EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE 07/1997

P A R T I E S

Department of Finance, Revenue Commissioners and Dept of Agriculture, Food & Forestry

A N D

Ms. K. Ormond & Ms. B. Mackin

File No. EE 11/94

1 Dispute

1.1 This dispute concerns a claim made by the Civil and Public Service Union on behalf of the claimants Ms. K. Ormond and Ms. B Mackin that the Department of Agriculture, Food and Forestry and the Office of the Revenue Commissioners discriminated against them when it did not pay them full pay for the duration of their maternity leave.

2 Background

2.1 The claimant Ms Ormond is employed by the Revenue Commissioners and Ms Mackin is employed by the Department of Agriculture, Food and Forestry. They previously worked full time and are now employed as job-sharers. The Union on their behalf claims that they were discriminated against by their employers, because when they were on maternity leave they were paid at a job-sharers rate of pay. It claims, that pregnant women, under the relevant circular that covers all women Civil Servants, are entitled to fourteen consecutive weeks maternity leave on full pay and also that this period should count as service in all respects. The Employers say that they paid the claimants and recognised their service as though they had been working during the period of maternity leave.

2.2 The Union made claims on the claimants' behalf and referred them to the Labour Court under Section 19 of the Employment Equality Act 1977 on the 24th March 1994.

2.3 The Labour Court on the 15th April 1995 referred the case to an Equality Officer. Following a joint hearing on 20th April 1995 between the parties the union requested further time to enable it to make an additional written submission. Subsequently an additional hearing between the parties was held on the 4th February 1997.

3 Summary of the Union's Submission

3.1 The Union claims that the Maternity Protection of Employees Act of 1981 (as amended in 1991) provides at Section 8(1) that an employee

"shall be entitled to leave... of not less than 14 consecutive weeks",

and that Section 15(1) of the same act provides that where a woman is absent on paid Maternity Leave of not less that 14 consecutive weeks

"such an employee shall be deemed to have been in the employment of her employer and accordingly while so absent she shall be treated as if she has not been so absent and such absence shall not affect any

right (other that her right to remuneration during such absence) whether conferred on her by statue, contract or otherwise and related to her employment".

3.2 The Union points out that Circular 27/81 covers all women Civil Servants going on Maternity Leave after 5th April 1981. (ref. Appendix I).

It says Section 2(a) provides that

"Maternity Leave will consist of 14 consecutive weeks"

and that Section 2(b) provides that

"During Maternity Leave a woman will be entitled to full pay less any Social Welfare allowance payable on foot of her social insurance"

and that Section 2(f) provides that

"Paid Maternity Leave will count as service in all respects".

3.3 The Union says that Circular 3/84: "Pilot Job-Sharing Scheme", set out the broad conditions of service that apply to job-sharers and in its appendix covers pay, attendance arrangements, annual leave, public holidays, sick leave, etc., and states in Section 11(iii); (see Appendix 1)

"In relation to all other conditions of service, and to the regulations governing civil servants generally, no special arrangements shall apply in the case of job-sharing staff".

3.4 It further points out that the Maternity Protection of Employees Act 1981 covers women Civil Servants as defined under Part 1, Section 2(1);

"employee means a person who is in employment for the time being specified in and under Part 1 of the First Schedule of the Social Welfare (Consolidation) Act 1981".

and Section 3, part 1 of the Social Welfare (Consolidation) Act of 1981 provides;

"Employment in the Civil Service of the Government or the Civil Service of the State and employment such that the service therein of the employed person is, or is capable of being, deemed under Section 24 of the Superannuation Act 1936, to be service in the Civil Service of the Government or the Civil Service of the State".

3.5 The Union makes the point that the claimants have no rights of redress under the Maternity Protection Act 1981, nor under the Conciliation and Arbitration Scheme of the Civil Service

as Section 27(1) provides that any dispute between an employee and her employer, to whom the Unfair Dismissals Act 1977 applies and to whom Part II or Part III applies may be referred to a Rights Commissioner or to the Employment Appeals Tribunal. This therefore means that a woman Civil Servant is excluded from processing a dispute since the Unfair Dismissals Act of 1977 does not apply to her. The Conciliation and Arbitration Scheme does not provide for the referral of any disputes in relation to the 1981 Maternity Act.

