

1. DISPUTE

- 1.1** This dispute concerns a claim by S.I.P.T.U. on behalf of Ms. Virginia Synnott that she was discriminated against by the Irish Dairy Board when it offset exclusively maternity related illness against normal sick leave entitlements. The claim was referred under Section 3(c) of the Anti-Discrimination (Pay) Act, 1974 and under Section 2(a) of the Employment Equality Act, 1977.

2. BACKGROUND

- 2.1** The Dairy Produce Marketing Act, 1961 establishes the Irish Dairy Board which is the major international exporter of Irish Dairy Products.
- 2.2** The claimant suffered a physical injury at the birth of her child in November, 1994. As a result she had a prolonged sick leave absence from work. The Board has treated this absence from work as sick leave in accordance with its normal sick leave arrangements for all staff. The claimant considers that, because her sick leave resulted from the birth of her child, she should not be subjected to the provisions of the normal sick leave scheme.
- 2.3** Consequently the Union, on behalf of the claimant, submitted a claim under the Anti-Discrimination (Pay) Act, 1974 on the basis that the claimant's sick leave absence from work should not be considered to be the same as normal sick leave and ultimately resulting in a reduction in the claimant's pay. It referred this claim to an Equality Officer for investigation and recommendation. The Union further submits that the Board directly discriminated against the claimant on the

basis of her sex under the Employment Equality Act, 1977 by subjecting her to the same sick leave entitlements as all other staff even though her sick leave specifically related to an injury suffered at childbirth.

3. SUMMARY OF THE UNION'S CASE

3.1 According to the Union the sick leave arrangements in the Board (attached as Appendix A) provide for up to one year's paid leave in any four year period i.e. six months on full pay and six months on half pay, less the appropriate social welfare. The Union says that the Board offset against her sick leave entitlement a period of absence from work following her maternity leave and which arose directly from an injury sustained during childbirth. The claimant went on maternity leave in December, 1994 and returned to work after her maternity related illness in October, 1995.

3.2 The Union contends that, as the claimant's sick leave arose directly from giving birth, it is an exclusively female issue and, therefore, could not occur to Mr. Dermot Tobin, the named comparator. Consequently it impinges on her normal sick leave entitlement and thus it gives her a lesser sick leave entitlement than the male comparator based solely on gender.

Case under the Anti-Discrimination (Pay) Act, 1974

3.3 The Union says that paid sick leave is part of the salary package and, therefore, any discrimination under this heading is in breach of Section 2(1) of the Act. The Union notes that the respondent accepts that both the claimant and the comparator meet the requirements of Section 3(c) of the Act.

- 3.4** The Union claims that Section 4 of the 1974 Act confirms that it is implied in the claimant's terms of employment that she would not be treated less fairly in terms of Section 2(1) even if the specific provision is not made for the exclusively maternity related illness, i.e. it is implied that such a provision is made and that no less favourable sick pay arrangements would be available for maternity related illness than is available for both the claimant and the comparator for "ordinary" illness. The Union contends that if the claimant is to be treated equally with the comparator under Section 2(1) then both must have the same sick leave arrangements for ordinary illnesses, but the claimant is entitled to a separate, but identical arrangement for maternity related illness.
- 3.5** The Union states that Section 5 of the Act obliges the employer to amend the sick pay arrangements to make provision for maternity related illness and/or to alternatively ensure that the claimant does not suffer any diminution of her normal sick leave entitlements because of the offsetting of sick leave that arose solely from maternity related illness which is gender related.
- 3.6** The Union says that both the claimant and the comparator are equally exposed to normal illnesses and are duly covered by the same sick pay arrangements. The Union, however, contends that the claimant, as a woman, is exposed to the potential of maternity related illness and to offset same against her normal sick leave arrangements places her at a disadvantage vis-a-vis the comparator. To effectively implement the requirement of Section 2(1) and, having regard to the provisions of Section 4, the Union says it is obvious that a separate but identical sick pay arrangement should be available

to the claimant for maternity related illness. According to the Union the absence of such an arrangement is a breach of Section 2(1) of the 1974 Act.

- 3.7 The Union asks the Equality Officer to find that the present sick pay arrangements are discriminatory against the claimant and that the Board should not offset maternity related illnesses against ordinary sick leave entitlements and it should provide a separate parallel sick leave arrangement (identical to that for ordinary illnesses) for those members who are likely to suffer from maternity related illnesses.

