EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE 08/1997

P A R T I E S

An Post

and

Ms Frances O'Connor
{Represented by the Civil and Public Service Union}

File No. EE 07/1995

1 Dispute

1.1 This dispute concerns a claim by the Civil and Public Service Union on behalf of the claimant Ms. F. O'Connor, that An Post discriminated against her when it did not pay her at full pay while on maternity leave.

2 Background

2.1 The claimant Ms O'Connor is employed as a clerical officer in An Post. She has been employed as a job sharer since January 1993. She applied for and was on maternity leave from September 1st to December 7th 1994. She alleges that during this time she was paid pro rata to full time workers and credited with only 7 weeks service. She claims that she is entitled to 14 weeks consecutive Maternity leave at the full time rate of pay and to have this enhanced time counted as service. As a consequence she claims that she has been discriminated against by her employer. The Civil and Public Service Union submitted a claim on her behalf to the Labour Court on the 17th February, 1995. The Labour Court referred the claim to an Equality Officer for investigation and recommendation. A hearing was held on 28th November 1995 between the parties and at this hearing additional time was given to the union in which

to make a further submission in this case. Further submissions made by both parties were finalised in December 1996.

3 Summary of the arguments made by the Civil and Public Service Union

3.1 The Union claims that the claimant was discriminated against by An Post, under Section 3 of the Employment Equality Act, 1977.

3.2 The Union claims that the Council Directive 92/85 on the protection of pregnant workers says in article 8 *"That workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with National Legislation and/or practice"* and that the Maternity Protection Act, 1994 which was introduced under National Law to give effect to this directive expressly provides that an employee *"shall be entitled to leave... of not less than 14 consecutive weeks".* The Union also claims that circular 27/81 (Appendix 1) covers all women civil servants including women in An Post on maternity leave. It says that Section 2(a) of this circular provides *"maternity leave will consist of 14 consecutive weeks".* It further provides in Section 2(b) *"during maternity leave a woman will be entitled to full pay less any social welfare allowance payable on foot of her social insurance",* and further at Section 2(f) that *"paid maternity leave will count as service in all respects".* The Union also argues that circular 3/84 (Appendix 2) which relates to job sharing, sets out the broad conditions of service to apply to job sharers and in the Appendix to that agreement it covers pay, attendance arrangements, annual leave, public holidays, sick leave etc., and it states *" 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".*

3.3 The Union says that it has referred this dispute on behalf of the claimant under Section 19 of

the Employment Equality Act, 1977; 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. The Union says that the Employment Equality Act, 1977 was expressively introduced to give effect in National Law to the Equal Treatment Directive 76/207.

3.4 The Union says that Section 14 of the Act allows employers to rely on certain statutes which are not bound by the provisions of the Employment Equality Acts but the Maternity Act of 1981 is not covered by that exemption. Accordingly, it argues that the provisions of the Maternity Act are covered by the Employment Equality Act and the Equal Treatment Directive.

3.5 The Union argues that Section 16 of the 1977 Act allows an employer

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

It says that this is consistent with Article 2(3) of the Equal Treatment Directive.

3.6 The Union says that in arguing that the claimant has been directly discriminated against, it accepts that job sharers have pro rata parity with their full time colleagues as set out in the Appendix to Circular 3/84 (Appendix 2). The Union argues that this cannot apply to issues concerning pregnancy and maternity as both the Equal Treatment Directive and Section 16 of

the 1977 Act (quoted above) provide that special treatment may be afforded to women in connection with pregnancy and childbirth and it quotes the Dekker, Hertz, Habermann and Webb decisions of the European Court of Justice in support of this.

3.7 The Union says that the European Court of Justice has ruled that it is direct discrimination based on sex to discriminate against a woman in relation to pregnancy and maternity, nor is it necessary, following from the same decisions, to show that a man would have been treated similarly in comparative circumstances. It says that Advocate General Darmon in the Dekker case (C-177/88) said; *"Pregnancy and maternity can never - excuse the truism - concern anyone but women."*

The Union says that the Dekker case concerns 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. The Court 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."*

3.8 The Union says that the Hertz case (C-109/88) concerned an interpretation of Articles 2(1) and 5(1) of the Directive and related to 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".

3.9 The Union says 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 Case C-177/88 Dekker v VJV-Centrum [1990] ECR I-3941 and Case C-179/88 Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening [1990] ECR I-3979)."

