

1. DISPUTE

- 1.1** This dispute concerns a claim by Ms. Therese Hand that, on 25th April, 1995 the Minister for Equality and Law Reform and the Secretary of the Department of Equality and Law Reform discriminated against her within the meaning of Section 2(a), Section 2(b) and Section 2(c) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act when they failed to offer her a job-sharing position in the Department.

2. BACKGROUND

- 2.1** The claimant is employed as an Assistant Principal Officer in the Department of Equality and Law Reform. In 1994 prior to going on maternity leave the claimant indicated to the Department that she wished to return to work on a job-sharing basis. However, two weeks before she was due to return to work (following her maternity leave) the claimant sought and obtained a six months career break. She advised the Department of her desire to return to work, following the career break, on a job-sharing basis. The Department, however, offered the claimant a full-time position which she was not in a position to accept because of family responsibilities.
- 2.2** Since this time and despite constant requests by the claimant to return to work on a job-sharing basis the Department has indicated that it is not in a position to accommodate her request. As a result, on the 24th October, 1995 the claimant lodged a complaint with the Labour Court and the Labour Court referred it to an Equality Officer for investigation and recommendation.

3. SUMMARY OF CLAIMANT'S CASE

- 3.1** The claimant says that prior to going on maternity leave

she indicated to the Personnel Officer that she wished to resume duty in a job-sharing capacity. She commenced her maternity leave on 1st April, 1994 and also availed of four weeks leave without pay. The claimant says that she was due to return to work on 23rd August, 1994 but because of childcare responsibilities she applied for a six months career break which was approved. The claimant states that she informed the Department, at the time she requested a career break, of her intention to return to work in a job-sharing capacity. About two weeks before the termination of her career break the claimant says that she applied to resume work in a job-sharing capacity and she was due to return to work on 23rd February, 1995.

3.2 The claimant argues that, at the time of her proposed return to work, there were two Assistant Principal (AP) vacancies within the Department. One of these had arisen as a result of an AP taking a six months career break in March, 1994. The other post arose when the Department's Information Officer retired in November, 1994 and the Department of Finance sanctioned the creation of a generalist AP post in substitution for the Information Officer post. These two posts have now been filled, one by internal promotion and the other, initially, by giving one of the Department's Higher Executive Officer (HEO) an allowance to perform higher duties. The latter post was filled in December, 1995 by that HEO being promoted to AP.

3.3 The claimant says that, in response to her application to return to work on a job-sharing basis, the Department offered her a full-time post saying that it was not in a position to facilitate her request for job-sharing. The claimant says that she had difficulty in ascertaining from the Department why it had refused her application

given that there were two AP vacancies at the time and as a result she wrote to the Secretary of the Department. In response to this letter the Personnel Officer informed her, by letter, that neither of the two vacant AP posts were deemed suitable for job-sharing purposes. These letters are attached as Appendix A. The claimant argues that when she spoke to the Department prior to the filling of the two AP posts it had not decided which division(s) would be given the newly created AP posts. As the claimant was not in a position to return to work on a full-time basis she applied for a further six months career break and has had to extend it again since then.

3.4 The claimant argues that the Department's rationale for its decision not to facilitate her in February, 1995 is very weak given that it was well aware in advance of her proposed return to work and of her request to resume duty in a job-sharing capacity. The claimant states that the Department was also aware, from contacts with herself and the Department of Finance, of the existence of an AP in the Department of Environment who wished to job-share. The claimant also states that, prior to going on maternity leave, the Personnel Officer considered her own post i.e. AP in Personnel Section as a suitable job-sharing position.

3.5 It is the claimant's contention that she has been indirectly discriminated against and she claims that there are many European Court of Justice judgements setting out the principles to be applied when considering cases of alleged indirect discrimination. The detail provided by her in this regard is set out in Appendix B.

3.6 The claimant states that her employer discriminated

against her when she was refused job-sharing in her employment and obliged to remain on a career break. She alleges that the refusal to permit her to job-share constitutes discrimination on grounds of sex and marital status contrary to Section 3 of the Employment Equality Act, 1977, in relation to access to employment, employment practices and working conditions. In consequence the claimant asks that the Equality Officer consider the loss suffered by her (i.e. loss of employment, loss of pension benefit arising from absence from work and restriction of her entitlement to future career breaks as she had no option but to extend this career break) in addition to the experience of discriminatory treatment.

4. SUMMARY OF RESPONDENT'S CASE

4.1 One submission was received from the Minister of Equality and Law Reform and the Secretary, Department of Equality and Law Reform who are the named respondents in this case.

4.2 The Department of Equality and Law Reform was constituted on 21st January, 1993. The claimant was employed in the Department as an Assistant Principal in the Personnel/ Organisation/Finance Unit. The respondents say that the claimant went on fourteen weeks maternity leave commencing on 4th April, 1994. On 12th April, 1994 she applied, in writing, to the Department's Personnel Officer, to return to work in a job-sharing capacity (alternate three days on/two days off) on the expiration of her maternity leave. The respondents say that, at the end of her maternity leave, the claimant availed of an additional four weeks unpaid leave and seven days annual leave and was thus due to return to work on 23rd August, 1994. The respondents say that, on

8th August, 1994, the claimant applied for a six months career break, on the grounds of domestic/family reasons and the Department approved this career break. Then in August, 1994 the respondents say that the claimant notified the Department that she wished to resume duty on 23rd February, 1995 preferably on a job-sharing basis.

4.3 The respondents say that, in order to facilitate the claimant's request to return to work on a job-sharing basis, it undertook a review of the job-sharing potential of all the Department's Assistant Principal posts including those in the Employment Equality Agency and the Legal Aid Board. In examining the individual posts, special attention was given to important features of the work involved, namely:

- the nature and range of duties involved, with particular reference to prevailing critical issues, new initiatives/developments, continuity and regular availability;
- requirements and frequency of foreign travel;
- extent and degree of inter-action with the Principal Officer in the context of her/his duties, the Minister's priorities/timetables;
- the inter-action reporting relationships vis-a-vis subordinate staff.

Having assessed all of these relevant factors, the respondents concluded that none of the AP posts were suitable for job-sharing, the details of the review are attached as Appendix C. The respondents say that the claimant trawled the other Government Departments with a view to finding a suitable job-sharing partner to coincide with her return from career break on 23rd February, 1995 while they placed her name on the Central Applications List for Job-Sharing held and controlled by the Department of Finance. The respondents regret that

their efforts to find a suitable job-sharing partner for the claimant were unsuccessful and they say that they did afford her the opportunity of returning to work on a full-time basis following the termination of her career break.

- 4.4** The respondents say that the pilot job-sharing scheme, agreed between the Official and Staff sides, states that:

"The particular posts in Departments/Offices which are suitable to be filled on a job-sharing basis, and the number of posts to be so filled under the pilot scheme, will be finally decided by management"

"Posts in supervisory grades may be included in the pilot scheme, provided management is satisfied in each case that standards of efficiency and supervision will not be affected".

The respondents state that they support the concept of job-sharing. They say that, on one occasion, there were two Assistant Principals, including the claimant, who were simultaneously on career break from the Department. To facilitate their return to work on a job-sharing basis, management indicated a willingness to consider filling a suitable Assistant Principal vacancy, on a matching job-sharing basis, provided the two officers concerned were agreeable to this arrangement. The respondents say that the claimant would have been aware of this possibility but this was not pursued further in the absence of an indication from the officers concerned that they had agreed attendance on a matching basis. The respondents say that they could only assume that the two officers were unable to agree to cover the post on an agreed matching job-sharing arrangement.

4.5 The respondents state that an Assistant Principal post in the Employment Equality Agency, which is under the aegis of the Department of Equality and Law Reform, is filled on a job-sharing basis. One of the job-sharers is on loan from the Department of Social Welfare and the initial period of job-sharing approved by the Department in respect of the latter was for one year ending on 19th December, 1994. The respondents say that this was extended for a further year to 19th December, 1995 at the Agency's request.

4.6 The respondents say that prior to 19th December, 1995 the Department reviewed the job-sharing potential of its Assistant Principal posts with a view to facilitating the claimant and the other Assistant Principal on career break who also wished to return to work on a job-sharing basis. The following decisions were taken:

- To terminate the job-sharing arrangement which it had with the Assistant Principal Officer on loan from the Department of Social Welfare whose duties included, inter alia, activities on an E.U. related project which was winding down and coming to finality in February, 1996 and
- To sanction a half Assistant Principal job-sharing position in the Task Force on the Travelling Community. The Task Force completed its final Report to the Minister in July, 1995. The staff of the Secretariat were involved subsequently in the work of an Inter-Departmental Working Group which reported to Government at its request on implementation measures.

4.7 The respondents say that the claimant had expressed a wish to be considered for any vacancy which might arise

in the "Equality Section" of the Department. Because of her previous work background in this area the Department planned to assign her to the job-sharing post in the Employment Equality Agency and to assign the other Assistant Principal to the half job-sharing post dealing with activities on the Travelling Community. The latter took up duty in January, 1996, and arrangements were put in place by the Department for the claimant's return on a job-sharing basis with effect from 8th January, 1996. The respondents say that the Department of Social Welfare subsequently informed the Department of Equality and Law Reform that it was reluctant to take back its Assistant Principal as it had no suitable vacancy either on a full-time or job-sharing basis. This inter-Departmental disagreement is still unresolved.

4.8 The respondents say that the claimant has stated that she is unable to continue employment in a full-time capacity because of family reasons and, in that context, she is being discriminated against because the requirement to work full-time places a more onerous burden on women, and particularly on married women, than on men or single women. The respondents, in their defence, say that they have made every effort, within the constraints imposed on them, to facilitate the claimant's return to work on a job-sharing basis. They categorically refute the claimant's allegation that they discriminated against her on the basis of her sex and marital status in contravention of Sections 2 and 3 of the Employment Equality Act, 1977.

4.9 The respondents say that the Department's primary responsibility is to deploy its resources, including staff, in a manner that will ensure the highest standards of effectiveness and efficiency in delivering its legislative workload as set out in the Government's

Programme for Competitiveness and Work. The respondents consider that the Department's inability to facilitate the claimant's return to work on a job-sharing basis is totally unrelated to discrimination of any kind. They say that, if the claimant in this instance were a male, the return to work on a job-sharing basis would have created the same difficulties for the effective operation of the Department.

