

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE 05/1997

PARTIES

Fifty-eight Named Female Part-Time Telephonists
{Represented by the Employment Equality Agency}

and

Telecom Eireann

1 Dispute

- 1.1** The dispute relates to a claim by fifty-eight named female part-time night Telephonists that Telecom Eireann discriminated against them on the basis of sex and/or marital status within the meaning of Section 2(c) of the Employment Equality Act, 1977 and in contravention of Section 3 of the Act by implementing a rota system which excludes them from week-end attendance.

2 Background

- 2.1** The fifty-eight claimants are employed as part-time night Telephonists in five provincial telephone exchanges. These exchanges provide operator-assisted call services mainly to callers dialling "10" and the emergency "999" service.
- 2.2** Telecom Eireann introduced new attendance rota arrangements, following consultation with the trade union representing the grades in question, with effect from the 1st February, 1992. Compensation was paid to staff financially affected by the new system, including the claimants. The new rota system included a reduction in the number of Saturday and Sunday duties. The new

arrangements also confined week-end attendance to full-time day Telephonists and full-time night Telephonists.

2.3 Notes accompanying the new arrangements state that "part-time night Telephonists staff will not be required for weekend work." The claimants, all of whom had prior to the new arrangements week-ends attendance, believe that the Company in the implementation of the new rota arrangements has discriminated against them on grounds of sex and/or marital status, under the terms of the Employment Equality Act, 1977.

2.4 In July, 1992 the claimants through the Employment Equality Agency referred the dispute to the Labour Court. The Labour Court referred the case to an Equality Officer for investigation and recommendation. The Agency contends that Telecom Eireann has discriminated against the claimants in terms of Section 2(c) of the Employment Equality Act, 1977, and in breach of Section 3(1), 3(2) and 3(4) of the Act.

2.5 The claimants' case initially also lay under Section 2(a) and (b) of the Act, however, these claims were subsequently withdrawn. In the course of the

investigation six of the original sixty-four claimants withdrew their claims. A list of the names of the fifty-eight claimants, as submitted by the Agency is at Appendix 1.

- 2.6** The Equality Officer subsequent to the receipt of written submissions from the Employment Equality Agency and Telecom Eireann held a joint hearing with them on the 28th June, 1994. Arising from that hearing further written submissions were received from the respondent and the claimants' representative, the last correspondence received in relation to the case was in November, 1996.

3 Summary of the Claimants' case

- 3.1** The Employment Equality Agency submits that the claimants, who are all part-time night Telephonists believe that the implementation of new rota arrangements in respect of week-end attendances resulted in discrimination against them on grounds of sex and/or marital status. The Agency contends that the discrimination is unlawful in terms of Section 2(c) of the Employment Equality Act, 1977 and in breach of Section 3(1), 3(2) and 3(4) of the Act.

- 3.2 The Agency rejects the contention by the Company that this complaint relates to "remuneration" and is therefore outside the scope of the Act of 1977. It explains that Section 3(4) of the 1977 Act refers specifically to overtime and shift work both of which would have financial implications for the claimants. It therefore submits that this dispute is proper to the Employment Equality Act, 1977.

Section 2(c) of the Act

- 3.3 Section 2(c) states that discrimination shall be taken to occur

"where because of his sex or marital status a person is obliged to comply with a requirement, related to employment which is not an essential requirement for such employment and in respect of which the proportion of persons of the other sex able to comply is substantially higher."

- 3.4 The claimants' representative argues that the correct approach to follow in claims of indirect discrimination

is as set out in the February, 1996 Supreme Court judgement in Nathan -V- Bailey Gibson & Others. She points out that the Supreme Court, relying on the case law of the ECJ, set the correct procedure thus:

"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."

3.5 The claimants submit that they were indirectly discriminated against on grounds of sex and/or marital status given that in order to qualify for week-end work workers had to satisfy the condition of being employed as full-time night staff. A requirement which a significantly higher proportion of men could comply with. They further submit that the disproportionate impact on female workers is related to sex since, as is generally accepted, most part-time workers are women

because of caring responsibilities.