The Union says that in Paragraph 18 the Court goes on 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 accordingly 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 (ref Case 184/83 Hofmann v Barmer Ersatzkasse [1984] ECR 3047, paragraph 25)"

3.10 The Union says in the Habermann Case that Advocate General Tesauro 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 be 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."*

3.11 The Union says that perhaps most importantly of all in the most 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 woman and in Hertz with respect to the dismissal of a pregnant woman. 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."

"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."

3.12 The Union says that the European Court in the Webb decision copperfastened the thinking of the Dekker and Hertz case 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-Belterman, 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."

3.13 The Union argues that the European Court 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, and that it is sufficient to refer to most recent case in Webb, where the Advocate General and the European Court in paragraph 25 of the judgement ruled that pregnancy is not in anyway comparable with a pathological condition and even less so with unavailability for work on non medical grounds.

3.14 The Union alleges that the employer directly discriminates against the claimant in the manner that the Maternity Leave Regulations are applied to pregnant job-sharers. It claims that the 1994 Maternity Act provides that all women going on maternity leave are entitled to 14 weeks maternity leave. It further claims that special treatment should be afforded to all women in An Post going on Maternity Leave and that the maternity leave should be on full pay and should count as service for all purposes. It argues that the employer has decided that pregnant job-sharers should only be entitled to only 7 weeks full paid maternity leave rather than 14 weeks to be counted as service for all purposes.

3.15 The Union also argues that the claimant was not employed on a part time basis but as a job-sharer. It points out that as a part time worker she would have qualified for payments from

the Department of Social Welfare.

3.16 The Union argues that it is discrimination against job-sharers to apply pro-rata maternity leave both in relation to pay and service and argues that a woman has a statutory entitlement under the Pregnancy Directive and the 1994 Maternity Act to 14 weeks maternity leave and to have her service recorded as if she had not been absent.

3.17 The Union in relation to its claim of indirect discrimination poses four questions and provides and answers them as follows:

1 "What is the requirement with which the claimant was obliged to comply?"

"The requirement can be stated to be that the claimant should work full time and not engage in job-sharing prior to the taking of Maternity Leave."

3.18 It argues that without prejudice to the above the claimant also contends 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.

2 "Was the requirement such that a higher proportion of males than of females could comply with it?"

The Union contends that 98% of all job-sharers in the Civil Service are women and these statistics show that a higher proportion of males than of females could comply with the requirement to work full time. It also says that in An Post 11% approx of males and 55%

approx of females are part-time, therefore 89% of males could comply with the requirement to work full-time whereas only 45% of females could comply with the said requirement.

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

The Union says that job-sharers in An Post 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.

3.18 The Union argues that child rearing is still seen primarily as a woman's responsibility and quotes in support of its argument the following;

(a) Article 41 of the Constitution clearly sets out the position of women in the Family where it states;

"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. However, 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".

It 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 says that job-sharing is seen as an equality initiative to enable women to more actively pursue and combine work and family responsibilities.

4 "Is the requirement essential?"

The Union says 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.

3.19 The Union claims that the claimant is entitled to a minimum of 14 weeks maternity leave and to have them treated as service for all purposes. It also claims that she is entitled to full pay while on maternity leave. The Union says that she has been directly discriminated against on the basis of ECJ decisions which clearly have held that it is direct discrimination when the question

at issue is pregnancy and maternity and therefore it is not correct to apply a comparative approach.

3.20 The Union seeks as a remedy;

(a) a finding in the claimant's favour that she was discriminated against by her employer;

(b) statutory entitlement to 14 weeks paid Maternity Leave.

(c) 14 weeks paid Maternity Leave at full pay.

(d) 14 weeks paid Maternity Leave counted as service for all purposes.

(e) compensation for the alleged act of discrimination.

4 Summary of An Post's Submission

4.1 The Company says that the claimant is employed as a Clerical Officer in An Post Headquarters. On 27 January, 1993 she applied to job-share, on the basis that she and her partner would work alternate weeks commencing on 25th February, 1993. Her application was approved and the arrangement went into effect on the due date. The Company says that the claimant applied to continue job sharing for a further year in January 1994. Her application was approved and she completed a fresh job-share agreement commencing 25 February, 1994 and ending 24 February, 1995.