4.10 The respondents made the following comments on the claimant's submission:

- They do not accept the claimant's contention that the rationale to their decision not to facilitate her return to work on a job-sharing basis "was very weak". On the contrary, it was clear from the analysis of Assistant Principal posts at the time, that none were suitable for job-sharing.
- They refer to the claimant's statement that "*it is difficult to see how the Department could argue that the (re-defined) post was not job-shareable as it (i.e. the Department) had no definite concept of what the post would be*". They say that it would be totally irresponsible of management to agree to a job-sharing arrangement, as proposed by the claimant, where the duties of a new or re-defined post were still to be defined. While no definite decision had been made regarding this re-defined post, at that time, the likelihood was that it would be geared to the preparation of legislation given the Department's heavy work programme in this field. Ultimately, as a result of

re-organisation, the post was located in the Law Reform Division with responsibility for preparing legislation.

- The respondents mention the claimant's reference to *"an AP in the Department of the Environment who was prepared to consider a transfer to another Department in order to job-share"* and say that this particular AP was prepared to CONSIDER transferring to another Department to job-share. The respondents say that there were no suitable AP posts to suit job-sharing at the time. However, the Department did try to have the claimant facilitated in the Department of Environment on a job-sharing basis as it understood from her that such a post existed there. The Department (of Environment) did not accede to this request. The claimant subsequently informed the Department that the most appropriate action for her was to avail of a career break which the Department sanctioned.
- While the respondents accept that the Personnel Officer may have considered the claimant's AP post as one which was job-shareable in 1994, this was not the position when the claimant wished to return to work on a job-sharing basis. In 1994 the role of the Assistant Principal officer with responsibility for Personnel/Finance/Organisation/ Information Technology underwent significant change.
- The respondents mention the claimant's reference to the fact that there is no appeal mechanism where a Department decides it cannot facilitate a request to job-share and the Department of

Finance appears to have a policy of non-involvement in detailed discussions of this nature and say that the Department has operated the job-sharing scheme as constituted and agreed between the Official and Staff sides. The respondents say that the Department's management must take responsibility for the effective and efficient operation of its activities and in doing so must decide whether posts in supervisory grades can be filled on a job-sharing basis without detriment to its overall effectiveness. The respondents say that there were discussions between the Department and the Department of Finance about the claimant's request to job-share and the reasons why the Department could not agree to the request.

5. CONCLUSIONS OF THE EQUALITY OFFICER

- 5.1** In this case the claimant alleges that the respondents discriminated against her, on 25th April, 1994, within the meaning of Section 2(a), Section 2(b) and Section 2(c) of the Employment Equality Act, 1977 and in breach of the terms of Section 3 of that Act. At the joint hearing in this case the claimant submitted a written response to the respondents' initial submission, the main details of which are set out in Appendix D. The respondents, in turn, presented me with a written response to this document and a summary of this response is also set out in Appendix D. In reaching a decision in this case I have taken into account all the evidence, both written and oral, made to me by the parties. Due to the volume of information received from both parties it is not possible to attach it all as a Appendix to this recommendation. However, it is available to the Labour Court should the Court require access to it at

some future date.

5.2 According to the claimant she is not in a position to continue in employment in a full-time capacity because of family responsibilities. Therefore, by failing to give her a job-sharing position, the claimant alleges that the respondents have discriminated against her because, she says, *"it is generally accepted that a requirement to work full-time places a more onerous burden on women, and particularly married women, than on men or single women"*. The respondents refute the claimant's allegation that their inability to facilitate her return to work in a job-sharing capacity constitutes discrimination on grounds of sex and marital status contrary to Sections 2 and 3 of the Employment Equality Act, 1977 and Article 2 of EEC Directive 76/207.

5.3 Prior to the first joint hearing in this case on 4th February, 1997 the respondents applied to the Labour Court for a preliminary hearing under Section 19(5) of the Employment Equality Act, 1977 on the basis that the claim was statute-barred. In response to this request the Labour Court informed the respondents that, as the case had been referred to an Equality Officer for investigation, it would not be proper to withdraw it from her. The Labour Court, in its letter, (attached as Appendix E) said that the respondents were entitled to show that the date, on which the first act of the alleged discrimination occurred, was not correctly given and that the Equality Officer could reach her own conclusions on that point during the course of her investigation. The Labour Court told the respondents that they had the right to appeal the Equality Officer's recommendation, if it proved to be unfavourable to them,

both in terms of the time limit issue and any other issue dealt with by her. At the joint hearing of this claim I informed the parties that I would not be making a decision in relation to the time limit issue on the basis of the judgement in the Supreme Court case of *Aer Lingus Teoranta v The Labour Court*¹ in which Judge Walshe stated:

".... The Equality Officer has no function to deal with any matter concerning the question of time bar and therefore any finding he makes is strictly without prejudice to what the Labour Court may decide about the latter point. If it were otherwise then the Labour Court would, ..., have to hold a preliminary enquiry into every case whereas in fact the Labour Court can decide on a question of the acceptability at the same time as it falls to determine the merits of the case."

5.4 At the joint hearing of this claim the respondents cited Section 13 of the Employment Equality Act, 1977 which states that:

"Nothing in this Act shall require an employer -

(a) to employ in a position a person who will not undertake the duties attached to that position or who will not accept the conditions under which those duties are performed, or

(b) to retain in his employment a person not undertaking the duties attached to the position held by that person".

The respondents argued that, in accordance with this Section of the Act, the claimant is refusing to undertake the duties attached to her position and as a full-time officer she cannot be retained in a part-time position. The respondents said that if this argument is accepted then the case collapses. The claimant, in response, said that she is not refusing to undertake the duties of the position. At some time in the future she may have to choose between her domestic responsibilities

¹ Case No. 141/88.

and full-time employment. However, her present contract of employment allows her to apply for job-sharing and career breaks. The claimant said that, while she has no statutory right to job-share, she is employed under the conditions that the job-sharing scheme is not operated in a discriminatory manner.

5.5 I am satisfied that the terms of the claimant's contract of employment allow her to apply for job-sharing and career breaks. The claimant has applied for a job-sharing position and, while her request for job-sharing had not been facilitated at the time of the alleged discrimination, she applied for and obtained a career break. There is no evidence to suggest that, at the date of the alleged discrimination, the claimant refused to carry out the duties of the position as claimed by the respondents. I note that, subsequently, the claimant was offered job-sharing positions in other Departments and she refused them and I consider that it could legitimately be argued that she refused to undertake the duties of the position. If this is to be used as a defence in a case it would then be necessary to examine the reasons for the refusal. However, I find that, as the claimant was not offered a job-sharing position at the date of the alleged discrimination and she opted to avail of a career break, she did not refuse to undertake the duties of the position and Section 13 of the Act cannot properly be used as a defence in this case.

5.6 Under Section 2(c) of the Employment Equality Act, 1977 discrimination shall be taken to occur:

"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 (as the case may be) of a different marital status but of the same sex able to comply is substantially higher"

The claimant, in her submission, stated that the requirement imposed on her to work full-time constitutes indirect discrimination as it is not an essential requirement for employment and it adversely impacts on women to a greater extent than on men. The respondents deny that they indirectly discriminated against the claimant.

- 5.7** To substantiate her claim that full-time work adversely impacts on women to a greater extent than on men the claimant referred to the statement in 'Women in the Labour Force' (EEA, 1995) by Joe Durkin, Economist, UCD that "almost three times as many females are engaged in regular part-time work as there are males". 1993 statistics show a total of 104,600 regular part-time workers, 28,200 of whom were male while the remaining 76,400 were female. Of the 76,400 females in regular part-time work in 1993, 54,500 were married and 16,300 were single. The claimant also cited paragraphs 3.12, 3.13 and paragraphs 4.29 to 4.33 of the National Economic and Social Forum Report No. 9 entitled Jobs Potential of Work Sharing, January, 1996 and these extracts are attached as Appendix F. The table of statistics set out in Appendix F and based on the CSO, Labour Force Survey, 1994 show that 30% of persons opted to work part-time on account of family responsibilities. In this category females accounted for 97% of the total.
- 5.8** The claimant submitted further statistics from the Equality of Opportunity in the Civil Service publications for 1991, 1992 and 1993. These statistics are set out in Appendix G. The claimant asked that the

Equality Officer, in considering these statistics, apply the approach of the European Court of Justice in *Nimz (applicant) v Freie Und Hansestadt Hamburg*². In this judgement the Court held that the more favourable treatment of full-time over part-time workers was contrary to the principle of equal treatment

"where the latter group of employees comprises a considerably smaller percentage of men than women, unless the employer can prove that such a provision is justified "

5.9 The claimant presented legal arguments to substantiate her claim that the respondents indirectly discriminated against her. The details of these cases, along with the arguments made by the claimant and the counter arguments made by the respondents, are set out in Appendix H. In its defence the respondents also referred to case law, the details of which are set out in this Appendix.

5.10 The Supreme Court in *Nathan v Bailey Gibson*³ held that Section 2(c) of the Employment Equality Act, 1977 only applies

"where the obligation is imposed on a person because of his sex or marital status".

The Court also said that

"It is sufficient to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the plaintiff's sex".

5.11 According to the claimant the requirement which the

² Case No. C-184/89 [1991] IRLR 222.

³ Case No. 375/92 (Judgement delivered on 29/2/96).

respondents imposed on her was that she work full-time. The respondents ask if the obligation to work on a full-time basis is a requirement to which the claimant has been subjected within the meaning of Section 2(c) or a condition of employment or work practice within the meaning of Section 3 of the 1977 Act. In asserting that such an obligation was not a requirement, condition or practice within the meaning of the relevant provisions of the 1977 Act the respondents relied on the determination of the (UK) Employment Appeals Tribunal in *Clymo v. Wandsworth London Borough Council*⁴ which held that the obligation to work full-time was 'part and parcel' of the complainant's employment and it was not a requirement or condition which had been applied to her.

