

**OFFICE OF THE DIRECTOR OF
EQUALITY INVESTIGATIONS**

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: DEC-E -2002-002

PARTIES

**Mr Gerry Kirwan
(Represented by MANDATE)**

AND

Tesco Ireland

*File No: EE 28/1998
Date of Issue :24 January, 2002*

1. DISPUTE

- 1.1 The dispute concerns a claim by Mr Gerry Kirwan that on 19th January, 1998 Tesco Ireland discriminated against him within the meaning of Section 2(a) and in contravention of Section 3 of the Employment Equality Act, 1977 in the conduct of a competition to fill the post of Senior Person, Delicatessen Department at the Artane branch of Tesco Ireland.

2. BACKGROUND

- 2.1 The Claimant has been employed at Tesco (formerly trading as Quinnsworth) since 1979. He applied for the position of Senior Person, Delicatessen Department at the Artane branch of Tesco in 1997 but was unsuccessful in his application. A female colleague was appointed to the position. It is the Union's contention that Mr Kirwan was not appointed to the position as the company had a preference for a female in the role of senior person in the delicatessen department.
- 2.2 The Claimant referred a complaint to the Labour Court in July, 1998 under Section 19 of the 1977 Act. The Labour Court referred the complaint to an Equality Officer for investigation and recommendation. Submissions were received from the parties to the complaint and a joint hearing of the complaint was heard on 20th September, 2001.

3. SUMMARY OF THE CLAIMANT'S CASE

- 3.1 It is the claimant's case that the Tesco Ireland discriminated against him in terms of Section 2(a) of the Employment Equality Act, 1977 in its failure to appoint him to the position of Senior Person, Delicatessen Department at its Artane branch. A female candidate was successful in the competition.

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'.

- 3.2 The Company internally advertised the vacancy at the Artane branch for Senior Person, Delicatessen Department in late 1997. Three male candidates and one female candidate

were interviewed for the position. The Union argues that having regard to the selection criteria adopted by the Respondent (Appendix 1), the Claimant was the better qualified candidate. At the time of the competition the Claimant had 18 years experience with the Company, approximately twelve of which were at the Artane branch. The Claimant holds a Leaving Certificate and graduated from the College of Marketing and Design. According to the Union, the female appointee has 11 years service with the Company and does not hold a Leaving Certificate or higher qualification (the Company offered no evidence to the contrary). The Union states that Mr Kirwan holds a good work record with the Company and that he has never been the subject of any disciplinary warnings or measures. The Union states that the experience, training and disciplinary records of the Claimant point to a consistently high standard of performance.

- 3.3 In its submission the Union states that the Company was not forthcoming with any information as to the basis for the appointment of a candidate with considerably less experience and qualifications than the Claimant when requested by the Union. The Company however included in its submission, a detailed marking sheet showing the marks awarded to each candidate under the various criteria listed in Appendix 1 under 'Interview' and 'Performance to Date'. Marks were recorded on two sheets, one completed by the Deli-Manager on the basis of his knowledge of the candidates' performance at work and the second completed after the interviews. The female appointee came out one mark ahead of the Claimant at 69 versus 68. During the course of the hearing the Equality Officer adverted to an error in a tot in the marking sheet completed by the Deli-Manager which left the Claimant one mark short. The Equality Officer also identified an apparent omission where marks were not awarded to any of the candidates under the heading 'Numeracy Skills - Bookwork and Documentation'. This latter skill area was one of the Claimant's stronger points compared to the appointee according to the second marking sheet which was completed by the interview board. The Union made a further submission in relation to these issues subsequent to the hearing and argued that the Claimant was clearly disadvantaged by comparison with the appointee in the marking process. As evidence that the Company discriminates against male and female employees the Union referred to Equality Officer recommendations in Three Male Employees and Power Supermarkets (EE

09/1994) where the Equality Officer found that the male complainants had been discriminated against by the Company when they were prohibited from wearing earrings and Fifteen Named Female Employees and Power Supermarkets Limited (EE 23/1996) where the Equality Officer found that the female complainants had been discriminated against by the Company in relation to access to night work.