4.2 The Company says that in August, 1994, the claimant gave notice of her intention to commence Maternity Leave. She commenced Maternity Leave on 1 September, 1994, and it expired on 7 December, 1994, and was followed by four weeks additional Maternity Leave

ending on 4 January, 1995. The claimant resumed work, on a job-sharing basis, on 5 January, 1995. The claimant has not applied to resume full-time working and has, in fact, continued to job-share since 25 February, 1995, when she was last due to finish job-sharing.

4.3 The Company says that in accordance with the terms of the relevant collective agreement, the claimant's remuneration was maintained during the period of Maternity Leave (14 consecutive weeks) but remuneration was not payable in respect of the succeeding four weeks' additional Maternity Leave.

4.4 The Company argues that the basis of the claim is under the Maternity Protection of Employees Act, 1981. It says that the claim appears to be based on three contentions:-

(a) that the claimant has a statutory right to pay during Maternity Leave;

(b) that paying the claimant less than full-time remuneration while she was pregnant (and on Maternity Leave) constituted direct discrimination within the meaning of Section 2 of the Employment Equality Act, 1977;

(c) that continuing to apply the pro-rata remuneration,

because she was job-sharing during her Maternity Leave constituted indirect discrimination within the meaning of Section 2 of the Employment Equality Act, 1977, and it rejects each of these contentions.

4.5 The Company says that there is no statutory right to remuneration in respect of Maternity Leave and therefore no right to any particular level of remuneration. Section 15 of the Maternity Protection of Employees Act, 1981, which provides for the preservation of an employee's rights and benefits during Maternity Leave, specifically excepts remuneration.

4.6 The Company says that maintenance of remuneration during Maternity Leave is a benefit which applied to the claimant under the terms of a collective agreement in force in the Company.

4.7 The Company says the claimant freely entered into and subsequently renewed an agreement to job-share, consequently it argues that the claimant re-contracted to work reduced hours and be paid a proportionately reduced salary. The terms of the job-sharing agreement constituted the relevant terms of the claimant's contract of employment throughout the full period she was on Maternity Leave i.e. during the material time, the claimant was employed on a part-time basis and was paid accordingly.

4.8 The Company argues that Section 8(1) of the Maternity Protection of Employees Act, 1981 entitles an employee to Maternity Leave "for a period of not less than 14 consecutive weeks". Statutory Maternity Leave is thus defined solely in terms of a uniform number of calendar weeks (i.e. regardless of differences in weekly hours worked by different employees). It further argues that any claim based on comparison of the pay and service credited to,

respectively, a part-time and a full-time employee in respect of statutory Maternity Leave is, by definition, a claim based on comparison between employees of the same gender and, accordingly, is not a claim to which the Employment Equality Act, 1977 applies.

4.9 The Company claims that it has not discriminated directly against the claimant and says that the level of remuneration payable to the claimant while on Maternity Leave derived solely from the agreed terms of her employment contract in force over the relevant period. While on Maternity Leave, she was paid fully in accordance with the terms of her contract of employment.

4.10 The Company also says that the level of pay applied was determined directly and solely by reference to the claimant's agreed hours of work under the contract, which related neither to her gender or her pregnancy. Nothing was done in any way to annul or avoid the terms of the claimant's existing contract of employment while she was on Maternity Leave; no variation in the terms of the claimant's conditions of employment resulted from or is attributable to her gender or to her pregnancy.

4.11 The Company says that it has not discriminated indirectly against the claimant and it did not impose a discriminatory requirement in relation to the level of remuneration payable to the claimant during her Maternity Leave as implied in the claimant's submission.

4.12 The Company further argues that the claimant was not subject to any requirement that she should work full-time and not engage in job-sharing prior to or in order to avail of Maternity Leave or as a condition of the grant of remuneration during Maternity Leave. It says that any contention made to this or like effect is wholly incorrect. It says that the claimant has made no application to resume full-time working since she commenced job-sharing. On the contrary, she applied and was allowed to renew her job-sharing arrangement.

4.13 The Company says that the only relevant requirement which can be inferred is that in order for an employee to be paid as a full-time employee, s/he should be concurrently contracted to work as a full-time employee. This is an essential contractual condition, which is self-evidently justified on objective (e.g. economic, productivity etc.) grounds wholly unrelated to any attribute of an employee's gender.