- 3.6** On its argument that the complaint should be addressed in the context of night Telephonists the Agency draws attention to the Labour Court findings in DEE 7/92, which was the appeal of an Equality Officer's recommendation (No: EE6/91) in the case of Telecom Eireann and fifty-five claimants (Appendix 2), where the Court stated (page 2):

" The Court is satisfied that there are two separate and distinct grading systems within the Telecom Eireann ITE structure, namely that applying to day telephonists and that applying to night telephonists. Each of these categories of employees is recruited separately and there are different conditions of employment for each: they are not interchangeable."

The Agency adds given that the Labour Court accepted that each was a separate "system" it may be inferred that all night Telephonists belong to the same system. Thus, it is now possible to apply the rationale of the Labour Court in DEE 7/92 to this case.

3.7 The Agency submits that the Company has conceded that the arrangements in question have an adverse impact on the complainants in one of its written submission , wherein it states:

".... The Company has reduced the amount of scheduled week-end work available to part-time night telephonists... The impact of the Company's decision on part-time night telephonists has been to restrict the amount of Saturday and Sunday allowances payable to them."

The Requirement

3.8 The claimants state that the requirement imposed within the relevant grade (i.e. that of night Telephonists) for access to week-end work is that one be a full-time night Telephonist; or alternatively that one not be a part-time night Telephonist. The claimants refute the respondent's argument that as week-end work is not confined to full-time night operators the claimants do not have to meet this requirement. They state that although the requirement which they have identified is not expressly formulated it is nevertheless an implied

requirement for access to week-end work.

Disproportionate Impact

- 3.9** The Agency explains that there were 172 staff, on the 1st February, 1992, 106 full-time (17 women) and 66 part-time (63 women) in the night Telephonists grade; of these 92 are men and 80 are women. If the requirement to be full-time worker in order to have access to week-end work does not apply, then 100% of both male and female workers would have access to this work.

The Agency further explains that when this requirement is imposed, however, 97% of men can comply with it (i.e. 89 out of 92) while only 21% (i.e. 17 out of 80) of women can comply. For this reason the Agency submits that, as per Section 2(c) of the 1977 Act, "a substantially higher" proportion of men in the grade, than of women in the grade, can comply with the requirement. Details of these statistics as supplied by the claimants are at Appendix 3.

Related to sex

- 3.10** The claimants maintain that the reason why a substantially higher proportion of men than of women can

comply is related to sex which, they state, is based on the fact that part-time workers are predominately female for sex-related reasons. They contend that this was accepted by the Equality Officer, for example, in case EE 14/91. "In that case the complaint was similar to the present case: the working hours of part-time workers were reduced in order to reduce costs while the working hours of full-time workers were not. The case was successful for the claimants who had their hours restored to them. The Equality Officer accepted that part-time workers are predominately female because of domestic responsibilities, hence the connection between a woman's part-time status as a worker and the fact of gender."

3.11 The European Court of Justice in Bilka-Kaufhaus -Vs- Weber von Hartz case (1986 IRLR 317) the claimants' representative points out, while the case dealt with equal pay, held that discrimination (indirect) had occurred where an occupational pension scheme excluded part-time employees "where that exclusion affects a far greater number of women than men ...". She contends that the rationale of the ECJ is relevant to the present case and points to the ECJ acceptance, in

Bilka-Kaufhaus, "the difficulties encountered by women workers in working full-time".

Essential Requirement

3.12 The facts of this case establish, the Agency argues, that indirect sex discrimination has occurred to the detriment of the claimants and that this discrimination is unlawful unless it can be shown by the respondent, as laid out in the Supreme Court judgment in *Nathan -v- Bailey Gibson & Others*, that the practice complained of is based on objectively verifiable factors which have no relation to the claimants' sex.

3.13 The Agency holds that the requirement which excludes part-time workers is not essential for the employment in question given that part-time night Telephonists have undertaken week-end work in the past and that some continue to work at week-ends, albeit on a reduced scale.