Case under the Employment Equality Act, 1977

- 3.8 The Union contends that the Board has failed to meet the requirements of Section 2(a) of the 1977 Act and that the claimant was treated less favourably by the offsetting of maternity related illness against her normal sick leave entitlement. According to the Union this inevitably treats the claimant less favourably than any male employee who cannot be subject to any such offsetting.
- 3.9 The Union states that Section 3(1) of the 1977 Act makes it illegal to discriminate in the matter of access to conditions of employment (i.e. sick leave in this case). According to the Union the claimant was entitled to access to the full sick leave entitlement for normal illnesses similar to her male colleagues and should not have had the criteria for such qualification reduced by the offsetting of maternity related sick leave.
- 3.10 The Union says that Section 3(2) of the 1977 Act makes it illegal to have rules that discriminate and/or

contravene Section 2(c). In this regard the Board's sick leave rules do discriminate against the claimant as an exclusively female issue of maternity related illness is being offset against normal sick leave entitlements, thereby reducing the claimant's sick leave cover for ordinary illnesses. The Union claims that the operation of a practice (paid sick leave in this case) which does not separately cater for ordinary illnesses to both sexes and a similar arrangement for maternity related illnesses clearly breaches this Section of the Act.

3.11 The Union states that Section 3(4) of the 1977 Act makes it illegal not to offer the same conditions of employment, etc. where the circumstances in which both such persons would be employed are not materially different.

3.12 The Union states that, under Section 4 of the 1977 Act, there is an implied equality clause where one is not provided. The sick leave arrangements in order to comply with this requirement must cover all ordinary illnesses in a scheme common to both male and female employees and also provide a separate but identical cover for maternity related illnesses. The Union considers that this view is further endorsed by Section 4(2) of the Act.

3.13 The Union states that Section 10(1) of the 1977 Act clearly states that any provision in a collective agreement or employment regulation that discriminates makes the total provision null and void. The Union says that the sick pay regulations do quite clearly discriminate and consequently the entire regulation on sick pay must be re-written to eliminate the element of discrimination.

3.14 The Union states that Section 16 of the 1977 Act clearly provides for the eventuality of separate provisions for issues connected with childbirth. It argues that the claimant's illness arose directly from childbirth and that the Board has failed in its obligations to provide her with separate cover, on par with ordinary sick pay cover.

3.15 The Union asks the Equality Officer to find that the sick pay regulations of the Board do discriminate and, therefore, the Board should not offset maternity related sick leave against ordinary sick leave entitlements. Furthermore it asks that the Board provide those suffering from maternity related illnesses with a parallel and identical sick leave arrangement as that provided to those absent through ordinary illnesses.

4. SUMMARY OF THE BOARD'S CASE

4.1 The Irish Dairy Board is the major international exporter of Irish Dairy products. It was established as a semi-state company under the Dairy Produce Marketing Act, 1961 and it functioned as such until 1973 when Ireland joined the European Community at which stage the organisation was transformed into a farmers' co-operative to conform with EC competition rules. The principle objective of the Board is marketing the produce of its members (who consist of manufacturing co-operatives and dairy companies) in order to generate the maximum return for primary producers and enhance the image of Irish dairy products abroad. In the course of its development, the Board has over the years acquired a number of subsidiary companies in the UK, mainland Europe and the USA.

4.2 The Board has a total workforce in Ireland of 166

employees, 146 of which are based in head office in Dublin, 20 in the Quality Assurance Laboratory and Distribution Company in Co. Cork and 8 based in the UK, Belgium, Germany, Austria and the USA. The current group turnover is approximately £1.3b of which some 50% is in the core business of Irish dairy products.

- 4.3** According to the Board the claimant is employed as a Payables Clerk in the Accounts Department. The Board says that the claimant suffered a physical injury at the birth of her child in November, 1994. Her absenteeism level after the end of her maternity leave (maternity leave ceased on 2nd April, 1995) was as follows:

25th April - 11th October, 1995	-	121 days	
18th and 20th December, 1995	-	1« days	
20th - 23rd February, 1996	-	4 days	
9th - 12th April, 1996	-	4 days	
8th - 10th May, 1996	-		3
days			
14th June, 1996	-	1 day	
TOTAL	-	134«	
days			

- 4.4** The Board says that two of the rules of its sick pay scheme state:

- (1) "After twelve months service payment at full rate, less Social Welfare Allowance where applicable, may be allowed up to a maximum of 6 months in any period of twelve consecutive months. On the expiry of six months sick leave on full pay, a further period not exceeding six months at two-thirds pay may be allowed provided that the total allowance does not exceed 365 days in any period of four consecutive years, and
- (2) If on any date a staff member has obtained payment for sick absence for 365 days during the period of the previous four years, no

further payment will be allowed".