4.14 The Company says that it is irrelevant to compare the number of females who work full-time and the number of males who work full-time because only females can qualify for Maternity Leave. Males can never qualify.

4.15 In relation to the submission made on behalf of the claimant where it relies on figures relating only to those part-timers who are job-sharing the Company points out that a majority of part-time employees of An Post are male (see Appendix 3).

4.16 In relation to indirect discrimination the Company refers to the ECJ ruling (case C33/89 Kowalska V Freie Und Hansestadt Hamburg) and argues that if indirect discrimination is established then the class of persons placed at a disadvantage by reason of the discrimination must be treated in the same way and made subject to the same scheme, proportionately to the number of hours worked, as other workers. In the Kowalska case, full-time workers (mostly men) received a lump-sum on severance. Part-timers did not. The part-timers were held to be entitled to a lump-sum proportionate to the number of hours worked. If men could qualify for maternity leave and maternity pay and if the claimant could establish that the proportion of female staff in An Post working part-time was significantly greater than the proportion of male staff working part-time, the claimant would still have no case because maternity pay is proportionate to hours worked in An Post and this fully complies with An Post's obligations under Article 119.

4.17 The Company says that in relation to the agreements on job-sharing and maternity leave that it would clearly amount to a "special arrangement" contrary to paragraph 11(iii) of the appendix to the Job Sharing Circular applying in An Post (Appendix 2 Circular 3/84), were other than pro rata remuneration to apply during a period of paid maternity leave. Paragraph 6 of Circular 3/84 provides that *"job-sharers will, broadly speaking, have pro-rata parity with their full-time colleagues".*

4.18 The Company in relation to the claimant's submission concerning the maternity leave arrangements which apply in the Company says that it does not accept that the expressions

"full pay" and *"service in all respects"* are to be construed as meaning, in all applications, "full-time remuneration" and "full-time service in all respects". The clear intent of these provisions is that, during maternity leave, remuneration should be maintained and reckonable service should accrue as if the employee were not on maternity leave at that time. The computation of remuneration and service for a job-sharer is defined by the terms of the job-sharing agreement and this is conserved by rather than set aside by the maternity leave provisions referred to.

4.19 In summary the Company says that

(a) the claimant was paid pro-rata remuneration rather

than full-time remuneration in respect of the period she was on maternity leave, not because of her gender or her pregnancy but because she was an employee who fulfilled certain conditions i.e. she was expressly employed at the time under a contract of employment which provided for her working a reduced number of hours and, correspondingly, a proportionate level of remuneration;

(b) that there is no statutory entitlement to paid

maternity leave and therefore there is no basis for any remedy in relation to pay;

(c) that the level of remuneration paid to the claimant

while she was on maternity leave did not in any way constitute unlawful discrimination against

the claimant and there is no basis therefore for any finding that it should be altered;

(d) that the claimant was employed on a part-time basis

during the period of her maternity leave. The reckoning of her service in respect of that period as part-time service (which is expressly in accordance with the terms of the job-sharing agreement) does not constitute unlawful discrimination and therefore there is no basis for any finding that the service should be reckoned differently;

(e) there is no basis for the award of compensation since

there has been no act of unlawful discrimination against the claimant.

5 Equality Officer's Conclusions

5.1 I consider the issue for examination in this case is whether or not the employer discriminated against the claimant in the manner in which it paid her and credited her service when she availed of maternity leave. In coming to my conclusions in this case I have taken into account all the submissions, both oral and written made by both the parties.

5.2 The union claims that the claimant was discriminated against by An Post, under Section 3 of the 1977 Act and also refers to the fact that under 56(2) of the 1977 Act that the Act of 1974 and the Act of 1977 shall be construed together as one Act; and further has referred the dispute under Article 119 of the Treaty of Rome and the European Union Equal Treatment

Directive 76/207.

5.3 I note that the union is seeking a clerical officer's full pay and entitlement to 14 weeks fulltime service on behalf of the claimant in respect of her maternity leave. I note that the claimant at the time of her maternity leave and in the periods before and after it, was job sharing with a colleague. As a jobsharer she is, by agreement, in receipt of half of the remuneration and half of the benefits accruing to a clerical officer's post in return for sharing the hours of the full time post in an agreed manner. The union's claim therefore is for double her normal remuneration for the period and also to have her service credited on the basis of a full time worker and not as a job sharer.