The Agency submits that Telecom Eireann, while it is not disputed that staff had to be reduced in order to reduce costs, nevertheless, has imposed a discriminatory requirement relating to employment which is not

essential for such employment. It adds that to attempt to justify the discriminatory treatment of these part-time workers by relying on these economic arguments is not establishing an objective non-discriminatory justification.

Section 3 of the Act

3.14 The claimants representative maintains that Telecom Eireann has discriminated against the claimants under Section 3 of the Act of 1977.

It submits that Telecom Eireann are in breach of:

Section 3(1) in that the claimants experienced less favourable conditions of employment than their full-time male colleagues

Section 3(2) discriminatory rules and practices were operated which discriminated against part-time night Telephonists, the vast majority of whom were women

Section 3(4) in that the terms of employment of full-time night Telephonists were more favourable than those of part-time night Telephonists, in

relation to working conditions.

4 Summary of the Company's case

4.1 The Company rejects the Employment Equality Agency claim that the implementation of new rota arrangements, which followed consultations with the relevant Union, resulted in discrimination against the claimants on grounds of sex. It argues "without prejudice" to its arguments under the Act of 1977, that the present claim constitutes a claim in respect of remuneration, as week-end work attracts certain premium payments, and is therefore proper for investigation under the Anti-Discrimination (Pay) Act, 1974.

4.2 The only benefit to the claimants of unsocial attendances, the Company contends, is financial. The respondent submits that the legislature, by differentiating between discrimination in matters of remuneration and other matters, intended that claims which were in reality equal pay claims, should be processed under the 1974 Act and that it was not the legislative intention that a claimant should be able to evade the requirements of the 1974 Act by disguising a claim in respect of remuneration as a claim in respect

of access to the work to which that remuneration is attached.

- 4.3** The Company submits that it decided, in consultation with the trade union recognised in respect of the telephone operator grades, that the proper and most efficient management of telephone exchanges entailed a modification of attendance patterns in the telephone exchanges in question. The new rota arrangements, while they did not change the terms and conditions of the staff effected, included a number of cost-saving measures such as a reduction in the number of Saturday and Sunday duties in the light of call traffic pattern. The Company points out that, as part of the new system, Saturday and Sunday work was confined to full-time day Operators and full-time night Operators. The Company adds that the new rotas had the effect of reducing the cost to it of staffing the telephone exchanges affected and, in consequence, reducing the overtime and allowances payable to all full-time and part-time staff involved. The terms and conditions of day and night staff, with regard to attendance, are at Appendix 4.

Section 2(c) of the Act

The Requirement

- 4.4 The new rota arrangements, the Company states, were intended to confine Saturday and Sunday work to full-time Day Operators and full-time Night Operators. As this work is not confined to full-time Night Operators, the Company argues, that the claimants are not obliged to comply with a requirement that they be full-time Night staff. The respondent adds that it is not conceded that membership of a full-time Day Operator or full-time Night Operator grades constitutes a "requirement" within the meaning of Section 2(c) of the Act.

Disproportionate Impact

- 4.5 Telecom Eireann does not concede that such alleged requirement has a disproportionate impact. It submits that the correct comparison is between the gender balance of those to whom Saturday and Sunday work remains available (all Full-Time Day Operators and Full-Time Night Operators in the telephone exchanges concerned) on the one hand and those (namely Part-Time Night Telephonists) to whom such work is not available on the other hand.

4.6 The Company submits the gender breakdown of the two sets of staff in the exchanges concerned on the relevant date (1st February, 1992) as set out below:

Exchange	Full-Time Operators (Day and Night)			Part-Time Night Telephonists		
	Male	Female	Total	Male	Female	Total
Galway	19(25%)	58(75%)	77	1(5%)	21(95%)	22
Limerick	21(30%)	50(70%)	71	0(0%)	23(100%)	23
Portlaoise	12(24%)	37(76%)	49	2(17%)	10(83%)	12
Sligo	17(25%)	50(75%)	67	1(13%)	7(87%)	8
Waterford	13(28%)	34(72%)	47	0(0%)	12(100%)	12
TOTAL	82(26%)	229(74%)	311	4(5%)	73(95%)	77

The respondent states the statistics show that:

- 302 females were working in the exchanges
- 229 of the 302 were full-time i.e. retained access to weekend work
- Therefore 76% of females retained access to weekend work
- 86 males were working in the exchanges
- 82 of the 86 were full-time i.e. retained access to weekend work
- Therefore 95% of males retained access to weekend work.