3.6 Because the claimants have no rights of redress under the Maternity Protection Act 1981, nor under the Conciliation and Arbitration Scheme of the Civil Service, the Union questions whether this complies with Article 12 of the Council Directive 92/85, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth.

3.7 The Union referred the dispute on behalf of the claimants under Section 19 of the Employment Equality Act 1977. It also asserts that this is a dispute under 56(2) of the 1977 Act which states that the Act of 1974 and the Act of 1977 shall be construed together as one Act, under Article 119 of the Treaty of Rome and the European Union Equal Treatment Directive 76/207. It says that the Employment Equality Act 1977 was expressly introduced to give effect in National Law to the Equal Treatment Directive 76/207.

3.8 The Union argues that Section 14 of the Act allows employers to rely on statues which are not bound by the provisions of the Employment Equality Act, and those four Acts are;

(a) The Conditions of Employment Act 1936

(b) The Shops (Conditions of Employment) Act 1938

(c) The Factories Act 1955

(d) The Mines and Quarries Act 1965

The Union claims that as the Maternity Act of 1981 is not exempted, its provisions are covered by the Employment Equality Act 1977 and the Equal Treatment Directive and the Union makes the point that Section 16 of the Employment Equality Act does allow an employer;

"to arrange for or provide special treatment to women in connection with pregnancy or childbirth"

which is consistent with Article 2(3) of the Equal Treatment Directive which provides that;

"This Directive shall be without prejudice to provision covering the protection of women, particularly as regards pregnancy and maternity".

3.9 The Union says that the claimants accept that job-sharers have, broadly speaking, pro-rata parity with their full time colleagues as set out in the appendix to Circular 3/84. (Appendix 1 refers). However, it argues that this cannot apply to issues concerning pregnancy and maternity because Article 2(3) of the Directive and Section 16 of the 1977 Act provide that special treatment may be afforded to women in connection with pregnancy and childbirth, and says that it is supported on this by the European Court of Justice decisions in the Dekker, Hertz, Habermann, and Webb cases.

3.10 The Union says that the European Court of Justice has ruled that to discriminate against a

woman in relation to pregnancy and maternity is direct discrimination based on sex and it is not necessary, following from the same decisions, to show that a man would have been treated similarly in comparative circumstances.

3.11 The Union says that in the Dekker case, Advocate General Darmon said

"Pregnancy and maternity can never - excuse the truism - concern anyone but women."

and argues that this case concerned an interpretation under Articles 2(1) and 3(1) of the Equal Treatment Directive as to whether an employer was directly or indirectly in breach of the principle of equal treatment. It says that the ECJ ruled very decisively that it was direct discrimination, contrary to Articles 2(1) and 3(1),

"where the motive results in the fact that the person concerned is pregnant, the decision is directly related to the applicant's sex and it is not important that there were no male applicants."

3.12 The Union says that the Hertz case (C-177/88) concerned an interpretation of Articles 2(1) and 5(1) of the Directive and concerned dismissal because of illnesses arising as a result of pregnancy after the statutory Maternity Leave. It says that once again the court ruled decisively that:-

"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 woman because of her pregnancy constitutes direct discrimination on grounds of sex, in the same way as does the refusal to recruit a pregnant woman".

3.13 The Union also argues that the Habermann case (ref IRLR 364 1994) further elaborates on

this question in paragraphs 14 and 15 of its judgement when it states:-

"The first question which arises is whether the annulment or avoidance (Anfechtung) of an employment contract in a case such as this constitutes discrimination directly on grounds of sex for the purposes of the directive. To that end, it must be established whether the fundamental reason for the annulment or avoidance of the contract is one that applies without distinction to workers of both sexes or, on the contrary, to one sex only.

It is clear that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex as the Court has held in cases where a pregnant woman was denied employment or dismissed (ref Cases C-177/88, Dekker v VJV-Centrum (1990) ECR I-3979) and C-179/88 Handels - og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening [1990] ECR I-3979)."