5.12 Having examined the *Clymo* case I find that the job-sharing facility applied to lower level jobs in the library service. However, it did not apply to the complainant's job due to the managerial responsibilities attached to it. The respondents in this case offered a job-share of the complainant's husband job but this was not accepted. In the present case the job-sharing facility is 'part and parcel' of the claimant's contract of employment and she is entitled to apply for the facility. I am, therefore, satisfied that it is one of her conditions of employment within the meaning of the 1977 Act. This facility is applicable to both male and female employees. The claimant has shown (see Appendix F) that a greater proportion of females than males avail of it for family reasons. Hence I am satisfied that the requirement imposed on the claimant was one with which a substantially higher proportion of males than females can comply.

5.13 The next issue for consideration is whether or not the

⁴ [1989] IRLR 241.

requirement to work full-time is essential and is based on objectively justifiable factors which have no relation to the claimant's sex. At the joint hearing in this case the respondents indicated that, while the claimant had the right to apply for a job-sharing position, she had no guarantees of being facilitated. The respondents said that her application for job-sharing could only be facilitated where they deemed a post to be suitable for job-sharing. In this regard one must bear in mind that the Department of Finance instruction to Departments is that they should facilitate requests for job-sharing where at all feasible. The respondents undertook a formal review of the Assistant Principal Officer posts to establish if any of these posts were suitable for job-sharing. On foot of this review (the details of which are set out in Appendix C) the respondents decided that none of the Assistant Principal posts in the Department or in the Legal Aid Board were suitable for job-sharing. The Chief Executive of the Employment Equality Agency indicated that her two Assistant Principal posts were suitable for job-sharing. I note that one of the posts in the Employment Equality Agency is currently being job-shared. The Department, however, did not pursue with the Employment Equality Agency the possibility of having the second AP position filled by job-sharers as it argued that the post is a specialist legal one.

- 5.14** The claimant was critical of the respondents for not having undertaken a review of the Assistant Principal posts in the Department including the Agencies for which the Department has responsibility prior to informing her that they were unable to accede to her request for a job-sharing position. The claimant was informed by letter dated 25th April, 1995 that it was not possible to facilitate her return to work in a job-sharing

capacity. Then, on foot of a request dated 29th May, 1995 from the Department of Finance the respondents commenced, on 14th June, 1995, a review of Assistant Principal posts (referred to above) to establish their suitability or otherwise for job-sharing. This was some six weeks after the claimant had been told that her job-sharing request could not be accommodated. The claimant contends that the refusal to place her in a job-sharing position was not based on the review of the potential of the Assistant Principal officer positions for job-sharing. Rather the review of the AP posts was a damage limitation exercise on foot of the letter from the Department of Finance.

- 5.15** I note that the Assistant Principal post over the Personnel/Finance/Organisation/Information Technology Unit was among the posts deemed unsuitable for job-sharing. This was the position which the claimant had occupied prior to her maternity leave and her six months career break. At the joint hearing in this case the claimant said that, prior to availing of maternity leave, the Personnel Officer (i.e. her Principal Officer) advised her that he considered her Assistant Principal post suitable for job-sharing purposes. She said that he indicated to her that he would be happy to have her job-share initially without a partner until such time as a job-sharing partner could be found. The respondents said that, while the Personnel Officer may have said this, it was his personal opinion as opposed to that of management and it is the role of management to decide on the suitability or otherwise of the post for job-sharing. I note that, from the information submitted by the respondents on the review of Assistant Principal posts in the Department, at least one of the Assistant Secretaries consulted his Principal Officers before deciding on the suitability or otherwise of the

posts. The Personnel Officer is the person charged with managing the Department's human resources, among other things, and, in my opinion, would have been the best person to decide whether or not the Assistant Principal post beneath him was suitable for job-sharing purposes. I am satisfied that the Personnel Officer's view would have been pertinent in the decision on the job-sharing suitability of this particular Assistant Principal post.

5.16 According to the respondents the Assistant Principal post over Personnel/Finance/Organisation/Information Technology was deemed unsuitable for job-sharing for the following reasons:

- the Personnel and Finance Systems had been computerised since the departure of the claimant and her replacement had been trained in the systems. It was considered important to preserve the continuity of the Assistant Principal over these units to ensure effective operational and monitoring of the new computerised systems;
- the changeover from preparing the Appropriation Account manually on a cash-basis to a system of accrual accounting required substantial changes on an on-going basis in various accounting procedures. To carry through these changes successfully it was essential to have continuity in this Assistant Principal post;
- it was necessary to have regard to the planned retirement in November, 1995 of the Principal Officer over this area. As the promotee to replace him was unlikely to possess comparable experience in this area it was considered important to preserve continuity and experience in this core area at Assistant Principal level during this transition period;
- an additional responsibility for a Pilot Childcare Initiative set up in mid-1994 was assigned to this Assistant Principal post involving the development of new policies and criteria for the operation of the scheme.

5.17 Two of the reasons given for the post being unsuitable for job-sharing relate to the computerisation of Personnel and Finance procedures. These systems were installed in the Department by the Government Computing Service (CMOD) and they are the standard Personnel Administration System (PAS) and Financial Management System (FMS) that have been installed in many other Government Departments. I note that the computerisation commenced after the claimant went on maternity leave. The respondents confirmed that the training given to her replacement at Assistant Principal level was no different to that given to all other staff using the systems. I note also that there is an Information Technology Unit in the Department headed up by a Higher Executive Officer with a background in Information Technology. At the hearing the respondents said that where there are problems with the systems the IT Unit is called upon to rectify them. The Department has maintenance contracts with specialist Companies who are contacted as and when required and the Department also has recourse to CMOD. I cannot, therefore, accept the respondent's argument of continuity in relation to the operation of the computerised systems. I would be prepared to accept that it might be necessary to maintain continuity in this post in terms of a knowledge of the workings of the various areas within this post. This continuity, however, could have been provided by the claimant given that she had held the position since the establishment of the Department on 21st January, 1993. As the claimant was involved in the setting up of these Units in the new Department she would have had a very good understanding of the areas. I am also satisfied that this argument, as presented by the respondents, has no bearing on the suitability of the post for job-sharing.

5.18 In not deeming this particular Assistant Principal post suitable for job-sharing the respondents argued that, because the Principal Officer was retiring in November, 1995, it was necessary to have continuity and experience at Assistant Principal level. (I note from further information presented to me by the respondents that the Principal Officer retired on 6th October, 1995.) The claimant was due to return to work on 23rd February, 1995. I am satisfied that between February and October the claimant would have had sufficient time to familiarise herself with changes which had taken place in her absence e.g. computerisation, Pilot Childcare Initiative, etc and hence provide both continuity and experience. Again I do not consider that this argument has any significance in relation to the suitability of the post for job-sharing purposes.

5.19 The final argument made by the respondents in relation to this post was the additional responsibility of the Pilot Childcare Initiative involving the development of new policies and criteria for the operation of the scheme. Civil Service jobs, by their very nature, involve additional responsibilities from time to time and civil servants, especially at senior management grades including Assistant Principal Officer, would be expected to have the ability to cope with additional responsibility. Furthermore, civil servants are transferred from one area to another within a Department in line with the demands at the time. Civil servants, especially at senior management grades, would be expected to cope in a new area. Officers on promotion coming to a Department for the first time are expected to come to terms with the new work area even though it might differ radically from the work they had been doing. I am, therefore, satisfied that the claimant could have coped with the additional responsibility of

the Pilot Childcare Initiative. Furthermore, I consider that the respondents have failed to show that this one additional responsibility required a person to be working full-time in the position. Having examined all the arguments put by the respondents as to why this post was deemed unsuitable for job-sharing I am satisfied that, in accordance with the Supreme Court decision in the Nathan and Bailey Gibson⁵ case, the respondents have failed to show that its unsuitability for job-sharing was based on objectively verifiable factors which had no relation to the claimant's sex.

5.20 Having examined one Assistant Principal post in detail, I am satisfied that the respondents have failed to substantiate their claim that none of the Assistant Principal posts were deemed suitable for job-sharing at the time. The respondents were in a ideal position, if they had so wished, to accommodate the claimant as there were two vacant Assistant Principal positions in the Department at the time. The Information Officer had retired on 22nd November, 1994. This was vacant at the time the claimant wished to return to work on a job-sharing basis. The post was re-defined as a legislative post with the approval of the Department of Finance. The second position which was vacant at that time was a legislative Assistant Principal post. The occupant of this post had taken a six months career break. The respondents argued that, because of the heavy legislative workload in the Department, these posts were unsuitable for job-sharing. Even if I accept the respondents' argument, I consider that they could have re-assigned officers at Assistant Principal level in order to accommodate the claimant.

5.21 I note that a number of the posts in the Department of

⁵ Case No. 375/92 (Judgement delivered on 29/2/96).

Equality and Law Reform are designated as legislative posts. The respondents argued that they were unsuitable for job-sharing because of the heavy legislative workload in the Department necessitating a high level of commitment including unsocial hours by the officers assigned to these posts. The respondents submitted detailed information on the workload assigned to each of these posts. This information is available to the Labour Court, should the Court require it. However, the Department of Finance informed me by letter dated 2nd May, 1997 that, in a number of other Government Departments, legislative posts have been filled by Assistant Principal officers working in a job-sharing capacity.

5.22 During the course of this investigation the respondents informed me that there is an Assistant Principal post in the Employment Equality Agency, (i.e. an Agency over which the Department of Equality and Law Reform has responsibility) which is being job-shared by a female Assistant Principal, who was already attached to the Agency and a male Assistant Principal, who is on loan from the Department of Social Welfare. The respondents accepted this person on loan from the Department of Social Welfare subject to the general conditions outlined in Circular 3/84 (attached as Appendix I). This arrangement has existed since December, 1993.

5.23 I note that, in a letter dated 31st August, 1994 to the Department of Equality and Law Reform, the claimant sought to return from her career break in a job-sharing capacity. She re-iterated this wish in a telephone conversation with an official from the Department of Equality and Law Reform on 5th December, 1994. In this conversation the claimant advised the official that she wished to resume duty on a job-sharing basis in

February, 1995. She said that her preference would be for job-sharing on the basis of a split week but she would be willing to consider other options. The claimant also indicated that she would be interested in working on the Equality side as she had experience in this area. Two days later on 7th December, 1994 the Department wrote to the Chief Executive of the Employment Equality Agency (E.E.A.) stating that the male officer on loan from the Department of Social Welfare had signed a job-sharing contract for an initial period of one year which was due to expire on Monday, 19th December, 1994. The Department asked if the Agency wished to retain the services of this officer and it advised the Agency to give it favourable consideration. The Agency informed the Department that it did wish to maintain the job-sharing arrangement and it asked the Department to renew the contract.