The company contends that the proportion of males to whom weekend working remained available (95%) was not substantially higher than the proportion of females to whom weekend work remained available (76%).

Requirement not imposed because of sex

- 4.7 The Company submits that the alleged requirement here (membership of the Full-Time Night Operator grade) or indeed membership of the Full-Time Operator grades (Day and Night) is not imposed and does not have a disproportionate impact "because of the sex" of the Claimants. It is submitted that the gender balance of the present grading structure is the result of historical factors, namely the discriminatory but lawful employment practices engaged in by the Company's predecessor prior to coming into force of the Act, together with a fall in telephone traffic and the consequent fall in employment opportunities since 1977.

Sex is no longer a factor influencing the composition of the various groups. Since 1977 recruitment to these groups has been free of any sex bias. Consequently a limitation of access to weekend work, assuming it can be

characterised as such, was not because of the Claimants' sex, but was related to grading, the recruitment process for which is now free of sex bias. Sex was thus not an activating cause or link in the determination of who was eligible for weekend work.

- 4.8 The Company submits that, in these circumstances, to find that the alleged disproportionate impact of the requirement is because of the sex of the Claimants would be to give the Act a retrospective effect contrary to the decision of the Supreme Court in Aer Lingus Teo - v - The Labour Court [1990] I.L.R.M. 485.

Essential requirement

- 4.9 The Company submits that, if the Equality Officer concludes that membership of full-time Operator grades (day and night) is a "requirement" within the meaning of Section 2(c), such requirement is an "essential requirement" within the meaning of Section 2(c) of the Act. Furthermore, the distinction between full-time Operators and part-time Night Telephonists with regard to weekend attendances is objectively justified and entirely unrelated to discrimination based on sex.

4.10 It is against a background of decreasing traffic and substantial losses that the Company sees its primary obligations of protecting employment in the service through containing costs. One of the measures introduced by the Company to reduce operating losses was to decrease unnecessary and expensive attendances at weekends. At weekends the traffic offering is on average about 60% of weekday traffic. The new rotas were designed to bring staff attendances in line with the reduced overall level of calls and in line with the daily and weekly call variations, but are clearly within the conditions of service of all the staff involved.

4.11 The Company points out that the level of call traffic (i.e. calls to "10" operators service) has declined from a level of 34.5 million revenue-earning trunk calls in 1982 to a level of 2.8 million trunk calls per annum in 1993. There has been a fall-off in operator-assisted traffic due to the expansion of the automatic network and the migration of traffic. The employer adds that the attendance of part-time Telephonists is required when traffic is higher, i.e. weekday evenings and the Company would not recognise any continuing entitlement of part-time Telephonists to attend other than when

traffic most necessitates that attendance.

Material Difference

4.12 Part-time Night Telephonists were initially, the Company maintains, intended to supplement full-time Operators by attending for short times in the evening to deal with traffic peaks. Those traffic peaks have ceased and current traffic levels are insufficient to sustain full-time Operators. In those circumstances, the Company re-organised attendance patterns with a view to protecting employment generally and providing some work for full-time Operators and part-time Night Operators. Full-time Operators attendances are dictated by traffic patterns and therefore, were the Company compelled to permit part-time Night Telephonists to attend for work without regard to traffic patterns, the circumstances in which full-time Operators and part-time Night Telephonists are employed would be materially different.