3.14 The Union further quotes this judgement of the ECJ and says that it goes on in Paragraph 18 to ask the question

"whether the directive precludes compliance with the prohibition on night-time work by pregnant women, which is unquestionably compatible with Article 2(3), from rendering an employment contract invalid or allowing it to be avoided on the ground that the prohibition prevents the employee from doing the night-time work for which she was engaged."

and it rules in Paragraphs 19 to 21 as follows:

"According to the Arbeiterwohlfahrt, the Member States possess a wide and independent discretion in appraising the interests of workers, both male and female, and of employers and society. Excessive protection of mothers might lead to abuse by women and also to discrimination against men who have not had the same opportunity to receive pay without having to work in return.

That argument must be rejected.

In the first place, so far as concerns the purpose of Article 2(3) of the directive, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with `pregnancy and maternity', that article recognizes the legitimacy, in terms of the principle of equal treatment, of protecting, first, a woman's biological condition during and after pregnancy, and secondly, the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see the judgment in Case 184/83 Hofmann v Barmer Ersatzkasse [1984] ECR 3047, paragraph 25)."

3.15 The Union says that Advocate General Tesauro in the Habermann Case spelt it out clearly when he said:

"that the purpose of article 2(3) of the Directive is that "different treatment is allowed or imposed, in favour of and to protect female workers, in order to arrive at material and not formal equality, since that would constitute a denial of equality. That being indubitably the ratio of the provision, it seems to me at least in principle, that `discrimination' permitted in order to take account of maternity and therefore to protect women, cannot be practised in such a way as to exclude women from the labour market. It is only too clear that if such conclusion were to reached, both the object of the Directive (ensuring equal treatment for men and women) and that of the derogation (allowing different treatment in favour of pregnant women to protect the special nature of their condition) would be completely undermined. Material equality between men and women in the field of employment requires that an event, which - by definition - affects women alone, should not be taken into consideration, even at the time of access to employment."

3.16 The Union argues that perhaps most importantly of all in the recent case in Webb (ref IRLR 482,1994) the Advocate General in Paragraphs 7 and 8 of his opinion stated

"It is quite clear that termination of an employment contract on the ground of pregnancy applies only to women and therefore constitutes direct discrimination on grounds of sex. The Court already has had

occasion to give a ruling to that effect both in Dekker with respect to the refusal to appoint a pregnant women and in Hertz with respect to the dismissal of a pregnant women. In connection with the latter case the Court stated `that the dismissal of a female woman on account of pregnancy constitutes direct discrimination on grounds of sex as does a refusal to appoint a pregnant woman."

He went on in Paragraph 8 to say

"The view that a refusal to appoint and/or a decision to dismiss on the grounds of pregnancy can relate only to women, thus constituting direct discrimination on grounds of sex implies - obviously - that substantial equality between men and women as regards employment preclude any consideration, either when taking up employment or during the employment relationship of a factor which by definition only affects women. It follows therefore from the reasoning underlying the judgement in Dekker and Hertz and how could it be otherwise - that the Directive must be construed so as to achieve substantial equality and not mere formal equality which would constitute the very denial of the concept of equality."

3.17 The Union says that this European Court decision in the Webb case copperfastened the thinking of the Dekker and Hertz cases when in paragraphs 20 and 26 it stated

"furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, Article 2(3) of Directive 76/207 recognizes the legitimacy,in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (Habermann-Beltermann, paragraph 21 and Case 184/83 Hoffmann v Barner Eraszkasse (1984) ECR 3047 paragraph 25)".

"the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of

the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the directive".

3.18 In relation to the rulings quoted at paragraphs 3.13 - 3.17 above the Union argues that the ECJ has ruled in a number of very significant cases that discrimination related to pregnancy and maternity is direct discrimination based on sex whether that discrimination occurs during recruitment or dismissal or as Tesauro has said during the employment relationship. It also argued that in the recent Webb case, the Advocate General and the ECJ in paragraph 25 of the judgement ruled that pregnancy is not in any way comparable with a pathological condition and even less so with unavailability for work on non medical grounds.

3.19 In relation to its claim that the claimants were indirectly discriminated against the Union posed the following questions;

"What is the requirement with which the claimants were obliged to comply?"