3.4 When questioned at the hearing about the relevance to the disputed position of his qualification in Marketing and Design, the Claimant said that it was highly relevant and that he made suggestions as to the product range that the delicatessen offered. By way of example, he said that he felt that there was a growing market for barbecue products and that the Company was slow to respond at the time but had now begun to develop in that area. The Union also argued that the Claimant trained in his junior female colleague who was then appointed to the senior position.

3.5 In its supplementary submission the Union stated that "in accordance with Labour Court Determination No. DEE 003/2000 (The Rotunda and the Mater Hospitals and Dr Noreen Gleeson) it is submitted by Mandate that the Claimant's qualifications and experience are far superior to those of the appointee and that a *prima facie* case of discrimination on grounds of sex is clearly established". The Union also goes on to refer to this Equality Officer's recommendation in Riney and Co Donegal VEC (DEC-E-2001/030) seeking a similar recommendation in favour of the Claimant.

4. SUMMARY OF RESPONDENT'S CASE

4.1 The Company denies that the Claimant was discriminated against on the grounds of his gender in the competition to fill the post of Senior Person, Delicatessen Department. The Company states that the Delicatessen Department in its Artane branch has a staff of 12. An experienced member of staff in the Delicatessen Department deputises for the Delicatessen Manager in his absence and is paid an allowance of €12.70 per week to wages plus a further 7½% of basic pay for periods when the Delicatessen Manager is absent. The previous person to hold this post up to May, 1997 was male. He was offered a temporary assignment in another branch and the Company proposed to appoint a male member of the

Delicatessen staff to the post on a temporary basis however other staff members in the Delicatessen objected on the grounds that if the vacancy were to become permanent this staff member would have an unfair advantage in a competition. The vacancy became permanent in July, 1997 and a competition was advertised in all branches. A copy of the notice is included in Appendix 2. There were four applicants, three male and one female and they all worked at the Artane branch.

4.2 The Store Manager and the Regional Fresh Food Trainer who interviewed the candidates drew up objective selection criteria (Appendix 1) on which the appointment would be based. The Delicatessen Manager also assessed the candidates against the same criteria. Two marking sheets were completed, one by the Delicatessen Manager on the basis of performance at work and one by the interview board. The marks were then aggregated to arrive at a final mark. The Company states that the appointee had continuously and consistently demonstrated through her work and during the selection process that she was the most suitable person for the job. The interview notes were retained by the Regional Fresh Food Trainer who left the Company on 20th March, 1998. When he was later contacted about the interview notes he indicated that he had discarded any papers relating to his work with the Company and that the notes were no longer available.

4.3 The Company in its submission summarised the reasoning given by the assessors for the scores given to each candidate as follows:

Work Ethic and Efficiency

Appointee : Thorough, does a job properly from start to finish, moves automatically to the next job of work. Positive approach to work, works on her own accord, needs little supervision. High standards in relation pricing, ticketing and hygiene. Would pick up rubbish.

Claimant : Takes short cuts. Does not start anything new until told to do so by the Department Manager. Besides working on the fish display, Mr Kirwan needs to be supervised. "Would walk around a piece of rubbish". If asked to do something slightly different Mr Kirwan would respond by saying "Pay me to do it".

Customer Care & Customer Service

Appointee : Pleasant with customers, bubbly personality, responds quickly to customer queries and questions. Very polite and serves customers immediately or calls someone else to help if she is busy herself. The Manager has received compliments from customers about Ms Smith.

Claimant : Serves customers efficiently, no salesmanship. Has ignored customers waiting to be served at the counter.

Communication Skills - Staff & Customers

Appointee : Clear communication. Good at holding conversations with customers. Keeps Manager informed in relation to products, promotions, delicatessen department issues. Blends well with other staff members. Approachable and open to constructive feedback.