The Board says that the claimant is alleging that because her absences have been related to pregnancy and confinement that such absences should be excluded for the purposes of calculating the length of time for which one is entitled to full pay whilst absent from work due to illness.

4.5 The Board states that the claimant has not lost any sick pay entitlement as at the date of her claim (23rd July, 1996). However she has lost sick pay entitlement after that date due to her high level of absenteeism. The Board argues that, as the claimant did not lose any income due to absence from work on or prior to 23rd July, 1996, then she cannot successfully allege discrimination on grounds of sex.

4.6 The Board says that, without prejudice to its argument that the claimant did not lose any sick pay due to maternity-related absences, it rejects the claimant's allegation that she was discriminated on the grounds of her sex when absenteeism related to illness arising out of confinement was taken into account in calculating entitlements under the terms of the sick pay scheme.

4.7 The Board states that the issue of preferential treatment for pregnancy or confinement related illness was dealt with by the European Court of Justice in the case of *Hertz v Aldi Marked K/S*¹. In this case the claimant was dismissed on grounds of repeated absences due to illness which was a consequence of a complicated pregnancy. The European Court held that the Equal Treatment Directive did not preclude dismissals resulting from absences due to illness which originated

¹ Case No. 179/88 [1991] IRLR 31

in pregnancy or confinement. The Board says that, in its judgement, the European Court stated the following:

"However in regard to an illness which appears after maternity leave, there is no reason to distinguish an illness which has its origin in pregnancy or confinement from any other illness. Female and male workers are equally exposed to illness and although certain problems are specifically linked to one sex or the other, the only question is whether a woman is dismissed for absence due to illness on the same conditions as a man".

The Board argues that an employer cannot give preferential treatment to illnesses related to pregnancy or confinement over other illnesses. To do so would be discriminatory and a breach of equality law as it would give preferential treatment to an illness which is unique to members of one sex.

Case under the Anti-Discrimination (Pay) Act, 1974

4.8 The Board says that it accepts that 'like work' as defined by the Act exists between the claimant's job and that performed by Mr. Dermot Tobin, the named comparator.

4.9 The Board responds to the claimant's allegation that it breached the terms of the 1974 Act in four ways as follows:

- (1) The employer is wrong in offsetting exclusively maternity-related illness against normal sick leave entitlements and thereby disadvantaging the claimant.

The Board rejects this and states that it has done nothing wrong. It says that all illnesses are treated the same as is required by equality law, to do otherwise

would be illegal.

- (2) The employer failed to treat the claimant equally in that he failed to provide a similar sick pay arrangement for exclusively female illnesses as that obtaining for the comparator.

The Board says that it rejects the implication in the above statement that some special arrangement in relation to sick pay was made on behalf of the comparator. No such special arrangement has ever existed.

- (3) That maternity-related illness, being exclusively female, should be treated separately and no less favourably than any illness common to both sexes.

The Board says that it treats maternity-related illnesses the same as any other illness. However, it cannot be treated separately or else this would give preferential treatment to females which would be discriminatory and a breach of the law.

- (4) That all the above are contrary to Section 2(1) and Section 5(2) of the 1974 Act.

The Board says that the claimant is paid the same rate of remuneration as that paid to the comparator under Section 2(1) of the Act. Also the Board states that its sick pay scheme does not base remuneration on the sex of an employee, hence it does not breach Section 5(2) of the Act.

The Board argues that the above allegations are irrelevant to this case as the claimant and the comparator were treated no differently, in terms of absence from work, at the date of the claim.

4.10 The Board states that no discrimination occurred on or prior to the date of this claim. It rejects that the rules of the sick pay scheme are discriminatory on

grounds of sex. It considers that the giving of preferential treatment to maternity-related illness over other illnesses would be discriminatory on grounds of sex and the preferential treatment sought by the claimant would result in a breach of the terms of the Anti-Discrimination (Pay) Act, 1974.