It stated as its answer, "... that both the claimants were to work full time and not to engage in job-sharing prior to the taking of Maternity Leave." The Union in addition pointed out that without prejudice to the above the claimants also contend that it is now no longer necessary to show a hurdle or requirement with which a woman has to comply, following the European Court of Justice decision in Enderby it is now only necessary to show disparate results.

"Was the requirement such that a higher proportion of males than of females could

comply with it?"

The Union on behalf of the claimants contend that a higher proportion of males than of females could comply with the requirement to work full time as 98% of all job-sharers in the Civil Service are women, with only 2% being male.

"Is the fact that females are substantially more affected by the requirement than males as a result of an attribute of sex?"

The Union argues that job-sharers in the Civil Service are almost exclusively female, because in Irish society, for social, cultural, and economic reasons, females continue to carry the greater burden of family and domestic responsibility than males. It also argues that child rearing is still seen primarily as a woman's responsibility and makes the followings points in support of its argument;

(a) It refers to Article 41 of the Constitution where it states in relation to the position of women in the Family;

"The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

(b) In 1981 the Government appointed a Working Party on Child Care facilities for working parents. The report recommended the establishment of workplace nurseries. It says that the Department of Health entered a number of reservations as it could be seen as;

"facilitating or even encouraging all mothers of young children to go out to work as a matter of choice."

The Union says that the Department's policy was that the young child should be cared for in it's own home.

(c) A recent report prepared for the European Commission found that over 70% of Irish women gave up paid work on the birth of their first child. Over half (58%) of the Irish women surveyed took career breaks longer than 5 years, and 66% said

it was due to family reasons.

The Union argues that job-sharing is seen in the Civil Service as an equality initiative to enable women to more actively combine work and family responsibilities, and is referred to in the Civil Service Report on Equality of Opportunity each year.

"Is the requirement essential?"

The Union claims that it is not an essential requirement for employment for a pregnant woman to work full time to avail of the statutory right to 14 weeks paid Maternity Leave.

3.20 The Union asserts that a pregnant job-sharer is entitled to have 14 weeks Maternity leave and to have those 14 weeks treated as service for all purposes because the Maternity Protection of 1994 states in section 22 that a pregnant employee is entitled to maternity leave (which is 14 consecutive weeks) and to have those 14 weeks treated as if she had not been absent. Accordingly it claims that a job-sharer should have her 14 weeks credited as service for all purposes and it claims that the claimants had only seven weeks service credited.

3.21 The Union is seeking as a remedy for the claimants, a finding in their favour that they were discriminated against by their employer. It claims that the claimants have an entitlement to 14 weeks paid Maternity Leave and that the 14 weeks paid Maternity Leave should be paid at full pay and counted as service for all purposes. It is also seeking compensation for the claimants because of the alleged act of discrimination to them.

4 Summary of the Employers' Arguments

4.1 The Department of Finance represented the Department of Agriculture, Food and Forestry and the Office of the Revenue Commissioners, cited as respondents in this case. It argues that as the claim primarily concerns pay, it could fall to be dealt with under the provisions of the Anti-Discrimination (Pay) Act, 1974 rather than the Employment Equality Act, 1977. However, it says that it has replied to the arguments made by the claimants which presume that the latter Act applies.

4.2 The Department in response to the claim of direct discrimination argued that Section 2 of the Employment Equality Act, 1977 states that

> "....*discrimination shall be taken to occur...*
>
> (a) *where by reason of his sex a person is treated less favourably than a person of the other sex..".*

It says that the union appears to be contending that this provision must be read in the light of European Court of Justice decisions to the effect that it is not necessary to show that a man would have been treated more favourably in similar circumstances where discrimination in relation to pregnancy is concerned. However, the Department claims that it is necessary to show that the claimants suffered a disadvantage and this necessarily entails some comparison. In the cases cited, by the union, the claimants maintained that they had been treated less favourably than they would have been if they had not been pregnant and it is submitted that this

is the proper test to adopt in this type of case. The Department argues that it is common cause that the claimants in the present case received precisely the same pay during maternity leave as they would have received had they remained at work. It follows that they suffered no disadvantage and, accordingly, have no basis on which to mount a claim.