5.24 In an attempt to facilitate the claimant's request for a job-sharing position the Department, in December, 1995, informed the male officer and the Department of Social Welfare that it was not in a position to renew the job-sharing contract. Both the male officer and the Department of Social Welfare raised objections to the termination of this loan arrangement. The Board of the Agency was, however, willing to accept the claimant in place of the officer on loan.

5.25 One must question what caused the change between December, 1994 and December, 1995 to force the respondents to decide not to renew the male officer's job-sharing contract in December, 1995 even though they were well aware that the claimant was seeking a job-sharing position very soon after December, 1994. The only apparent difference was that the claimant had submitted a claim of discrimination under the Employment

Equality Act, 1977 on 25th April, 1995. It would appear that the respondents, by renewing the job-sharing contract with the male officer on loan from the Department of Social Welfare in December, 1994, treated him more favourably than a female officer of its own Department. However, the evidence available to me does not suggest that the more favourable treatment of the male officer was related to his sex. I also note that, in a written submission and at the joint hearing, the claimant said that she was not making a claim of direct discrimination under Section 2(a) of the 1977 Act.

5.26 In their submission the respondents said that they support the concept of job-sharing. They mentioned that there were two officers at Assistant Principal level (including the claimant) on career break who wished to return to work on a job-sharing basis. They said that:

"management indicated its willingness to consider filling a suitable Assistant Principal vacancy, on a matching job-sharing basis, provided the two officers concerned were agreeable to this arrangement. Ms. Hand would have been aware of this possibility. However, this was not pursued further in the absence of an indication from the officers concerned that they had agreed attendance on a matching basis. The Department can only assume that the two officers were unable to agree to cover the post on an agreed matching job-sharing arrangement".

This poses a number of questions. If the respondents decided that there was no Assistant Principal vacancy suitable for job-sharing then how could they be considering filling a suitable Assistant Principal vacancy? Furthermore, the respondents would have been aware that, from as early as 12th April, 1994, the claimant sought job-sharing on a three days on/two days off basis. In June, 1994 the claimant said that working two and three days a week alternately was her preferred option but that she would be prepared to consider other

options. The claimant denied that the respondents or the Department had asked her to agree a matching attendance with the other Assistant Principal. The respondents did not submit any evidence to prove that they asked the officers to agree attendance on a matching basis. I consider that, even if the respondents had asked the officers to agree attendance on a matching basis, this is not an essential requirement for employment in a job-sharing capacity given that the respondents placed the other Assistant Principal officer in a job-sharing position with no partner.

5.27 In conclusion, I find that the requirement which was imposed on the claimant to work full-time, in terms of Section 2(c) of the 1977 Act, was one with which a substantially higher proportion of persons of one sex could comply. The claimant's inability to meet the requirement was linked to her sex and I am satisfied that the requirement was not essential for employment. I find that, in accordance with the Supreme Court judgement in the Nathan v Bailey Gibson⁶, the respondents have failed to show that there were objectively verifiable factors, unrelated to the claimant's sex, which prevented them from offering the claimant a job-sharing position. I find, therefore, that the respondents indirectly discriminated against the claimant in terms of Section 2(c) of the 1977 Act.

5.28 Having examined all the evidence submitted by both parties in detail, I am satisfied that there is insufficient evidence available to me to prove that, in terms of Section 2(a) and Section 2(b) of the 1977 Act, the respondents directly discriminated against the claimant on the basis of her sex or her marital status.

⁶ Case No. 375/92 (Judgement delivered on 29/2/96).

6. OTHER ISSUES

6.1 Throughout this investigation a number of other issues were highlighted which warrant mention. The claimant initially requested to return to work on a job-sharing basis following her maternity leave. Two weeks prior to her return to work, she sought and was granted a six months career break. On 31st August, 1994 she informed the Department that she wished to return to work on a job-sharing basis following her career break. The claimant was due to return to work following her career break on 23rd February, 1995. I note that another female Assistant Principal officer was due to return to work following her six months career break on 6th August, 1995.

6.2 At the joint hearing the respondents said that the Task Force on the Travelling Community was winding down and they considered that this post only required one Assistant Principal officer working part-time. At the same time the respondents said that they had hoped to be able to place one of the two Assistant Principal officers in one of the job-sharing positions in the Employment Equality Agency by asking the officer on loan to return to his parent Department. The respondents decided to place the claimant in this position because of her stated preference to work in the Equality area and also because of her previous experience in the area. On 11th December, 1995 the Department informed both the officer on loan to it and the officer's parent Department that it was not in a position to renew the job-sharing arrangement. On 12th December, 1995 the Department informed the other Assistant Principal officer that it could facilitate her request for job-sharing with effect from 8th January, 1996. Towards

the end of December, 1995 the Department of Equality and Law Reform had representations both from the Department of Social Welfare and from IMPACT on behalf of the officer on loan formally lodging their objection to the proposed decision to terminate the job-sharing arrangement.

- 6.3 At the joint hearing of this case the respondents informed me that they do not ask officers for their work preferences and then proceed to accommodate them. In my opinion it is irrelevant that the claimant specified a preference because it is neither Department or management policy to identify staff preferences and accommodate them. The respondents also informed me that it would be normal practice to accommodate requests for job-sharing on the basis of the date of receipt. The claimant's request for job-sharing pre-dated the request from the other Assistant Principal officer. The respondents said that

"even if the complainant is aggrieved that another officer of the Department was given a job-sharing position in preference to her (which, on the facts, is not the case anyway) such grievance cannot amount to discrimination within the meaning of the 1977 Act, as the other officer concerned was also a married woman".

The respondents said, at the joint hearing, that their intention was to facilitate both Assistant Principal Officers with job-sharing positions. However, it would appear in hindsight that the respondents acted too hastily given the, still unresolved, problems which arose in relation to the job-sharing position in the Employment Equality Agency. I consider that there is insufficient evidence available to find that the respondents, by not offering the claimant the guaranteed job-sharing position, were penalising her, in terms of Section 2(d) of the 1977 Act, for having brought a claim

under the Equality legislation.

6.4 The respondents pointed out that the claimant was offered a job-sharing position in the Department of Arts, Culture and the Gaeltacht in May, 1996. On receipt of this offer the claimant wrote to the Personnel Officer in the Department of Equality and Law Reform seeking clarification on a number of issues relating to the career break scheme. The respondents argued that the claimant could have accepted the job-sharing position and clarified the outstanding issues afterwards. The claimant said that, had she accepted the position and the outstanding issues had not been clarified to her satisfaction, then she could, at a future date, be faced with having to resign if she could not avail of another career break. The claimant said that her delay in accepting the offer was caused by the Department's failure to respond to the issues she raised. The respondents argued that the claimant also caused delays in the process. The history of the issue as made known to me is set out in Appendix J.

6.5 I note that, at the joint hearing, the claimant said that, had she known the Secretary would have been prepared to favourably consider the waiver of the service requirements in her case then, she would have accepted the job-sharing position in the Department of Arts, Culture and the Gaeltacht. I am satisfied that, on receipt of the letter from the Department of Equality and Law Reform dated 16th May, 1996, the claimant could have asked if the Secretary of the Department would be prepared to waive the service requirement instead of leaving it until 2nd August, 1996 to put this question. I accept the respondents' argument that the other issues, which were passed to the Department of Finance for decision, had no direct impact on the claimant's

decision to accept or refuse the offer from the Department of Arts, Culture and the Gaeltacht.

- 6.6 The claimant was offered a job-sharing position in the Department of Finance. The Department of Equality and Law Reform notified the claimant, on 5th November, 1996, of a job-sharing vacancy on a split week basis in the Department of Finance. The Department of Equality and Law Reform asked the claimant to apply through its Personnel Unit if she wished to be considered for the vacancy. The claimant responded to this letter on 14th January, 1997 saying *"while I am still very interested in job-sharing, I am unable to consider taking up a post in the immediate future, for reasons referred to in recent correspondence with the Department"*. I consider that the claimant should have asked that the Department of Finance be informed of her circumstances at that time and the decision as to whether or not to offer the position to her should have rested with the Department of Finance and not the claimant. It is possible that the Department of Finance may have been able to accommodate the claimant's circumstances.

7. REMEDY

- 7.1 The claimant asked that the Equality Officer find that she had been discriminated against by the respondents within the meaning of Sections 2 and 3 of the Employment Equality Act, 1977. In terms of remedy the claimant sought the following re-dress:
- Compensation for loss of earnings from 25th April, 1995 (including annual increments);
 - Compensation for stress and anxiety;

- Compensation for the consequences of the claimant being on an enforced career break i.e. loss of annual leave entitlements, service for promotion purposes, service for superannuation benefits (her service entitlement or compensation to buy back her service including related tax benefits).
- Currently there is a five year limit on career breaks. Because of the discrimination the claimant has been on an enforced career break. The claimant asks that her enforced career break be discounted.

7.2 The respondents told the Equality Officer that, should she find that they had discriminated against the claimant, it would be inappropriate for her to make a remedy which they would be unable to comply with in terms of the service as reckonable service for superannuation purposes. The respondents said that there was no evidence of any loss of promotion opportunities. The respondents argued that the claimant is not entitled to any compensation for stress and anxiety as she still maintains a very good relationship with her former colleagues in the Department. The respondents said that the foregoing was without prejudice to its contention that the claim is statute barred in terms of Section 19(5) of the Employment Equality Act, 1977.

7.3 Following my thorough investigation in this case I am satisfied that the respondents indirectly discriminated against the claimant on the basis of her sex within the meaning of Section 2(c) of the Employment Equality Act, 1977. I consider that the claimant should be put into the position she would have been in but for the discrimination. In this regard I note the claimant's

current personal position as referred to in paragraph 6.6 above. I also note that the claimant has failed to respond to a letter dated on 27th January, 1997 from the Department of Equality and Law Reform asking her to *"indicate when you foresee that you would be available to take up a job-sharing position, in the event of one arising"*.

