

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 19/1997

P A R T I E S

Mr. Paul Devlin
(Represented by the Employment Equality Agency)

AND

John McElhinney Ltd.
(Represented by V.P. McMullin & Son, Solicitors)

File No: EE 15 /1996

1 Dispute

- 1.1** This dispute concerns a claim by Mr. Paul Devlin that John McElhinney Ltd t/a McElhinney's discriminated against him on the grounds of his sex in terms of Section 2(a) of the Employment Equality Act, 1977 and in breach of Section 3(1) and 3(3) in relation to access and appointment to the position of Fashion Merchandiser.

2 Background

- 2.1** John McElhinney Ltd trading under the name of McElhinney's operate a large department store. The Company has some 100 employees. In response to an advertisement through FAS for a Fashion Merchandiser in March/April 1995, the Company received eight applications. The Managing Director, Mr. McElhinney considered only the three candidates, a male and two females, who included a C.V. with their applications. Mr. Devlin was one those who furnished a C.V. but his application was unsuccessful.

- 2.2** Mr. Devlin submits that was discriminated against in the selection process in that he was not interviewed for the position, and in relation to the appointment. He alleges that he was more suitable than the successful female appointee particularly given his relevant experience and qualifications as against the appointee who had no experience in fashion merchandising. He considers that the Company's conduct towards him amounted to unlawful discrimination, because of sex, under the terms of the Employment Equality Act, 1977.

- 2.3** In October, 1995, Mr. Devlin referred the dispute to the

Labour Court. The Labour Court on the 26th. April 1996, referred the case to an Equality Officer for investigation and recommendation. In June, 1996 the Equality Service was informed that the Employment Equality Agency would be acting on behalf of the claimant. In the course of the Equality Officer's investigation he received written submissions from the parties. After receipt of the submissions a joint hearing with the parties was held on the 22nd. November, 1996. Subsequent to the hearing further submissions were received from both parties to the case. The last correspondence received in regard to the dispute was in May 1997.

- 2.4** In the course of the hearing it was confirmed that the claimant's case was one of direct discrimination on grounds of his sex and that there is no claim of indirect discrimination as had been originally claimed.

3 The Claimant's Case

- 3.1** The Agency submits that the claimant was discriminated against by the Company on grounds of his sex within the meaning of Section 2(a) of the Act and in contravention of Section 3 of the Act in the selection process in that he was not interviewed for the position, and in relation to the appointment to the position of Fashion Merchandiser.

- 3.2** Mr. Devlin applied for the position of Fashion Merchandiser in the Company through FAS in April/March 1995. The advertisement read "Fashion Merchandiser

required for large department store in Finn Valley area for window and instore displays work."

3.3 The claimant explains that when he heard nothing from FAS in relation to the job he phoned Mr. McElhinney of the Company on the 21st. April, 1995 in the matter. He alleges that in the course of the conversation he asked Mr. McElhinney why he was not interviewed for the position he replied "well we were really looking for someone for the Ladies floor", when he pressed upon him the fact he advertised for someone for window dressing and instore displays, Mr. McElhinney said "listen you know how it is", the claimant advises that at this point he finished the conversation.

3.4 The facts of this case, the Agency maintains, do not support the Company's contention the appointee was the most suitable applicant. The Agency states that "there is no evidence of the selection process used other than the employer stated he knew the appointee, but given that her C.V. did not indicate that she had got the relevant experience in merchandising and display, experience the complainant clearly demonstrated on his C.V. it must be inferred that the selection process was not fair and objective."

3.5 The Agency contends that the fact the complainant was not called for interview, the fact that a less qualified and less experienced female was appointed together with the fact that only two males work in ladies fashion and as the employer stated he told the complainant he was looking for someone for ladies fashion raises an

inference of discrimination.

3.6 The appointee, the claimant contends, had never previously been employed as a Merchandiser and had never performed this kind of work before she took up her position in the Company. He further contends that the appointee admitted that she applied for the job as she wanted to do something different.

3.7 The claimant asserts, as he has over ten years experience in Merchandising work, that he was more than capable of doing the advertised job. He considers because of the experience he gained performing merchandising work in Chemists, Menswear shops, Ladies boutiques and Sportswear shops qualified him to work in a department store. Mr. Devlin believes that he was more suitable than the successful female appointee particularly given his relevant experience and qualifications.

4 The Respondent's Case

4.1 The Company rejects the allegation that the selection process adopted or the appointment of a female to the position of Fashion Merchandiser amounted to unlawful discrimination against Mr. Devlin. It denies that it discriminated against the claimant on any grounds whatsoever and specifically on grounds of sex.

4.2 There is no obligation in law, the Company points out, for an employer to interview all or a certain number of applicants for a position. In regard to the position of Fashion Merchandiser the Company states that they

received the names of eight applicants for the job from FAS but only the three applications with Curriculum Vitae were considered. The Company submits that the Managing Director examined the Curriculum Vitae submitted and interviewed the candidate who appeared to have the most appropriate Curriculum Vitae.