4.3 The Department says that Section 22(1) of the Maternity Protection Act 1994, which came into effect of 30 January 1995, states that

"During a period of absence from work by an employee while on ... maternity leave ... the employee shall be deemed to have been in the employment of the employer and, accordingly, while so absent the employee shall... be treated as if she had not been so absent; and such absence shall not affect any right (other than ... the employee's right to remuneration during such absence), whether conferred by statute, contract or otherwise, and related to the employee's employment."

The Department argues that this provision, or, more precisely, the equivalent provision in the Maternity Protection of Employees Acts, 1981 and 1991, was complied with in full, in the case of both claimants. While on maternity leave, both women were treated for all purposes as if they had not been so absent.

4.4 The Department argues that furthermore, while there is no statutory entitlement to payment from an employer while on maternity leave, under the terms of their conditions of employment in the Civil Service, the claimants were paid their normal salary while on maternity leave as if they were not absent on maternity leave. The Department makes the point that even if they had been paid less during maternity leave than while they were working, this would not amount

to discrimination under the 1977 Act or the Equal Treatment Directive. It says that Article 2(3) of the Equal Treatment Directive and Section 16 of the Employment Equality Act, 1977 do not support the union's argument in this respect. They are enabling provisions and do not impose any obligation on an employer to provide special treatment, let alone require that job-sharers be paid twice as much while on maternity leave as they would have been paid had they not been on maternity leave. It also says that the European Court of Justice judgements referred to by the union do not support its case. Those judgements concerned the dismissal or non-employment of female staff because they were pregnant. They cannot be interpreted as precluding a reduction in pay while on maternity leave. If this were the case, one would have to conclude that both domestic legislation regarding maternity leave and the Pregnant Workers Directive contravene the principle of equal treatment, which is not tenable. In any event, as has already been pointed out, the claimants suffered no loss of earnings during maternity leave.

4.5 In relation to the claim of indirect discrimination the Department argues that Section 2 of the Employment Equality Act, 1977 states that

"..discrimination shall be taken to occur..

(c) *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 the other sex or .. of a different marital status but of the same sex able to comply is substantially higher..".*

4.6 The Department says that it is true that in order to qualify for payment at full-time rates during maternity leave there is a requirement to be employed in a full-time capacity. However there is also a requirement to be employed in a fulltime capacity in order to qualify for payment at full-time rates while not on maternity leave. If accepted, the union's argument could equally be applied to render the difference in pay between job-sharers and full-time staff discriminatory, which would clearly be absurd.

4.7 It further submitted that the views of the European Court of Justice in the Helmig case (Case no. C-399/92) in which it said the following in relation to deciding whether indirect discrimination has occurred;

> *"23. To that end it must be determined whether they [the impugned conditions] establish different treatment for full-time and part-time employees and whether that difference affects considerably more women than men.*
>
> *24. That is the nature of the review traditionally exercised by the Court of Justice in this area (ref inter alia Kowalska, cited above, and Case 170/84 Bilka [1986 ECR 1607]).*
>
> *25. Only if those two questions are answered in the affirmative does the question arise of the existence of objective factors unrelated to discrimination which may justify such a difference in treatment."*

should be taken into account.

Accordingly, the Department says that to establish a case of indirect discrimination against part-time workers, it is necessary to show a difference in treatment between the claimants and full-time staff. It says that no such difference has been, or could be, shown in this case as both job-sharers and full-time staff receive precisely the same treatment in regard to pay, both while they are working (they are both paid the same rates for the hours worked) and while on

maternity leave (they are both paid precisely what they would be paid if they were not on maternity leave). Accordingly, it says, no case for indirect discrimination arises.

4.8 In relation to the remedy sought, the Department makes the following points:

(a) the claimants were granted their statutory entitlement

of 14 weeks maternity leave and, in addition to their statutory entitlements, received payment during that leave;

(b) the claimants received full pay during maternity

leave, that is they were paid at precisely the same rate as they would have been had they not been on maternity leave;

(c) their maternity leave counted as service for all

purposes as if they had been working during that period.