Case under the Employment Equality Act, 1977

- 4.11 The Board says that, in this case, the claimant is alleging that she lost remuneration as a result of an illness connected with confinement which is discriminatory on the ground of sex.

Section 3(1) of the Employment Equality Act, 1977 states that:

"... an employer shall not discriminate against an employee ... in relation to ... conditions of employment (other than remuneration or any condition relating to an occupational pension scheme) ...".

Under the Anti-Discrimination (Pay) Act, 1974 remuneration is defined as including:

"any consideration whether in cash or in kind, which an employee receives, directly or indirectly, in respect of his employment from his employer".

The Board says that, while the term "consideration" has not been defined in the Act, the Equality Officer in her recommendation in the case of Educational Building Society v Male Employees² stated that:

"Consideration may be described as some advantage moving from one party to a contract to the other party to the contract in return for something given or promised by the other party under the contract".

The Board says that, in the case just cited, the 'consideration' flowing from the claimant is the service

² Recommendation No. EP 9/1987

as agreed under the contract of employment and obedience to the employer's lawful orders under the contract. However, in the present case 'consideration' is the sick pay given under the terms of the sick pay scheme. The Board, therefore, argues that sick pay is remuneration as defined by the terms of the Anti-Discrimination (Pay) Act, 1974 and thus specifically excluded from the terms of the 1977 Act.

The Board refers to the European Court of Justice decision in the case of *Rinner-Kuhn v FWW Spezial - Gebaudereinigung*³ in which the Court held that:

"The continued payment of wages to a worker in the event of illness falls within the definition of pay within the meaning of Article 119."

The Board contends that there can be no dispute that sick pay is remuneration and for this reason this claim falls to be considered under the 1974 Act and not the Employment Equality Act, 1977.

- 4.12** On a point of clarification the Board states that the claimant went on maternity leave in November, 1994 and not December, 1994. The Board also says that Section 16 of the 1977 Act does not require an employer to provide special treatment to women in connection with pregnancy or childbirth. In conclusion the Board rejects the allegation that it discriminated against the claimant on grounds of her sex in relation to sick pay. It states that, as sick pay is remuneration, the claim cannot be properly referred under the Employment Equality Act, 1977. The Board says that the claimant was treated the same as other employees in relation to sick pay entitlement because to do otherwise would have been discriminatory.

³ [1989] IRLR 493

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 The Union submits that the claimant was discriminated against on the basis of her sex in terms of the Anti-Discrimination (Pay) Act, 1974 when her maternity related sick leave was taken to be the same as normal sick leave thereby affecting her sick pay entitlements. The Union also submits that the claimant has been discriminated against on the basis of her sex in terms of the Employment Equality Act, 1977 when her maternity related sick leave was offset against normal sick leave entitlements.

5.2 The respondent rejects the allegation of discrimination made by the Union. It contends that a separate sick pay scheme to cover maternity related sickness experienced by the claimant would in itself be discriminatory. The respondent also states that this claim relates to remuneration as it is specifically concerned with sick pay. On this basis the respondent says that the claim is not covered by the provisions of the 1977 Act which excludes remuneration.

5.3 The first question for consideration is whether the claim relates to remuneration and is covered by the provisions of the 1974 Act or whether it relates to a condition of employment and is appropriate for consideration under the terms of the 1977 Act.

5.4 Remuneration is defined in the 1974 Act as "*any consideration whether in cash or in kind which an employee receives, directly or indirectly, in respect of his employment from his employer*". I note, from the respondent's submission, that no deduction in pay had been made from the claimant's pay, in relation to her

sick leave for a maternity related illness, at the time of the claim (i.e. 23rd July, 1996). I am, therefore, satisfied that the claim specifically relates to a condition of employment (i.e. the impact on the claimant's sick leave entitlement given that she was suffering from a maternity related illness as against the normal sick leave entitlement in the organisation) and is appropriate for investigation under the 1977 Act and not the 1974 Act.

5.5 The next issue for consideration is whether or not the claimant has suffered discrimination in terms of the 1977 Act as a result of her sick leave entitlement for maternity related illness being treated in a similar manner to normal sick leave entitlements.