7.4 In terms of remedy, I am satisfied that the claimant is entitled to the following re-dress:

- Refund for all loss of earnings (including annual increments) from 25th April, 1995 to 4th June, 1996. Based on my findings at paragraph 6.3 above I am satisfied that the claimant could have been in a job-sharing position in the Department of Arts, Culture and the Gaeltacht by 4th June, 1996. Had the claimant accepted this position she would have mitigated her loss to some extent.
- As the claimant wished to return to work on a job-sharing basis then from 25th April, 1995 to 4th June, 1996 she is entitled, as a job-sharer, to all of the rights e.g. annual leave, seniority, etc which would be the entitlement of any civil servant serving in a job-sharing capacity.
- During the period from 25th April, 1995 to 4th June, 1996 the claimant, as a job-sharer, is entitled to service for superannuation purposes or monetary compensation to enable her to fully buy back this service.
- The enforced career break from 25th February, 1995 to 4th June, 1996 should not be counted towards the

five year career break limit.

- The claimant is entitled to £2,000 compensation for stress and anxiety suffered as a result of the discrimination.

8. RECOMMENDATION

8.1 In view of my conclusions above in Sections 5, 6 and 7 of this recommendation, I find that the Minister for Equality and Law Reform and the Secretary of the Department of Equality and Law Reform indirectly discriminated against Ms Therese Hand, Assistant Principal Officer on the basis of her sex in terms of Section 2(c) of the Employment Equality Act, 1977 and in contravention of Section 3 of that Act when they did not facilitate her request for a job-sharing position.

8.2 Accordingly, I recommend that the Minister for Equality and Law Reform and the Secretary, Department of Equality and Law Reform compensate Ms. Hand in line with the compensation package detailed in paragraph 7.4 above.

Gerardine Coyle

Equality Officer

14th May, 1997

APPENDIX A

Claimant's letter to the
Secretary
Department of Equality & Law Reform
and
Response from the Secretary

APPENDIX B

Extract from the claimant's
submission

*European Court of Justice judgements
on the
principles to be applied
when considering
cases of alleged discrimination*

In the ECJ case Enderby [1993 IRLR 591], the Advocate General in his Opinion gives a lucid description of the principles to be followed in an indirect discrimination case (please see para. 26 et seq):

'The concept of indirect discrimination is a legal concept which enables cases of unequal treatment, for which there is an objective justification but which in fact result in the woman being disadvantaged, to be included as an instance of unlawful sex discrimination ...

In the case concerning indirect discrimination hitherto brought before the Court the disadvantaging of female workers was effected by reference to an objective criterion.

The resultant disadvantage arose from the fact that women were affected by the criterion more than men. The Court has accepted as the cause of that effect reasons linked to the social role of women. For example, when the Court considers indirect discrimination against women to be possible in reference to the characteristic of part-time employment 'taking into account the difficulties encountered by women workers in working full-time', it is thereby recognising that, as a result of their role in the family and in bringing up of children, women regularly meet considerable difficulties in working full-time. If under those circumstances women have to rely on part-time employment, then the link to part-time employment affects women specifically.'

The Advocate General emphasises that indirect discrimination

is established by comparison between groups rather than individuals (para 34) in order to determine 'discriminatory effect'. He further states (para 35) that if the comparison between the groups:

' ... reveals that the group consisting principally of women suffered a significant disadvantage when compared with the male group comparator, a presumption of indirect discrimination will thus arise.

According to the Court's case law, the employer, in order to avoid the charge of sex discrimination, would have to show that the measures that have led to the result were "based on objectively justified factors unrelated to any discrimination on grounds of sex" or could "be explained by factors which exclude and discrimination on grounds of sex".'

The Advocate General summarises the position at para. 38, stating that a rebuttable presumption of indirect discrimination may be raised by a group comparison 'which places the onus on employer to *adduce evidence in rebuttal of that presumption* or to produce a *justification*'.

APPENDIX C

Review of all
Assistant Principal Officer
posts in the
Department of Equality & Law Reform

The respondents, in their submission, (dated 23rd April, 1996) said that they examined the job-sharing potential of all the Department's Assistant Principal posts (including those in the Employment Equality Agency and the Legal Aid Board) with a view to facilitating the claimant's request to return to work in a job-sharing position. The respondents said that on examining the individual posts special attention was given to important features of the work involved, namely:

the nature and range of duties involved, with particular reference to prevailing critical issues, new initiatives/developments, continuity and regular availability;

requirements and frequency of foreign travel;

extent and degree of inter-action with the Principal Officer in the context of her/his duties, the Minister's priorities/timetables;

the inter-action reporting relationships vis-a-vis subordinate staff.

Based on the information submitted by the respondents the review of the posts commenced on 14th June, 1995 on foot of a request from the Department of Finance dated 29th May, 1995. While the respondents said, in their submission, that all posts were reviewed, they only gave details of the Assistant Principal posts in the Department as follows:

Legislative Posts (8)

The Assistant Principals assigned to these posts are mainly engaged in the preparation of legislation. The nature and content of the work is very demanding and requires a high degree of continuity in order to progress the legislation through the various stages including both Houses of the Oireachtas. In addition, a considerable number of other legislative measures referred to in the Government's legislative programme are currently being prepared. This legislative work requires a great deal of research and entails on-going meetings/consultations with the Minister, other Government Department officials and the parliamentary draughtsmen in the Office of the Attorney General. Invariably, the preparation of complex legislation involves

working long un-social hours which can include working through week-ends and on bank holidays. In view of these demanding requirements the Department, having examined the feasibility of accommodating a matching job-sharing arrangement, concluded that none of the Assistant Principal posts engaged in the preparation of legislation, at that time, were suitable for job-sharing. The requirements of Assistant Principal posts dealing with the Department's legislative programme remain unchanged.

Commission/Taskforces (2)

At the time of Ms. Hand's request to return to work on a job-sharing basis, there were two Assistant Principals heading up the Secretariat of (a) the Commission for the Status of People with Disabilities, and (b) the Taskforce on the Travelling Community. The functions of these particular posts include, inter alia, acting as Secretary to, and the servicing of, a regular programme of meeting of these bodies and associated Working Groups. After a detailed examination of these two posts, the Department concluded that neither was suitable for job-sharing. There was an absolute need for continuity in a whole range of Secretarial activities, including, the facilitation of an on-going heavy schedule of meetings, the preparation of working papers in consultation with the Chairperson and members of the body; internal and foreign travel arrangements; preparation of briefs for the various meetings, seminars, conferences; meeting foreign delegations; briefing sessions; the preparation of interim reports; analysis of various other relative reports; regular on-going discussions with the various voluntary and community interest groups; dealing with the complexities of legal issues arising from time to time; on-going liaison with the media and other Government Departments, etc. As the Secretariat is expected to be "on-call" at all times to the Chairman and members of these bodies, there is a high degree of un-social working hours.

In the circumstances, the concept of job-sharing was deemed to be totally unsuitable and inappropriate.

Personnel/Finance/Organisation/Information Technology Unit (1)

Ms. Hand occupied this Assistant Principal post prior to her departure on maternity leave in April, 1994. Following a detailed examination of the post, the Department concluded

that it was not job-sharable for the following reasons:

At the time Ms. Hand went on maternity leave, the post had responsibility for the Personnel, Organisation, Information Technology (IT) and Finance functions in the Department. At that time, the Department's Personnel Administration System and Finance System operated on a manual basis. The Department's IT system was subsequently expanded/developed by the introduction of a new computerised Personnel Administration System (PAS) and a new Financial Management System (FMS) in September and November, 1994, respectively. Prior to the introduction of the new computerised systems, training was provided for the staff in the Unit which included the Assistant Principal in charge of these Units, to ensure effective operational and monitoring of the new computerised systems.

The effective and efficient operation of the FMS was, and continues to be, of paramount importance in the preparation of the Department's annual Appropriation Accounts. Previously, the Appropriation Account had been prepared **manually** on a **cash-basis**. Commencing in 1994, the Department of Finance decided to introduce, on a phased basis over three years, a change-over from the traditional cash-based accounting to a system of accrual accounting. This decision involved substantial changes on an on-going basis in various accounting procedures. The Department decided that in order to carry through these changes successfully it was essential to have **continuity** in this Assistant Principal post.

The Department was also obliged at this time to have regard to the planned retirement, in November, 1995 of the Principal Officer who held the post of Personnel/Finance Officer for the Department. As the promotee who would replace him seemed unlikely to possess comparable experience in this area it was considered important to preserve continuity and experience in this core area at Assistant Principal level during the transition period.

The Assistant Principal post also attracted an additional responsibility for a Pilot Childcare Initiative which was set up in the Department in mid-1994. This involved the development of new policies and criteria for the operation of the scheme. Since its introduction, expenditure on the Initiative has been in the region of flm. It will be clear from the above that

the responsibilities of this Assistant Principal post had changed considerably from the period when it was filled by Ms. Hand and that the post was not suitable for job-sharing.

Equal Status Unit (1)

The main areas of responsibilities/activities with the post include, inter alia, Secretariat to the Monitoring Committee on the implementation of the Report of the Second Commission on the Status of Women; member of the Council of Europe Steering Committee on Equality; member of the Steering Committee for the ESRI Report on the impact of co-education; Liaison with National Women's Council; preparatory and follow-up work to the UN Fourth World Conference on Women (Beijing); Convention on the Elimination of all forms of Discrimination against Women; etc. The duties also entail the preparation of draft reports, preparation of briefing materials, dealing with parliamentary questions, liaison with various Groups/ Organisations, attendance at meetings at home and abroad. The latter, sometimes, requires attendance for protracted periods. Much of these activities are of an inter-related nature. In the circumstances, the Department considered the post was not conducive to a job-sharing arrangement.