4.9 In conclusion the Department denies that Ms. Ormond or Ms. Mackin were discriminated against either directly or indirectly in relation to their maternity leave.

5 Conclusions of the Equality Officer

5.1 I have considered all the evidence presented to me by the parties in this case, both written submissions and further oral submissions made at the hearings attended by both parties.

5.2 The matter for investigation in this case is whether the Department of Agriculture, Food and Forestry and the Revenue Commissioners should have paid for and recognised the period of

maternity leave in the case of each of the claimants as being equivalent to full-time working, both in relation to service and pay. The situation that obtained was that the claimants were paid at their normal rate of pay as job-sharers during their respective periods of maternity leave.

5.3 The Department of Finance (on behalf of the Department of Agriculture, Food and Forestry and the Revenue Commissioners) argues that the claimants were paid at their normal rate of pay for the duration of the maternity leave, that is the same rate as they would have been paid had they not been on maternity leave and also that the period of 14 weeks maternity leave has been counted as service, also as if they had not been absent on maternity leave. The union for its part is seeking that the claimants be paid at full pay i.e. the rate at which fulltime staff are paid, for the 14 weeks maternity leave and that this maternity leave (equivalent to a full time worker's entitlement) should be counted as service for all purposes. It argued at the hearing that effectively the claimants respectively were in receipt of seven weeks maternity leave each as it claimed that;

one claimant got 14 half weeks maternity leave as she works two days one week and three days the following week

the other claimant got 7 weeks maternity leave as she works a week on/off pattern.

I note that both these arrangements were arranged locally between the claimants and local management.

5.4 The union is seeking that the circular governing maternity leave in the Civil Service be

implemented in such a manner as to give the claimants service and pay at the same level as full time staff for the period that they availed of maternity leave although the claimants are job sharers.

5.5 I note that the union has referred to the Maternity Acts of 1981 amended in 1991 and also at the final hearing in this case to the Maternity Protection Act 1994. The Maternity Acts have been enacted to give certain statutory rights to women during and after pregnancy. I note that these statutory rights include access to both ante natal and post natal care (which is not in question here) and the rights to maternity leave and to return to work. These Acts give a statutory right to pregnant women at work to 14 consecutive weeks maternity leave. I note that there is no statutory right to remuneration during the period of maternity leave. I further note that suitably qualified women may be paid up to 70% of their earnings by the Department of Social Welfare or be paid a social welfare benefit but there is no statutory requirement on an employer to pay women for the period of maternity leave. In each of these cases under consideration in this investigation, both of the claimants were paid as if they had been at work, they were in receipt of 14 calender weeks maternity leave and have since returned to work.

5.6 I further note that the claimants worked on a job-sharing basis and had done so for a considerable period. Ms. Ormond commenced jobsharing in May 1991 and Ms. Mackin in June 1986. I also note that these claims are in respect of maternity leave availed of in late 1993/early 1994 by the claimants. I note that while job-sharing their normal hours are 50% of the attendance liability of a worker employed full time and these hours are agreed locally with

management. These hours could be agreed between the workers and management variously as week on/week off, split weeks, or half day attendance either A.M. or P.M. Their conditions of employment are covered by Circular 3/84 (Appendix 1). These conditions outline the principle governing job-sharing i.e. "a full time post shared equally between two officers". I also note that these claims are in respect of maternity leave availed of in late 1993/early 1994 by the claimants prior to the enactment of the Maternity Protection Act 1994.

5.7 The union argued during the hearings that while the claimants do not have statutory rights to paid maternity leave, circular 27/81 "Maternity Leave" (Appendix 2) which outlines the conditions governing maternity leave in the Civil Service speaks of paid maternity leave at full pay. The union claims in accordance with this circular, that the claimants' maternity leave should be paid at the same rate of remuneration as that paid to full time workers whether on maternity leave or not. I note that the union also referred at the hearing to a judgement of the ECJ (Gillespie Case C-342/93) and quoted Para 14

"the benefit paid by an employer under legislation or collective agreements to a women on maternity leave is based on the employment relationship"

in support of this argument as it argued that this circular is a collective agreement and that it speaks of "full pay".

