, 1999