4.3 The respondent's representative points out that the Managing Director, Mr. McElhinney having interviewed the person whom he considered would be the best candidate for the job he was more than satisfied that she was the person he required for the position in question. She asserts that the Managing Director made selection on the basis that:

1. the appointee was the most suitable
2. he had known her both professionally and personally for a number of years
3. she had run her own fashion accessory business
4. she had qualifications in pottery and screen painting
5. she had plenty of the requisite service in merchandising and displays

4.4 In relation to the telephone conversation of 21st. April, 1995 with the claimant, Mr. McElhinney states that, his response of "well we were really looking for someone for the Ladies floor" would have been in reply to the claimant's question - where was the person required for? Mr. McElhinney has no recollection that he said to Mr. Devlin "listen you know how it is" and he advises that they are not words he would use.

4.5 The Company contends that it is an equal opportunity employer and employs both male and female employees in its Department store. It points out that while the majority of employees in the Ladies Fashion section are female this is largely due to historical reasons and it should be noted that there has been two male employees working in this section for the past number of years. The respondent adds that for the last eight years it has employed a male window dresser and that this employee carries out work in all departments, including ladies fashions.

5 Conclusions of the Equality Officer

5.1 At the outset of the hearing held in relation to this dispute Mr Devlin's representative confirmed that the case was one of an allegation of direct discrimination and that there are two aspects to it, firstly that the claimant was not called to an interview for the position of Fashion Merchandising and secondly that he was not selected for the position.

5.2 The Company rejects the allegation that it exercised unlawful discrimination against the claimant. It submits that the Managing Director, Mr. John McElhinney, examined the three Curriculum Vitae submitted. It contends that the Managing Director interviewed the candidate who appeared to have the most appropriate Curriculum Vitae and having interviewed her he was satisfied that she was suitable for the position in question.

5.3 The claimant alleges that the respondent Company discriminated against him on the grounds of his sex in terms of Section 2(a) of the Employment Equality Act, 1977 and in breach of Section 3(1) and 3(3) in relation to access and appointment to the position.

Section 2(a) of the Act of 1977 deals with direct discrimination and it states that discrimination shall be taken to occur:-

"where by reason of his sex a person is treated less favourably than another person of the other sex."

5.4 I consider that for discrimination on the grounds of sex to take place, it is not necessary for an employer to set out with the intention to discriminate contrary to the terms of the Act. The issue to decide is whether or not an employer's actions result in a person or persons of a particular sex being treated less favourably by reason of their sex.

5.5 Having regard to all the evidence available to me in the present case I am satisfied that the first issue which I must consider is whether or not there is a prima facie case that the claimant was treated less favourably than a person of the other sex. If I find that there is a prima facie case of discrimination I will then consider all the available evidence as to whether or not it establishes, either directly or on the balance of probability, that there was discrimination contrary to the terms of the Act of 1977.

5.6 I note that Mr. McElhinney stated at the hearing held in this case that he was "delighted" that the appointee was an applicant for the position because he knew her and he was aware that she had run her own fashion accessory business. I consider that the invitation to an interview was extended by Mr McElhinney to this applicant, in the first instance, was essentially because of his knowledge of her. While the selection process adopted by the Company lacks transparency and is arguably unfair the evidence available is insufficient for me to take an inference from it that the selection method was sex bias.

5.7 In the course of the hearing held I called a recess in order that the claimant and his representation could examine the C.V.s of the other two candidates; copies of the three C.V.s were submitted at the hearing. After the resumption of the hearing the claimant expressed the views that he was equally qualified with the other unsuccessful applicant i.e. a female and that the appointee was the least qualified. I note that he also stated that in his opinion there was also discrimination exercised by the respondent against the other unsuccessful female candidate. It may be useful to point out that the question I am obliged to address under the Act of 1977 is not whether or not the claimant is correct in his view that there was discrimination per se against both himself and a female i.e. the other unsuccessful candidate, but rather the more specific question was Mr. Devlin "treated less favourably" by reason of his sex.

5.8 The evidence available to me in this case is that neither of the two unsuccessful applicants, one of whom is female and the other male, were interviewed by Mr. McElhinney. It is clear that the effect of the selection process adopted by the Company in relation to the filling of the position applied equally to a male and a female. It therefore follows that the claimant was not treated less favourably by the Company than the other unsuccessful applicant. Accordingly I cannot hold that the evidence available to me establishes that there is a prima facie case that Mr. Devlin was treated less favourably than a person of the other sex.

5.9 Arising from the hearing held in this case I received a submission from the Agency. The main argument of the submission is that the Agency contends that the facts of the case raise an inference of sex discrimination. I recognise the difficulties claimants often have in producing evidence of discrimination, however, in the present case I cannot ignore the claimant's evidence at the hearing that both he and a female were discriminated against by the Company.

5.11 In reaching my conclusions in this case I have taken into account all the submissions, including case law, both oral and written. Having regard to the views that I have expressed in the preceding paragraphs I am satisfied that there was no unlawful discrimination against the claimant. Accordingly, I find that Mr. Devlin has no entitlement, under the Employment Equality Act, of 1977.

6 Recommendation

- 6.1 In view of my conclusion in the preceding paragraphs, I find that John McElhinney Ltd. t/a McElhinney's did not discriminate against Mr. Paul Devlin contrary to the provisions of the Employment Equality Act, 1977.

Jim Clerkin,
Equality Officer,

7th July, 1997.