5.8 I note that this judgement also says in relation to remuneration that

"Council Directive 75/117/EEC on the approximation of the laws of the Member States .... neither requires that women should continue to receive full pay during maternity leave, nor lays down specific

criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardize the purpose of maternity leave."

As the ECJ has ruled that neither Article 119 of the Treaty or the Equal Treatment Directive 75/117 require that women should continue to receive full pay during maternity leave, nor lays down specific criteria for determining the amount of benefit payable to them during that period nor for that matter do the Maternity Acts 1981 to 1994, it remains for me to examine whether the employer discriminated against the claimants in its treatment of them when availing of maternity leave.

5.9 In these claims under investigation I note that the claimants' employer/employee relationship continued during and after the period of their respective periods of maternity leave in precisely the same manner as if they had been in work. They were in receipt of 14 consecutive weeks maternity leave, their rate of pay was maintained and they were credited with their service for this period also. I am satisfied that the claimants regardless of the difference in their weekly hours of work when compared to full time workers were in receipt of 14 weeks consecutive leave. I am satisfied that the employers did not discriminate against the claimants. I am further satisfied with reference to the ruling in the Gillespie case (ref para 5.8 above) that the employers did not discriminate against the claimants.

5.10 I note that the union has referred to various ECJ recommendations in support of its claim to have the period of maternity leave treated more favourably than at present. These European Court cases quoted by the union at paras 3.13 to 3.17 above uphold the principle that women

should not be discriminated against due to the special needs they have during pregnancy and immediately after childbirth. As I have already said in the preceding paragraph, the claimants were treated, in relation to pay and service when on maternity leave, as if they had not been absent and as such they do not have a claim in relation to statutory entitlements. I consider that this claim is for double the normal remuneration (in relation to both pay and service) for the duration of their maternity leave.

5.11 As I have found that the claimants were not directly discriminated against I have examined this claim with regard to indirect discrimination within the meaning Section 2(c) of the 1977 Act. I note that in the Dekkar case the ECJ ruled that direct discrimination arises, contrary to Articles 2(1) and 3(1), of the Equal Treatment Directive when

"the motive results in the fact that the person concerned is pregnant, the decision is directly related to the applicant's sex and it is not important that there were no male applicants."

Therefore to establish a case of indirect discrimination against the claimants who are job share workers, it is necessary to show a difference in their treatment vis-a-vis full-time staff. The comparison then lies between female full-time workers and job sharers. The union claimed in its original submission that the claimants had been indirectly discriminated against because in order to paid at the same rate as full-time workers when on maternity leave it is necessary to work full time. It argued that the greater percentage of job sharers in the Civil Service are female so it is substantially more difficult for female workers to comply with this requirement to work full-time.

5.12 I note that the union accepts that the claimants' pay and conditions when on maternity leave was the same on a pro-rata basis as full time staff. I do not consider that the claimants were unfavourably treated in relation to full time staff when they availed of maternity leave as while on maternity leave they both received the same treatment in regard to pay and service as fulltime workers and were paid and their service recognised as if they had not been absent. Having regard to all the evidence presented in this case I find that the Department of Agriculture, Food and Forestry and the Revenue Commissioners did not indirectly discriminate against Ms Ormond and Ms Mackin.

5.13 The union in seeking that the circular governing maternity leave in the Civil Service be implemented in such a manner as to give the claimants, who are job sharers, service and pay at the same level as full time staff for the period that they availed of maternity leave, sought additional pay and service for them. Consequently I consider that this claim relates to remuneration. I note that the claim was referred for investigation under the 1977 Act which specifically precludes consideration of cases relating to remuneration but the union also relied on the fact that under section 56(2) of the 1977 Act the 1974 Act (which deals with remuneration) can be construed together with the 1977 Act. However as I have found that the claimants were not discriminated against in relation their respective maternity leaves I consider that it is not necessary to consider the reference by the union to the 1974 Act.

6 Recommendation

6.2 In view of my conclusions in the preceding paragraph I find that the Department of Agriculture, Food and Forestry and the Revenue Commissioners did not discriminate against the claimants in relation to their respective maternity leaves.

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Mary Solan Avison
Equality Officer

22nd April 1997