Nathan -v- Bailey Gibson & Others

4.13 In relation to the decision of the Supreme Court in Nathan -V- Bailey Gibson and Others the Company submits that the claimants in this case have not succeeded in demonstrating that the practice complained of

(restriction of week-end working) bears significantly more heavily on members of the complainants' sex (female) than on members of the other sex. The respondent contends that the onus of proof does not shift to the Company to show that the practice complained of is based on objectively verifiable factors. The Company adds that in any event it has demonstrated that the practice complained of is based on objectively verifiable factors which have no relation to the complainants' sex.

Section 3 of the Act

4.14 In relation to the claimants' allegation that the Company has discriminated against them under Section 3(1), 3(2) and 3(4) of the Act, the respondent makes the following points:

- (i) Section 3(1) refers to discrimination in relation to access to employment, conditions of employment (other than remuneration and occupational pension schemes), training, experience promotion, regrading or classification of posts. The Company by reducing the week-end work available to part-time Night Telephonists has not modified their

conditions of employment. Neither has it impacted on the other matters provided for in Section 3(1).

- (ii) Section 3(2) refers to rules, instructions and practices which are indirectly discriminatory. For the reasons already set out on the issue of indirect discrimination the Company submits that it has not infringed Section 3(2) and has not indirectly discriminated against the claimants.

- (iii) Section 3(4) of the Act refers to terms of employment (other than in relation to remuneration or an occupational pension scheme) working conditions, overtime, shift, work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures. The Company has reduced the amount of scheduled week-end work available to part-time Night Telephonists. The Company's decision has not impacted on overtime or shift work. The impact of the Company's decision on part-time Night Telephonists has been to restrict the amount of Saturday and Sunday allowances payable to them. For that reason, the Company contends that the dispute

relates to remuneration and is outside the scope of Section 3 (4).

5 Conclusions of the Equality Officer

5.1 The Employment Equality Agency submits that the claimants, believe the implementation of new rota arrangements, which in effect reserve all necessary week-end attendances to full-time staff, resulted in discrimination against them on grounds of sex and/or marital status in terms of the Employment Equality, Act 1977.

5.2 The Company rejects the claim that the implementation of new rota arrangements resulted in discrimination against the claimants on grounds of sex (or marital status). It argues, in the first instance, as week-end work attracts certain premium payments, that the present claim constitutes a claim in respect of remuneration, and is therefore proper for investigation under the Anti-Discrimination (Pay) Act, 1974.

5.3 The first question for consideration is whether the claim relates to discrimination in relation to pay and is covered by the provisions of the Anti-Discrimination

(Pay) Act or does it relate to a condition of employment and is therefore appropriate for consideration under the terms of the Employment Equality Act 1977.

- 5.4** The Company argues, as week-end work attracts certain premium payments that the present claim constitutes a claim in respect of remuneration and it is therefore proper to the Anti-Discrimination (Pay) Act, 1974. It is my opinion that the mere fact that a new arrangement in the workplace may have an affect on remuneration does not mean that a claim of discrimination arising from its introduction is proper to the Act of 1974.

I note, from a list of names furnished by the Company, that not all the "part-time Night Telephonists" sustained a financial loss on the introduction of the new rota arrangement. It seems to me that most of the matters catered for in Section 3 of the Employment Equality Act, 1977 usually have a remuneration aspect to them e.g. promotion, re-grading, overtime, lay-off, shift work etc. I therefore conclude that it was never the legislature's intention to exclude claims from the 1977 Act because there could be a remuneration aspect to them.

5.5 Having regard to the views that I have expressed in the preceding paragraph I am satisfied that the dispute is proper to the Employment Equality Act, 1977 not the Anti-Discrimination (Pay) Act, 1974. As I have so found I will now consider the submissions made by the parties, both oral and written, and all the available evidence in relation to the Employment Equality Agency's claim that the introduction of the new rota arrangement resulted in discrimination, on ground of sex and/or marital status, against the claimants in terms of section 2(c) of the 1977 Act and in breach of Section 3(1), 3(2) and 3(4) of the Act.

5.6 Section 2(c) of the Act states that 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 or membership of a body referred to in Section 5, which is not an essential requirement for such employment or membership 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."