Minister's Press/Information Officer (1)

Each Government Department has one nominated Press/Information Officer. The name of this person is circulated widely by the Government Information Service (GIS) to the news media, both nationally and internationally, as well as to all Embassies at home and abroad. The Press/Information Officer is on round-the-clock call and liaises with the Minister on an on-going basis. The un-availability of this officer as a result of a job-sharing arrangement would create an intolerable situation for the Minister and the media. The Department, therefore, deemed the post to be unsuitable for job-sharing.

At the first joint hearing in this case on 4th February, 1997 the respondents agreed to submit to me a description of the Assistant Principal posts in the Employment Equality Agency and the Legal Aid Board. As the Assistant Principal posts in the Employment Equality Agency were deemed suitable for

job-sharing purposes I have decided not to include them here. They are available for inspection by the Labour Court should the Court so require. However, set out below are details of the Assistant Principal posts in the Legal Aid Board and the reasons why the respondents did not deem them suitable for job-sharing purposes.

Two Posts at Assistant Principal (Assistant Chief Executive) level in the Legal Aid Board

The Legal Aid Board is headed up by a Chief Executive and two Assistant Principals (Assistant Chief Executives).

The period from 1993 to date has been a period of unrivalled expansion and development for the Legal Aid Board. This expansion and development was an essential element in the Government family law programme which led up to the divorce referendum and, subsequently, to the divorce legislation.

This entailed both Assistant Principals in the Legal Aid Board co-operating with staff of the Department on work relating to the processing of civil aid legislation (the Civil Legal Aid Act, 1995 and related Regulations made in 1996). The Legal Aid Board became a statutory Board on 11th October, 1996.

Major initiatives in the period included

- (1) the expansion of the network of law centres, from 16 in 1993 to 30 in 1997, with a corresponding increase in the number of staff employed by the Board from 99 to 224 over that period;
- (2) the introduction of new staffing arrangements, which included the use of solicitors' apprentices for the first time, the introduction of a new grade of Law Clerk in the law centres and the use of solicitors in private practice in delivery of service;
- (3) the revision of financial eligibility rates with effect from 1st August, 1995 - the first such revision to take place since 1991;

There was a corresponding increase in the Department's grant-in-aid to the Legal Aid Board, from under £3m in 1992 to £8.3m in 1997.

Reasons why the Board deemed the two posts not to be suitable for job-sharing purposes:

This level of change could not be achieved in the limited time available without both Assistant Principals being prepared to work long hours and, in the case of the officer responsible for property, it also involved considerable travel. Naturally, these activities has serious implications for industrial relations in the Board and for its interaction with the Department and required that management staff would be on hand to deal with the issues as they arose.

Having regard to the above and to the scheduled retirement of the Chief Executive of the Legal Aid Board on 31st July, 1995, it was not possible to consider either of these Assistant Principal posts as job-shareable.

The Legal Aid Board, a body under the aegis of the Department, operates its day to day administrative arrangements independently of the Department. Any requests for job-sharing within the Board would, in the first instance, have to be considered and approved by the Board.

Neither of the Assistant Principals applied or wished to be considered for job-sharing in the Board.

The decision of the Board to facilitate a job-sharing arrangement (if requested) at any particular time would be determined by the prevailing, relevant circumstances such as the type of work programme in hand, whether a suitable matching partner was available, whether other related posts were also being staffed on a job-sharing basis, etc.

APPENDIX D

Summary of the claimant's response
to the respondent's initial
submission

and

Summary of the respondent's views
on the claimant's response

Summary of the claimant's
Response to the
Department's original submission

1. The claimant objects to the Department's statement that she applied for job-sharing on a three day/two day a week basis and says that she applied for job-sharing preferably on this basis rather than exclusively.
2. The claimant considers it unclear as to who undertook the review of the Assistant Principal posts and asks if they were reviewed by the Personnel Department or were Principal Officers asked if they considered any of their posts suitable. The claimant says that the latter approach would be unlikely to elicit a positive response as job-sharing will usually involve some inconvenience no matter how suitable a post. The claimant also asks when the review was conducted.
3. The claimant says that the reference to the Department's efforts to find a suitable job-sharing partner have to be viewed in the light of the fact that the Department made no effort outside of itself to find a partner other than to notify the Department of Finance. The claimant says that the Department (of Equality and Law Reform) informed the Department of Finance that her application was going to be accommodated and her name was removed from the central register sometime before October, 1995 despite the fact that the claimant had not returned to work in a job-sharing capacity.
4. The claimant says that the Department's reference to its inability to facilitate her return to work is misleading. She says that she would refer to it as a refusal to facilitate her return to work. The claimant contends that the use of the word 'inability' suggests some sort of physical impossibility or other binding constraint. The claimant says that, while her return to work might have inconvenienced the Department somewhat, it does not constitute an inability.
5. The claimant mentions the Department's reference to the unsuitability of legislative posts for job-sharing and says that it would suggest that persons on job-sharing would find it difficult to hold any of these types of posts. She considers that this suggests an effective bar on such persons - who would be disproportionately women - from progressing in the Civil Service. The claimant says that it seems to ignore the leading role which the Department could be assumed to have in terms

of promotion equality through flexibility in work practices throughout the Civil Service.

6. The claimant points to the Department's reference to a high degree of un-social working hours in relation to the Secretariat/Commission posts. She asks if the Department can substantiate this or if there is an element of exaggeration. The claimant suggests that a reasonable amount of un-social working would not be a bar to job-sharing if both the job-sharer and the Department were willing to be flexible. The claimant says that, at no point, did she say that she would be unwilling to work outside normal working hours.
7. The claimant says that she fails to understand why the Department cited the agreement on the pilot job-sharing scheme as it does not remove the Department's obligation to act in accordance with the Employment Equality Act, 1977. The claimant refers to the Department's reference in its submission to its willingness to consider filling a suitable job-sharing post on a matching basis. The claimant argues that this is at variance with the entire drift of the Department's case. The claimant says that the Department did not make her aware of the existence of a suitable vacancy at any stage. The Secretary's letter dated 22/8/95 to the AHCS mentioned that future possibilities for job-sharing depended on matching attendance between job-sharers in order to cover the work requirement at AP level. The claimant says that the AHCS wrote to the Secretary asking that the Department write to the two Assistant Principals on career break asking them to agree a matching arrangement. However, the Department did not do this.
8. The claimant says that the Department's efforts to accommodate both herself and the other AP on a job-sharing basis did not mitigate the original discrimination. The Department added further injustice taking back the other AP in a job-sharing capacity without a partner even though the claimant request for job-sharing pre-dated the request made by the other AP. The claimant says that the Department should have been aware that there would be difficulties in accommodating her in the position in the Employment Equality Agency because it is her understanding that the Department could not force the male officer out of the job-sharing position in the Agency. The claimant says that, to her

knowledge, the only circumstance in which this could happen is if the officer concerned either opted to return to work full-time, went on a career break or resigned. If the Department was aware of this then the claimant argues that its efforts to accommodate her cannot be viewed as legitimate.

9. The claimant asks if the Department can produce evidence to substantiate its claim that she expressed a wish to be considered for a vacancy in the Equality Section in the Department. She says that any such expression should not have been construed as only facilitating her request should it be within the Equality Section rather than offering her a position should one become available in another area in the Department. The claimant says that there can be little doubt about her flexibility in this regard given her attempts to set up job-sharing outside the Department.
10. The claimant says that the Department is ignoring the fact that there were two Assistant Principal posts vacant in February, 1995 and that the AP in the Department of Environment, who was available to job-share in August, 1994, was still willing to consider job-sharing at that time. The claimant argues that if the Department was serious about job-sharing then it is difficult to believe that it could not have accommodated her particularly as one of the posts had not been assigned duties. The claimant acknowledges the efforts made by the Department of Finance to have both herself and the AP in the Department of Environment accommodated but to no avail. The claimant asks if the Department is claiming that the function of management is to 'deploy staff in such a manner as to ensure maximum effectiveness and efficiency in the delivery of the Department's services' notwithstanding the implications for indirect discrimination.
11. The claimant points to two further injustices which have resulted from the Department's efforts to accommodate her. These are:
 - An Assistant Principal who was in the middle of a career break was taken back in a job-sharing capacity even though the claimant had a prior application to job-share.

- Following the offer of a job-sharing post in the Department of Arts, Culture and the Gaeltacht, the Department took an inordinately long time to respond to my letters concerning my conditions of service, and in particular, the waiver of the service requirement in the event of my return to work. This delay effectively resulted in the claimant missing a further opportunity to job-share.

12. The claimant says that the Department's argument that its role is to deliver its services with maximum efficiency and this permits it to override other considerations is surely not sound on both legal and practical grounds for the following reasons:

- Employers cannot generally overrule legislation on the grounds of efficiency - one cannot dispense with requirements covering adequate work space or working hours on the grounds that they are inconvenient or costly which they undoubtedly are;
- Providing flexible working arrangements improves staff morale and helps to retain useful skills which - in the long run - is likely to be beneficial to the Department's functioning so that the efficiency argument is not in itself clear-cut.

13. The claimant says that the Employment Equality Act refers to an 'inessential' work requirement. She says that if this is to have any meaning it must be interpreted in a 'reasonable' way - as meaning something which is not 'essential'. The claimant says that if employers can interpret any inconvenience at all as meaning that full-time work or some other attribute is 'essential' then there would seem to be little point to this part of the Act. The claimant argues that an 'essential' requirement is intended to mean something absolutely central to a particular job such as a driving licence for a sales representative or a reasonable degree of physical fitness for a P.E. teacher. The claimant suggests that there are very few areas in which having one person work full-time rather than two job-sharers is really essential and that the Department was not justified in its refusal to accommodate her on these grounds.

14. The claimant says that she has always acted reasonably in her dealings with the Department. She says that she only sought a return of service lost through the Department's original decision, together with an offer of job-sharing, even though she might have felt entitled - and, indeed, reserve the right - to claim more.