Claimant : Good communication skills. Content of communications to both customers and staff have been negative about the Company on occasions. Dominates communication sessions.

Flexibility

Appointee : Would change day off if requested. Would occasionally work an extra late night. Would change arrangements with short notice.

Claimant : Not flexible to change away from regular schedule. Only once changed his day off. When asked to stay until 5 or 6 o'clock one Saturday, Mr Kirwan replied "Only if it is double time off".

Positive/Negative Attitude

Appointee : Generally positive attitude, however, can be influenced by others. Very helpful.

Claimant : Consistently would have something negative to say on a daily basis.

Consistency of Performance

Appointee : Consistently high standard of performance. In relation to attendance Ms Smith was absent on average 4.5 days per annum.

Claimant : Consistent level of steady performance, level disappointing in relation for someone with so much experience working in the delicatessen department, i.e. needs to be asked to do more than the minimum, does not use his own initiative. At busy times Mr Kirwan makes no effort to increase output. Good attendance and time keeping record, Mr Kirwan was absent from work between 2 to 3 days per annum.

5. CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1 The matter for consideration is whether or not Tesco Ireland discriminated against the Claimant on the basis of his sex in terms of Section 2(a) of the Employment Equality Act, 1977 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 It is well established in equality caselaw that a person making an allegation of discrimination must to present *prima facie* evidence of his or her allegation. Once a *prima facie* case of discrimination has been established, the burden of proof then shifts to the respondent who must rebut the presumption of discrimination by producing evidence that it did not unlawfully discriminate. I will firstly address the question of whether or not the Union have demonstrated that a *prima facie* case of discrimination on grounds of the Claimant's gender. The disputed position in this case is that of Senior Person - Delicatessan Department. When the term 'senior' is used in an employment context when referring to two persons in the same grade it is generally taken to mean the person with the longer service. The Claimant had 16 years service with the Company while the female appointee had eleven years service. The Claimant holds a Leaving Certificate and graduated from the College of Marketing and Design. I would regard a qualification from the Marketing Institute to be a relevant qualification to someone aspiring to progress to a position of responsibility in the retail trade. The Union stated that the appointee does not hold a Leaving Certificate or higher qualification and the Company at no point contradicted this statement. Without referring in detail at this point to the selection criteria adopted by the Company, I am satisfied that in terms of qualifications and experience, the Union has established a *prima facie* case of

discrimination on grounds of gender and the burden of proof must therefore shift to the Respondent.

5.3 Having accepted that a prima facie case of discrimination has been demonstrated I must consider whether the Company has provided sufficient evidence to rebut the presumption of discrimination. The selection criteria which the Company says it adopted (Appendix 1) are divided under two headings i.e. the interview and work performance to date. Two marking sheets were completed, one by the Delicatessen Manager and one by the two member interview board. Although the Delicatessen Manager was not a member of the interview board the Company decided that he should also mark the candidates under the same headings as the interview board. When the marks were totalled the female appointee came out in first place with 69 marks, one mark ahead of the Claimant. However in the course of my investigation of the complaint I noted that an error had been made in the addition of the Claimant's marks on the Delicatessen Manager's marking sheet. If the marks had been added correctly a tie in first place would have resulted. I also noted that no marks were awarded under the heading 'Numeracy Skills - Bookwork and Documentation' to any of the candidates on the Delicatessen Manager's marking sheet. It is clear from the layout of the document that this was an oversight caused by the fact that the text of some of the headings encroached into the space where the marks were hand written giving rise to confusion as to which headings the marks belonged. A copy of this part of the document is included in Appendix 3 (in view of the confidential nature of the information the full sheet has not been included nor candidates identified). The omission, for whatever reason, is significant. The Delicatessen Manager's marking sheet closely follows that of the interview board and indeed the Store Manager, who was a member of the interview board, stated in the course of the hearing that he went through the marking sheet with the Delicatessen Manager. The two forms were completed in similar hand writing. The area of numeracy skills, bookwork and documentation is one area where the Claimant consistently excelled over the appointee where ratings were given. Having regard to the fact that the marks already awarded should have shown a tie and if the consistency evident throughout the marking sheets had been followed in this instance, the Claimant would have scored higher overall than the appointee and would have been successful in the competition.