5.7 At the hearing held with the parties it was indicated on behalf of the claimants that they were not making any claim in respect of their marital status. In a letter, subsequent to the hearing, the Agency stated that "this is a case of indirect sex and marital status discrimination." However the submissions received from the claimants do not make any specific argument; or indeed were any statistics furnished, in relation to a case of marital status. In the circumstances I consider that there is insufficient evidence available to me to make a finding of discrimination on grounds of marital status.

5.8 In support of their respective cases the parties cite Irish and European Court of Justice case law. I have given these various cases careful consideration. However, it is my view that the recent Supreme Court judgment in Nathan -v- Bailey Gibson., the Irish Print Union and the Minister for Labour (1996 E.L.R. 114), which finding took into account ECJ case law, is

pertinent to the present case. Accordingly I propose to take its findings in consideration in reaching my findings here.

5.9 The Supreme Court in "Nathan" considered the law on indirect discrimination and its main findings are as follows:

the complainant is "not required, in the first instance, to prove a casual connection between the practice complained of and the sex of the complainant"

it is sufficient for the complainant "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"

if the complainant shows that the practice complained of bears significantly more heavily on the complainant's sex than on members of the other sex "the complainant has established a prima facie case of discrimination"

once a prima facie case of discrimination has been established "the onus of proof shifts to the employer"

the onus on the employer "is to show that the practice complained of is based on objectively verifiable factors which have no relation to the plaintiff's sex"

5.10 Having regard to the aforementioned Supreme Court judgment I consider that the first matter now to be addressed is to identify the requirement imposed and having done that I must then decide whether or not its imposition had a disproportionate impact on the claimants. If I find that it did bear "**significantly more heavily on the complainant's sex than on members of the other sex**", a prima facie case of discrimination will then be established. In these circumstances I will then consider the available evidence as to whether or not it shows that the Company had "**objectively verifiable factors**" which have no relation to the claimants' sex for the imposition of the requirement.

5.11 The Agency identifies the requirement for access to

week-end work is that one be a full-time night Telephonist; or alternatively that one not be a part-time night Telephonist. It points out that although this requirement is not expressly formulated it is nevertheless an implied requirement for access to week-end work. The Company states that the new rota arrangements were intended to confine Saturday and Sunday work to full-time Day Operators and full-time Night Operators, therefore, the claimants are not obliged to comply with a requirement that they be full-time Night staff. I note that the Company does not concede that membership of a full-time day Operator or full-time night Operator grades constitutes a "requirement" within the meaning of Section 2(c) of the Act.

5.12 I note that following the introduction of the new rota arrangements that full-time Day Operators attendance of five days over Monday to Saturday and Sunday work, albeit on overtime, continues to be applicable to them. I further note that there is an exclusion to week-end work in respect of part-time Night Telephonists contained in the new arrangements but none in relation full-time Night Operators. I therefore consider, as a

consequence of the new rota arrangements, notwithstanding the fact that since this claim was served some week-end work is available to part-time night Telephonists in some Telephone Exchanges, that the requirement one had to comply with is "not to be a part-time Night Operator" for week-end work.

5.13 In order to examine the impact of compliance with the requirement, it is necessary to examine the statistics having regard to the relevant pool of employees. The claimants contend that the requirement should be looked at in the context of all night Telephonists whether they be full-time or part-time employees. In support of this argument they point to the Labour Court determination, in the case of Telecom Eireann and 55 Female Day Telephonists and Senior Day Telephonists (Case No DEE792). They cite the following passage:

"The Court is satisfied that there are two separate and distinct grading systems within the Telecom Eireann ITE structure, namely that applying to day telephonists and that applying to night telephonists. Each of these categories of employees is recruited separately and there are

different conditions of employment for each: they are not interchangeable."

I note that Telecom Eireann submits that the correct comparison is between the gender balance of those to whom Saturday and Sunday work remains available (all full-time day Operators and full-time night Operators in the telephone exchanges concerned) on the one hand and those (namely part-time night Telephonists) to whom such work is not available on the other hand.