Summary of the Department's
views on the
claimant's response

1. The Department says that the review of Assistant Principal posts in the Department was carried out by Senior Management i.e. Assistant Secretary level in the Department and Chief Executive Officer level in the Employment Equality Agency and the Legal Aid Board. The formal review commenced on 29th May, 1995 and terminated on 6th July, 1995.
2. The Department says that the claimant took the initiative to write to all Government Departments asking if they could accommodate her request for job-sharing. Had the claimant not done this the Personnel Section in the Department would have done so. Some of the replies to the claimant's request were returned to the Department. The Department says that, following an examination of the Department's files, they failed to show any evidence of the issuing of an instruction to have the claimant's name removed from the Central Register. The Department also says that this would not have adversely affected her position because according to the Department of Finance any AP job-sharing requests within the civil service would have been circulated to all Government Departments as is evidenced by the offer of (a) a job-sharing arrangement with the Department of Arts, Culture and the Gaeltacht in May, 1996 and (b) a job-sharing arrangement in the Department of Finance in November, 1996, neither of which the claimant accepted.
3. The Department says that it supports the concept of job-sharing and it currently has seven officers job-sharing in the Department.
4. The Department says that, in its Department, the proportion of staff engaged in legislative type work is significant whereas the pattern throughout the civil service is the opposite because the Department is legislative driven.
5. The Department says that the officer working on the Commission for the status of People with Disabilities had a high element of unsocial hours reflected in the officer's travel and subsistence costs as follows:

1994 - £ 5,800

1995 - £ 3,500

1996 - £10,800

6. The Department says that it continued at all times to review all the AP posts with a view to facilitating the claimant on a job-sharing basis. The Department says that these reviews highlighted the possibility of a suitable post arising. The Department says that the Personnel Officer spoke with the claimant and suggested that if she could agree job-sharing arrangements with another officer it might be possible to facilitate her return on a job-sharing basis. The Department says that the claimant failed to respond.
7. The Department refutes that it was involved in any discrimination be it direct or indirect. The imposition of full-time work was essential to the Department carrying out its mandate. The Department says that if the claimant was male or unmarried the same position would apply.
8. The Department refutes that there were any in-ordinate delays on its part in relation to the service-related issues that the claimant sought clarification on prior to being in a position to accept the offer of job-sharing from the Department of Arts, Culture and the Gaeltacht. The Department is satisfied that the claimant took the decision to refuse the offer of job-sharing from the Department of Arts, Culture and the Gaeltacht.
9. The Department says that, at all times in discharging its responsibilities, it complies with its statutory obligations and actively promotes good work practices including flexible working arrangements for its staff.
10. The Department says that under the Civil Service Superannuation arrangements unpaid leave, including career break leave, does not count as reckonable service for superannuation purposes.

APPENDIX E

Letter
from the
Labour Court
to the
Respondents

APPENDIX F

Extracts from the
National Economic & Social Forum
Report No. 9
(January, 1996)

Employees

- 3.12 While it might, therefore, be concluded that the majority of men who work part-time do so involuntarily, there is no basis for assuming that the majority of women who work part-time do so voluntarily. Quite apart from the 23 per cent of female part-time workers who actually declared a preference for working full-time, there was a further 40 per cent who cited family responsibilities as the reason for not seeking full-time work. Since the Labour Force Survey question did not differentiate between family responsibilities as a positive choice, which would render such part-time work voluntary, and a no choice situation due to the lack of child care facilities, which would render the part-time work involuntary, no firm conclusion can be drawn. The Forum's Report on the services sector highlighted how this country has the lowest level of child care provision in the EU, with only 2 per cent of young children having access to publicly-funded child care. It is not unreasonable, therefore, to assume that the family responsibilities reason advanced for working part-time has a significant no choice, involuntary component.

Table 3.1

Reason for Working Part-time (000's)

| Reason | Male | Female | Total |
|--------------------------------|-------------|-------------|--------------|
| Family Responsibilities | 1.2 (3%) | 39.2 (40%) | 40.4 (30%) |
| Did not want a full-time job | 5.2 (13%) | 24 (25%) | 29.2 (21%) |
| Could not find a full-time job | 22.1 (57%) | 22.7 (23%) | 44.8 (34%) |
| Own illness or disability | 1.3 (3%) | 0.6 (1%) | 1.9 (1%) |
| In education or training | 5.5 (14%) | 6.2 (6%) | 11.7 (8%) |
| Other | 3.9 (10%) | 4.7 (5%) | 8.6 (6%) |
| Total | 39.2 (100%) | 97.4 (100%) | 136.6 (100%) |

Source: CSO, Labour Force Survey 1994

- 3.13 The reluctance of some men to share domestic duties and the generally higher rates of pay enjoyed by men may make the part-time work option, a rational, though involuntary option for some women. The proportion of women who are voluntarily engaged in part-time employment is, therefore, likely to be lower than is usually inferred from existing but insufficient statistical data.

Option 3: Sharing Jobs

- 4.29 This option is normally seen as two people sharing one job, e.g. on a week on/week off basis. However, there are many possible combinations centring on the recognition that many jobs are not a single task but rather a series of tasks. For instance, options such as five workers sharing four jobs, each working four out of five days or four workers sharing three jobs, each working three weeks in four could be possible.
- 4.30 In the U.K. a number of initiatives were undertaken to encourage job sharing including the Job Splitting Scheme and the Part-time Job Release Scheme. These schemes offered subsidies to employers to split existing jobs or allowed early retirees to phase their retirement by sharing their jobs with an unemployed person, respectively. However, there was a poor take-up partly due to the design of the schemes and also because of general attitudes to job sharing. In the Netherlands during the 1980s the Government strongly encouraged the growth of part-time working through its Employment Plan, which aimed to create 39,000 jobs through the conversion of full-time jobs to part-time jobs, and also through Government agreements, whereby a proportion of full-time public sector jobs would be converted to part-time. The Government estimated that some 150,000 jobs had been created due to these schemes but this conclusion was questioned by some commentators, who suggested that some of those jobs would have occurred without Government intervention.
- 4.31 While employee interest in job sharing programmes is high, only about 7 per cent of employees in the ESRI/UCD survey said that they were interested in and could afford to job share. This option is more widely available in the public sector with four fifths of public sector organisations offering job sharing facilities as compared to only 5 per cent of private employers offering such facilities. In general, employers expressed negative views about job sharing. Among the concerns of employers are problems regarding continuity of work, administration costs, lack of communication between job sharers and potential time delays. However, employers who have participated in job sharing programmes are much less negative than those who have not tried these schemes.
- 4.32 In 1984 a job sharing scheme was introduced here in the civil service which involved two people sharing the

duties of one job in return for half the pay and benefits. There are now 1,500 civil servants, or 5 per cent of that workforce, job sharing, of which 98 per cent are female and 75 per cent are at clerical level grades. A number of job sharing schemes have also been introduced in the wider public sector, e.g. most local authorities, first and second level education (pilot programmes), ESB, FAS, and An Post. However, there is a low rate of take-up in most of these bodies.

- 4.33 The Forum notes that there is an anomaly in the Family Income Supplement Scheme which operates to the detriment of job sharers, Part-time workers with the requisite hours can qualify but job-sharers with the same hours are statutorily excluded. The hours threshold may also debar job sharers.

APPENDIX G

Statistics submitted
by the claimant from
Equality of Opportunities in the Civil Service
1991, 1992 and 1993

At the end of 1991 there were 1,020 staff in the civil service working on a job-sharing basis. Of this number, 97% were women. Numbers serving in the civil service at this time were 27,989 of which 44% were women and 56% were men.

[Source: *Equality of Opportunity in the Civil Service - 1991, published February, 1993*]

At the end of 1992 there were 1,084 staff working on a part-time basis in the civil service. Of this number 97% were women. Numbers serving in the civil service at the time were 28,619 of which 44% were women and 56% were men.

[Source: *Equality of Opportunity in the Civil Service - 1992, published February, 1994*]

In February, 1994 there were 1,498 staff working on a job-sharing basis. Of this number, 98% were women.

| Grade | Total | Men | Women |
|---------------|---------------------|-----------|--------------|
| PO | 1 (0.1%) | 0 | 1 |
| AP | 25 (2%) | 1 | 24 |
| HEO | 83 (6%) | 5 | 78 |
| EO | 190 (13%) | 7 | 183 |
| SO | 77 (5%) | 2 | 75 |
| CO | 664 (44%) | 8 | 656 |
| CA | 458 (31%) | 2 | 456 |
| TOTALS | 1,498 (100%) | 25 | 1,473 |

[Source: *Equality of Opportunity in the Civil Service - 1993, published March, 1995*]

**STATISTICS PRESENTED TO THE EQUALITY OFFICER BY THE
DEPARTMENT OF FINANCE**

Job-Sharing Statistics

| LEVEL | TOTAL | % AT LEVEL | MEN | WOMEN |
|--------------------------|-------------|-------------|-----------|-------------|
| Principal | 2 | 0.1% | 0 | 2 |
| Assistant Principal | 33 | 2% | 2 | 31 |
| Higher Executive Officer | 135 | 7% | 10 | 125 |
| Executive Officer | 271 | 14% | 14 | 257 |
| Staff Officer | 152 | 8% | 2 | 150 |
| Clerical Officer | 937 | 47% | 20 | 917 |
| Clerical Assistant | 475 | 24% | 3 | 472 |
| Other | 5 | 0.2% | 2 | 3 |
| TOTALS | 2010 | 100% | 53 | 1957 |

[Source: *Equality of Opportunity in the Civil Service, 1994 and 1995, published January, 1997*]

APPENDIX H

Legal arguments
by the
claimant and the respondents

LEGAL ARGUMENTS BY THE CLAIMANT

The claimant cited the decision of a Northern Ireland Industrial Tribunal in ***Violet Mulligan v Eastern Health and Social Services Board*** (Case Ref: 1258/93 UD; 1259/93 UD) which concerned a complaint by a woman who had been refused job-sharing and who had consequently resigned from her employment. In that decision, the tribunal accepted that the requirement to work full-time, which had been imposed on the complainant, adversely impacted on women to a greater extent than on men, and on married women to a greater extent than on single women. The Tribunal considered that considerably fewer women than men were in a position to comply with the requirement to work full-time as a consequence of child-rearing responsibilities. The Tribunal concluded that the refusal to allow Ms. Mulligan to reduce her working hours constituted unlawful indirect discrimination and, further, that the termination of her employment amounted to constructive dismissal.