5.6 I note that both parties to this claim accept that the claimant suffered a physical injury at the birth of her child in November, 1994. Her maternity leave (inclusive of the option of taking four weeks of unpaid leave) ended on 2nd April, 1995 when she commenced three weeks of annual leave. From 25th April, 1995 until 14th June, 1996 the claimant was absent from work due to illness resulting from the birth of her child for a total of 135⁴ days. The sick leave rules (detailed in Appendix A) applied by the respondent meant that the claimant's sick leave was being counted towards her normal sick leave entitlement hence resulting in a reduction in her pay during any period of sick leave absence after 14th June, 1996 even though her sick leave related to the birth of her child.

5.7 The European Court of Justice in the case of Hertz v

⁴ At the joint hearing of this case on 21st May, 1997 the respondent confirmed that the total period of sick leave was 135 days and not 134« days as stated in its submission.

Aldi Marked K/S⁵ considered the issue of preferential treatment for pregnancy or confinement related illness. The background to this case was that Mrs Hertz was employed by Aldi Marked in July, 1982 as a part-time cashier and saleswoman. She gave birth to a child in June, 1983 after a complicated pregnancy during which she was mainly on sick leave. After the expiry of her statutory entitlement to 24 weeks' maternity leave from the date of birth, she resumed work at the end of 1983 and had no health problems until June, 1984. However between June, 1984 and June, 1985, as a result of an illness arising out of her pregnancy and confinement, she was off work for 100 days. In June, 1985, the employers dismissed Mrs. Hertz on grounds of her repeated absences due to illness. In its judgement the European Court held:

"Article 2(3) allows for national provisions which ensure specific rights for women in respect of pregnancy and maternity, such as maternity leave. The dismissal of a female worker because of her pregnancy constitutes direct discrimination on grounds of sex, in the same way as does the refusal to recruit a pregnant woman. Therefore, a woman is protected from dismissal because of her absence during the maternity leave from which she benefits under national law.

However, in regard to an illness which appears after maternity leave, there is no reason to distinguish an illness which has its origin in pregnancy or confinement from any other illness. Female and male workers are equally exposed to illness and although certain problems are specifically linked to one sex or the other, the only question is whether a woman is dismissed for absence due to illness on the same conditions as a man. If sickness absence would lead to dismissal of a male worker under the same conditions, there is no direct discrimination on grounds of sex."

⁵ Case No. 179/88 [1991] IRLR 31

5.8 The Advocate-General's opinion in the Hertz⁶ case identifies the need for a distinction between the normal risks of pregnancy and conditions which do not arise from normal risks of pregnancy and which should receive the same treatment as illness under normal law. In this regard an extract from that opinion is set out below:

" in a distinction between the normal risks of pregnancy and confinement, the usual complications which accompany such events and which sometimes give rise to a slightly longer maternity leave and on the other part medical conditions which do not arise from normal risks of pregnancy and which should therefore receive the same treatment as illness under the normal law.

.... in the absence of provisions in national law giving special protection to women, where a woman worker has exhausted her rights to maternity leave, absences due to illness - even originating from the pregnancy or confinement - should not be treated as a normal consequence of maternity and should be considered in the same way as illness for any other worker "

5.9 I note that the claimant's sick leave absence, while resulting from an injury at childbirth, occurred after her maternity leave and three weeks annual leave. The injury sustained by the claimant at childbirth, while lasting for a fixed duration, was not a normal consequence of maternity or confinement and, in accordance with the Hertz⁷ case, cannot be treated as such. Therefore, I find that the respondent did not discriminate against the claimant in terms of the Employment Equality Act, 1977 when it treated her sick leave absence which was maternity related in the same manner as it would treat normal sick leave absence.

⁶ Case No. 179/88 [1991] IRLR 31

⁷ Case No. 179/88 [1991] IRLR 31

6. RECOMMENDATION

6.1 1974 Act:

I find that this claim relates to conditions of employment and, consequently, is excluded from the application of the provisions of the Anti-Discrimination (Pay) Act, 1974.

6.2 1977 Act:

I find that the Irish Dairy Board did not discriminate against Ms. Virginia Synnott when it treated her sick leave, which arose from an injury at childbirth, in the same way as it treats normal sick leave in accordance with its sick leave rules and regulations.

Gerardine Coyle
Equality Officer

17th June, 1997

APPENDIX A

Sick Pay
Rules and Regulations
in the
Irish Dairy Board