The union argues that while many ECJ recommendations have held that it is unlawful and discriminatory to discriminate against pregnant women, it has also held that it is not unlawful nor discriminatory to discriminate in favour of pregnant women. On this basis it argues that the employer in this case should discriminate in the claimant's favour and pay her the full time rate of remuneration and credit her with 14 weeks of full time service in respect of her 14 weeks maternity leave.

5.4 I note that the company argues that the claimant had been jobsharing for some time before commencing maternity leave It says that she commenced job sharing in 1993 and that the claimant applied to continue job sharing for a further year in January 1994. She was job sharing when she commenced her maternity leave and resumed work, on a job-sharing basis,

on 5 January, 1995. The company makes the point that the claimant has not applied to resume full-time working and has, in fact, continued to job-share since 25 February, 1995, when she was last due to finish job-sharing.

5.5 I note that the union has referred to the Maternity Acts of 1981 amended in 1991. 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. Pregnant women at work consequently have a statutory right 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. The claimant in this case was paid as if she had been at work, and was in receipt of 14 calender weeks maternity leave and has since returned to work.

5.6 The union argued at the hearing that while the claimant does not have a statutory right to paid maternity leave, circular 27/81 "Maternity Leave" (copy at Appendix 1) which outlines the conditions governing maternity leave in the Civil Service and in An Post, speaks of paid maternity leave at full pay. The union claims in accordance with this circular, that the claimant's maternity leave should have been paid at the same rate of remuneration as that paid to full time

workers whether on maternity leave or not.

5.7 As I have already noted the claimant worked on a job-sharing basis and had done so for a considerable period. She commenced jobsharing in February 1993. I also note that this claim is in respect of maternity leave availed of between September to December 1994 and that she continued to job share after she resumed work. I note that while job-sharing her normal hours are 50% of the attendance liability of a worker employed full time and that her hours were agreed locally with management. These hours could have been agreed, variously as week on/week off, split weeks, or a daily half day attendance either A.M. or P.M. Her conditions of employment are covered by Circular 3/84 (Copy at Appendix 2). These conditions outline the principle governing job-sharing i.e.*"a full time post shared equally between two officers".* I also note that this claim is in respect of maternity leave availed of prior to the enactment of the Maternity Protection Act 1994.

5.8 I note that a recent judgement of the ECJ (Gillespie case-342/93) 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, or lays

down specific criteria for determining the amount of benefit payable to them during that period or for that matter do the Maternity Acts 1981 to 1994, it remains for me to examine whether the employer discriminated against the claimant in its treatment of her when availing of maternity leave.

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

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 3.7 to 3.13 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 claimant was treated, in relation to pay and service when on maternity leave, as if she had not been absent and as such does 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 the maternity leave.

5.11 As I have found that the claimant was not directly discriminated against I have examined the claim with regard to indirect discrimination within the meaning Section 2(c) of the 1977 Act. I note that in the Dekkar case (C-177/88) 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 claimant who is a job share worker, it is necessary to show a difference in her treatment, because of her pregnancy, vis-a-vis full-time staff.

I note that the union's claim is for the full time rate of pay and service and that consequently the claimant has been indirectly discriminated against because in order for her to be paid this rate when on maternity leave it was necessary for her 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.

I note that the company provides the same length of maternity leave to both job sharers and full time staff. I further note that both categories are paid at their normal rate of remuneration whether at work or on maternity leave.

I do not consider that the claimant was indirectly discriminated against. She was in receipt of her normal remuneration and maternity leave entitlements and the union's claim is that she should have been paid at the same rate as full time staff.

5.12 I note that the union accepts that the claimant's pay and conditions when on maternity leave were pro-rata to full time staff. I do not consider that the claimant was unfavourably treated in relation to full time staff when she availed of maternity leave as while on maternity leave she received precisely the same treatment in regard to pay and service as fulltime workers. She was paid and her service recognised as if she had not been absent. Having regard to all the evidence presented in this case I find that An Post did not directly or indirectly discriminate against Ms O'Connor.

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 claimant, who is a job sharer, service and pay at the same level as full time staff for the period that she availed of maternity leave, sought additional pay and service for her. 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 claimant was not discriminated against in relation her maternity leave 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 An Post did not discriminate against the claimant in relation to her maternity leave.

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Mary Solan Avison
Equality Officer

22nd April 1997