5.14 I have given careful consideration to the Agency's argument on the relevance of Labour Court's determination in Case No: DEE792 to this case. I note that in Case DEE792 the dispute concerned the voluntary participation on a newly introduced 24 hour rota confined to night Telephonists. It seems to me that the Labour court made its determination in that particular case on the grounds that "only the night telephonists are contractually employed on the basis of 24 hour liability, 7 days a week, and it is only those telephonists who are obliged to work the disputed shift rota". In the present case all operating staff, night and day Operators, had a liability before the

introduction of the new arrangement on the 1st February, 1992, to work week-ends. The consequence of the new week-end work arrangement, which give rise to this dispute, only affected the attendance liability of those Operators who are part-time night Telephonists. I therefore do not hold with the Agency's argument that it is possible to apply the rationale of the Labour Court in DEE792 to this case.

5.15 As Saturday is part of full-time Day Operators attendance liability and as Sunday work could arise, albeit on overtime, for them I do not hold with the Agency's argument that they should be excluded from the comparison. As already stated all night Operators i.e. part-time and full-time night Operators have a seven day attendance liability. It is therefore my opinion that the appropriate pool of workers for comparison purposes should consist of all telephone operating staff who would have been liable for week-end work but for the introduction of the new arrangements on the 1st February 1992.

5.16 Having regard to the views expressed by the Agency in its submission of July 1996 and the views expressed by

the Company, as outlined in the paragraph 5.13, it appears to me that both parties consider that the gender comparison should be confined to those Telephone Exchanges in which the claimants work. It is my opinion as this case centres on an issue which also affects Telephone Exchanges other than those in which the claimants work the appropriate pool of workers, for comparison purposes, should be drawn from all the Exchanges affected by the new arrangements.

5.17 I received statistics from both parties to the case.

The table containing the statistics, which I consider are the relevant statistics, which were furnished by the respondent, are contained in the statistical table at Appendix 5. I note that the Agency does not dispute the statistics furnished by the Company in respect of the position on the 1st February, 1992 in regard to all the Telephone Exchanges affected by the new arrangements (Appendix 5).

5.18 I note that there were 397 males (393 of whom were full-time Operators) and 618 females (537 of whom were full-time Operators) all of whom had a liability for week-end work immediately before implementation of the

new arrangements. I further note that when the requirement, "not to be a part-time Night Operator", is imposed 99% of male operators i.e full-time day Operators and full-time night Telephonists and 87% of female operators i.e. full-time day Operators and full-time night Telephonists meet the requirement. However, while the proportion of males who were able to comply with the requirement was greater than the proportion of females, I do not consider the actual difference of 12%, meets the approach in the "Nathan" Supreme Court case i.e. **"bears significantly more heavily on members of the complainant's sex than on members of the other sex"**.

5.19 As I have not establish that the requirement "not to be a part-time Night Operator" had a disproportionate affect on the claimants I therefore must conclude that a prima facie case of discrimination has not been established. Accordingly I hold that the claimants were not discriminated against by the Company within the meaning of Section 2(c) of the Employment Equality Act, 1977.

5.20 In summary, in relation the claimants case of indirect

discrimination, on grounds of sex and/or marital status,
I found the following:

the dispute is proper to the Employment Equality
Act, 1977

there is insufficient evidence available to me to
make a finding of discrimination on grounds of
marital status

the requirement imposed "is not to be a part-time
Night Operator"

while a greater number of males than females were
able to comply with the requirement the actual
difference of 12% was not **"substantially higher"** as
required by the Act

Having regard to my findings in this case I hold that
the claimants were not discriminated against, on grounds
of sex and/or marital status, under the terms of Section
2(c) of the Employment Equality Act, 1977.

6 Recommendation

6.1 In view of my conclusions in the preceding paragraphs, I find that Telecom Eireann did not discriminate against the claimants contrary to the provisions of the Employment Equality Act, 1977.

Jim Clerkin,

Equality Officer.
20th March, 1997