5.4 While accepting that an error was made in adding up the marks, the Company rejected the hypothesis that the Delicatessen Manager's failure to award marks under 'Numeracy Skills - Bookwork and Documentation' in relation to work performance favoured the female appointee to the disadvantage of the Claimant and in the course of the hearing the Company stated that it was satisfied that the most suitable candidate was appointed. It is clear from the notes provided by the Company at paragraph 4.3 above that the appointee was seen by the Company as being of a friendly disposition, good with customers, flexible and had a positive attitude towards her work and the Company. By contrast, the Claimant, while performing his functions adequately, was regarded by the Company as being inflexible, unwilling to take on additional tasks and harboured a negative attitude towards the Company. That being the case, the Company would have grounds for favouring the appointee despite his longer service and superior educational background. It appeared to the Equality Officer that the marking sheets were completed after store management had agreed on the preferred candidate and that the marking sheets were intended to reflect the Company's preferred choice. The Company did say during the hearing that the marking sheets were filled out at the end of the interview process which took place over a two week period. However when the error and omission referred to above are taken into account the marking sheets would appear to favour the Claimant. It is the Equality Officer's belief, which was reinforced by the Company's demeanour at the hearing i.e. "the most suitable candidate was appointed", that if the errors had been noticed at the time, the marking sheet would have been amended so that the marks clearly placed the appointee in first place. The Company provided evidence that the two previous incumbents in the Senior Person position were male, the next person that it sought to appoint on a temporary basis was male and the Claimant himself was later appointed to the position when the female appointee left the position on promotion. I am persuaded by the evidence, despite the suspect marking system, that the Company was not influenced by the Claimant's gender when it decided to appoint the female candidate but rather by his perceived lack of flexibility and negative attitude towards the Company. In the course of the hearing when the issue of the Claimant seeking double time off for working late on Saturday was mentioned (paragraph 4.3 above re 'work ethic' etc.), the Claimant retorted that it was his right to be compensated for any

additional hours that he was required to work and that he made no apology for making such requests.

5.5 In determining whether unlawful discrimination took place in this instance, I must weigh up the contradiction of the marking sheets, which if properly completed, would appear to favour the Claimant against the Company's continued preference for the female candidate. Given the history of male appointees to the position, including the later appointment of the Claimant himself and the evidence in relation to the Claimant's flexibility and attitude, I must conclude, while having regard to the procedural shortcomings in the selection process, that on the balance of probabilities, the appointee's gender was not a determining factor in her selection.

5.6 In its submission, the Union referred to the 'sex based nature' of the Company's structure stating that 'women are still employed in canteen, cleaning, cash office, customer service desk and crèche duties while men are employed in the areas of butchery, back stores, security and of course store management'. However in this instance a woman was selected as the senior person to deputise for the Delicatessen Manager and in fact has since been promoted to a management position in the Company. There would appear therefore to be some inconsistency in the case being made by the Union in this regard. There are some significant differences between the present case and that of Riney and Co Donegal VEC (DEC-E-2001/030) to which the Union has referred. In that case evidence was presented of a history of non progression of female candidates to management positions in the respondent VEC. The Equality Officer found the marks awarded by the interview board to be defective and no other convincing evidence was presented to the Equality Officer to suggest that the claimant in that case was not a more suitable candidate for the disputed position than the appointee.

6. RECOMMENDATION

6.1 On the basis of the foregoing, I find that Tesco Ireland did not discriminate against Mr Gerry Kirwan on the basis of his gender in terms of Section 2(a) of the Employment Equality Act, 1977 and in contravention of the provisions of Section 3 of that Act.

Raymund Walsh,

Equality Officer

24 January, 2002