The claimant said that the question of whether the refusal of job sharing can constitute indirect discrimination had been considered in the following cases:

- (1) ***Robinson v Oddbins*** [Case No. 4224/95 (decision of Industrial Tribunal sitting in Reading delivered 5th January, 1996)] In this case the claimant was employed as a branch manager and her contract of employment provided that she would be required to work such hours as might be necessary to carry out her duties. In practice this meant that she had to work 50 hours or more per week. Shortly before her return from maternity leave she asked to work on fixed hours because she could not arrange her child care cover if she did not know in advance what her hours were to be. The company refused her request because it did not believe that her job could be shared. This was held to be indirectly discriminatory. The Industrial Tribunal took the view that the employers had never considered the job sharing option properly and, consequently, had failed to show that the reasonable needs of the business outweighed the effect of the condition to work whatever hours were necessary.

- (2) ***Puttick v Eastbourne Borough Council [Case No. 38152/95 (decision of Industrial Tribunal sitting in Brighton delivered 4 December 1995)]*** In this case the claimant was employed as a full-time council tax officer and, on her return from maternity leave, she requested that she be allowed to move to a job-share or part-time working. It was decided, however, that because of the importance of the prompt collection of council tax, only full-time staff could be employed in the council tax section. Unable to cope with the twin demands of child care and a full time job, the claimant resigned and claimed that she had been discriminated against. Upholding her claim, the tribunal found that the condition of full-time working had a disparate impact on women and was to the claimant's detriment. The Tribunal could see no reason why the job itself was not suitable for job-sharing.

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The respondents, at the hearing, said that by accepting that they discriminated against the claimant is accepting a far-reaching proposition. There is no contractual right to job-share but there is a contractual right to apply for it but no guarantees of getting it. According to the respondents they can refuse to facilitate the claimant. The claimant does not have the statutory right to transform the full-time position into a part-time position irrespective of the needs of the employer based on Section 3 of the Act. The respondents asked if a married woman had the statutory right to declare that her job is part-time rather than full-time then what is to stop a married man, etc from making the same claim.

The respondents point to two aspects of the Puttick case as follows:

- The employer had a policy of no job-sharing;
- The Tribunal found that the position was a clerical position, not a management or supervisory one. It also found that there was no aspect of her job that was difficult to job-share.

In the Oddbins case the respondents said that the discrimination was intentional. A requirement was put on the

claimant which the employer knew would make her position untenable. The respondents said that they did not intentionally set out to do down the claimant's position. Rather they did their best and took reasonable steps to facilitate the claimant. The respondents also said that there is no evidence that any of the existing AP posts which are not currently being job-shared are suitable for job-sharing.

LEGAL ARGUMENTS BY THE RESPONDENTS

According to the respondents indirect discrimination is prohibited by Section 2(c) and Section 3 of the Employment Equality Act, 1977: see **Vavasour v The Employment Equality Agency [1995] 1 IR 450** and **Bailey Gibson Ltd (Unreported, Supreme Court, 29th February, 1996)**.

The respondents said that it is a pre-requisite for the application of Section 2(c) of the 1977 Act that the complainant has been subjected to and obliged to comply with some requirement which has a disproportionate impact on married women and which is not shown to be an essential requirement for the complainant's employment: see per Costello J. in **Vavasour v The Employment Equality Agency**.

The respondents said that if indirect discrimination under Section 3 is to be established by the complainant, it must be established that some condition of employment or work practice is in place which bears more significantly on the complainant (as a married woman) than on other categories of employee, in which case the onus shifts to the employer to establish that the condition or practice in question is objectively justifiable: see per Hamilton CJ in **Nathan v Bailey Gibson Ltd**.

In asserting that such obligation is not a requirement, condition or practice within the meaning of the relevant provisions of the 1977 Act, the respondents relied on the determination of the (UK) Employment Appeal Tribunal in **Clymo v Wandsworth London Borough Council [1989] IRLR 241**, in which the EAT upheld the decision of the Industrial Tribunal. The EAT ruled that the obligation to work full-time was "part and parcel" of the complainant's employment and was not a requirement or condition that had been applied to her so as to bring the matter within the ambit of the Sex Discrimination Act, 1976 (the then UK equivalent of the 1977 Act), distinguishing the earlier decision in **The Home Office v Holmes [1984] IRLR 299** on which the claimant has placed some reliance. In the course of his ruling in the Clymo case the Presiding Member, Wood J. stated:

".. it seems clear that in many working structures

whether in industry or in public bodies, local government or elsewhere, there will be a grade or position where the job or appointment by its very nature requires full-time attendance ... The judgement in Holmes was not reserved and if the passage at p.300 is to be read to indicate that in testing whether or not the decision that a job of itself required full-time work was a decision for the Tribunal, then we would respectfully disagree. Provided that the decision made by the respondent is reasonable - made upon adequate grounds - and responsible - bearing in mind the need to avoid discrimination upon sex and balancing that against other needs and responsibilities - then the decision is one for management." (at paragraph 41).

The respondents said that the claimant relied on the later decision of the Northern Ireland Court of Appeal in **Briggs v North Eastern Education [1990] IRLR 181** which preferred the approach of the EAT taken in Holmes to that in Clymo, a decision of the Northern Ireland Industrial Tribunal, namely **Mulligan v Eastern Health and Social Services Board (16th March, 1994)** and two recent decisions of Industrial Tribunals in England, namely **Puttick v Eastbourne Borough Council (4th December, 1995)** and **Robinson v Oddbins (5th January, 1996)** which expressly followed Briggs. The respondents said that, notwithstanding the persuasive status of any decision of the Northern Ireland Court of Appeal, Briggs was wrong and ought not to be followed in this jurisdiction.

The respondents said that to suggest that an obligation to work full-time, which is knowingly and voluntarily accepted by an employee when he or she accepts an offer of employment, is a requirement or condition applied to that employee for the purposes of the 1977 Act does not, accord with common sense and is not dictated by the wording of the 1977 Act which, in respect, should be given a strict construction so as to restrict only as far as necessary the freedom which employers would otherwise have to manage their resources as they see fit.

The respondents said that the if the obligation to work full-time is properly to be considered a requirement or condition applied to or imposed upon the claimant, it would appear to follow inevitably that the "occurrence of .. discrimination" within the meaning of Section 19 of the 1977 Act must have occurred when the claimant first took up her

post and must, accordingly, be out of time.

The respondents said that, if the Equality Officer is of the view that the reasoning in Holmes and Briggs is to be preferred to the reasoning in Clymo, no valid complaint has been made. The respondents said that no allegation is made that the job-sharing scheme in operation in the Civil Service, including the respondents' Department, has been operated in a manner that contravenes any provision of the 1977 Act. In this respect, it may be re-iterated that, even if the claimant is aggrieved that another officer of the Department was given a job-sharing position in preference to her (which, on the facts, is not the case anyway) such grievance cannot amount to discrimination within the meaning of the 1977 Act, as the other officer concerned was also a married woman.

APPENDIX I

Copy of Job-sharing
Circular No. 3/84

APPENDIX J

History of the job-sharing offer
to the claimant
in the
Department of Arts, Culture & the
Gaeltacht

- 14th May, 1996 - The claimant notified the Department of Equality and Law Reform of the job-sharing offer from the Department of Arts, Culture and the Gaeltacht. She asked the Department if it would be prepared to grant a restoration of service so that she would not have to work the full-time equivalent of the time spent on career break should the need arise. She also asked if she would be on loan to the Department of Arts, Culture and the Gaeltacht.
- 16th May, 1996 - The Department of Equality and Law Reform wrote to the claimant advising her of the recent amendment to the Career Break Scheme which provides that the period of service requirement may be waived at the discretion of the Head of the Department. The Department said that her queries regarding restoration of service and who her parent Department would be in the event of her accepting the offer were passed to the Department of Finance for decision.
- 17th May, 1996 - The Department of Equality and Law Reform wrote to the Department of Finance requesting a decision on the issue of the restoration of the claimant's service and on the issue of her parent Department should she accept the offer from the Department of Arts, Culture and the Gaeltacht.
- 21st June, 1996 - The Department of Finance responded to the letter dated 17/5/96 from the Department of Equality and Law Reform. According to the Department of Finance the claimant's parent Department would be the Department of Equality and Law Reform and she would be on loan to the Department of Arts, Culture and the Gaeltacht. The Department of Finance also said that special leave without pay does not reckon as service for any purpose.

- 26th June, 1996 - The Department of Equality and Law Reform wrote to the claimant informing her of the contents of the reply it had received from the Department of Finance to its letter dated 17th May, 1996.
- 17th July, 1996 - The claimant wrote to the Department of Equality and Law Reform informing it that she was obliged to refuse the job-sharing offer in the Department of Arts, Culture and the Gaeltacht because the regulations do not provide a guarantee that she could apply for another career break before the completion of three years job-sharing employment. She asked that the Department forward a copy of this letter to the Department of Arts, Culture and the Gaeltacht.
- 25th July, 1996 - The Department of Equality and Law Reform wrote to the claimant acknowledging receipt of her letter dated 17th July, 1996 and saying that it had forwarded a copy of her letter to the Department of Arts, Culture and the Gaeltacht. In its letter the Department again pointed out that the Secretary has the discretion to waive the service requirement where an officer is seeking an additional career break.
- 2nd August, 1996 - The claimant wrote to the Department of Equality and Law Reform asking if the Secretary would be prepared to waive the service requirement in her case?
- 8th August, 1996 - The Department of Equality and Law Reform acknowledged receipt of the claimant's letter of 2/8/96. The Department said that it would bring the claimant's request to the attention of the Secretary on his return from annual leave later in the month.
- 27th August, 1996 - The Department of Equality and Law Reform wrote to the claimant stating that the Secretary would be prepared

to favourably consider the waiver of the service requirement subject to the conditions of the Career Break Scheme.

25th Sept. 1996 - The Department of Arts, Culture and the Gaeltacht wrote to the claimant advising her that the position which had been offered to her had been filled when the Department was informed by the claimant that she could not accept the position.

15th Oct. 1996 - The claimant wrote to the Department of Equality and Law Reform acknowledging receipt of its letter dated 27th August, 1996. The claimant informed the Department that the job-sharing offer from the Department of Arts, Culture and the Gaeltacht had since been filled. She re-iterated her wish to return to work in a job-sharing capacity.