

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 10/1999

PARTIES

MS. PAULINE FORDE  
(Represented by IMPACT)

AND

OFFICE OF THE REVENUE COMMISSIONERS

File No: EE 33/1995

**1 Dispute**

1.1 This dispute concerns a claim by Ms. Pauline Forde that

the Office of the Revenue Commissioners discriminated against her on the grounds of her sex and marital status in terms of section 2 of the Employment Equality Act, 1977 and in contravention of section 3(2) of the Act in relation to promotion.

## **2 Background**

**2.1** Ms. Forde following an open competition commenced employment as a Law Clerk in the Offices of the Revenue Commissioners in November, 1974. She was promoted to a Legal Clerk in May, 1982 and in May, 1991 to the position of Senior Legal Clerk. She served in a full-time capacity until February, 1994 when she commenced job sharing, in accordance with the scheme in operation in the Civil service. She is married and works a split-week without a job-sharing partner.

**2.2** Ms. Forde works in an office with a small complement of staff, with few promotion opportunities and the promotions are on the basis of seniority/suitability. When the complainant commenced job sharing in February, 1994 she was first of four on the seniority list. When a promotional opportunity arose in September, 1995, and when this vacancy was filled in December, 1995, Ms Forde had been relegated on the list, because of the calculation of job sharing service. Ms. Forde considered that the employer by counting each job sharing year as half a year for the purposes of seniority had discriminated against her contrary to the terms of the Employment Equality Act, 1977.

**2.3** In September, 1995 Ms. Forde through her Union referred the dispute against the Office of the Revenue Commissioners to the Labour Court. The Labour Court

referred the case to an Equality Officer for investigation and recommendation.

- 2.4** The Equality Officer subsequent to the receipt of written submissions from the Union and the Office of the Revenue Commissioners held a joint hearing with them. Arising from both the hearing and further submissions from the parties the Equality Officer decided to put a stay on the completion of the investigation pending receipt of the European Court of Justice ruling, on cases referred to it, on the calculation of job sharing service.
- 2.5** In March, 1998 the Equality Officer became aware that the Department of Finance issued Circular No: 04/98 "Amendment to the job sharing scheme re reckoning of service and seniority". The circular was issued on foot of an ECJ ruling. It states that for purposes other than pay, incremental progression and superannuation, "credit should be given for all job sharing service upon the same basis as full-time service." As the terms of the circular appeared to applicable to Ms. Forde the Equality Officer sought, in March, 1998, the up todate position of the Office of the Revenue Commissioners on Ms. Forde's claim of unlawful discrimination.
- 2.6** In July, 1998 the Office of the Revenue Commissioners advised that Ms. Forde, in accordance with the provisions of Circular 4/98, "has been given credit for all her job sharing service on the same basis as full-time service." Notwithstanding the Commissioners assertion on the complainant's service the Union maintains that the reason Ms Forde was not considered

for the post was "related solely to the fact that she was a job sharer". The last correspondence received in relation to this case was in May, 1999.

### **3 Summary of the Case**

**3.1** The Office of the Revenue Commissioners advised in July, 1998 that Ms. Forde, in accordance with the provisions of Circular 4/98, "has been given credit for all her job sharing service on the same basis as full-time service, insofar as service for the purposes of seniority and qualifying service for promotion....". The Commissioners submits that a claim of discrimination against them no longer exists. Ms Forde, the Commissioners contend, regardless of her service could not have been considered suitable for promotion because of her sick leave record.

**3.2** The Union maintains that the reason Ms Forde was not considered for the post was "related solely to the fact that she was a job sharer". The claim of unlawful discrimination is that, because each year of service was counted by the Office of the Revenue Commissioners as a half year service, Ms. Forde was relegated from first position on the seniority list her "suitability for promotion was never considered, as she was not deemed the most senior in her grade".

The complainant claims the discrimination against her was direct and indirect in nature and that it was on the grounds of sex and marital status in relation to her conditions of employment i.e. section 3(2) of the Act.

**3.3** The Revenue Commissioners maintain the method of

calculating seniority is immaterial as Ms Forde could not have been considered suitable for promotion at the time of the alleged discrimination because of her sick leave absences. The Revenue Commissioners also maintain that as the date of the alleged discrimination is given as the 6th July, 1995, on which date the Personnel Officer informed Ms. Forde of the calculation of job sharing service for the purposes of promotion, and as the vacancy to which the Ms Forde aspired was filled on 18th December, 1995, there could not have been discrimination against her on the relevant date.

**3.4** The Commissioners point out that the Department of Public Service Circular 34/76 is the governing circular used in the Civil Service in relation to the clearance of candidates for promotion or establishment by reference to sick absence and health considerations. The complainant in the relevant four year period i.e. up to 18 December, 1995 had six absences and 233 days' sick leave the latter significantly greater than the maximum of 56 days' sick leave envisaged at paragraph 3.4 of circular 34/76. The respondent asserts that Ms Forde did not (and could not) meet the overriding principle in the circular that her sick leave absence record was compatible with the requirements of regular and effective service.

**3.5** The Union maintains that the issue of whether or not the complainant would be eligible for promotion was always dealt with on the basis of her service as calculated based on the erroneous job-sharing circular of 3/84. In the Union's view it is therefore abundantly clear that the Revenue Commissioners operated a rule which has now been deemed to be

unlawful and that the operation of that rule militated against Ms Forde being considered for promotion at the appropriate time. The claimant's representative asserts that Ms Forde's sick leave is irrelevant.

#### **4. Conclusions of the Equality Officer**

**4.1** The Union argues, despite the fact that the complainant has retrospectively received full recognition for the length of her service, that does not in anyway take from the union's argument that she was discriminated because she "was not considered for promotion at all because of the method of calculating seniority". The Office of the Revenue Commissioners reject the claim of unlawful discrimination, they argue, firstly, there was no vacancy on the 6th. July, 1995, the date identified by the complainant as the date of the alleged discrimination and, secondly, the complainant could not have been appointed to the position because of her sick leave record.

**4.2** It appears to me that the first issue I must address is the Commissioners claim that a case of discrimination in relation to the disputed appointment cannot lie against them because the appointment was not made until December, 1995 which was some months after 6 July, 1995 the date identified by the complainant as the date of the alleged discriminatory act.

The Union points out that the referral form served on the Labour Court states that "her job sharing would be used to her disadvantage in calculating service for the purpose of seniority in relation to promotion."

**4.3** I note that the referral form submitted by the Union to

the Labour Court, which states, inter alia, that the alleged discriminatory act took place on "6 July, '95 and subsequently" and "A promotion will take place in Sept." I am satisfied from the wording used by the Union that a complaint related to promotion was referred to the Labour Court. I am required, under Section 19 of the Act, to investigate and issue a recommendation on a dispute referred by the Labour Court. Accordingly, I am satisfied that I am obliged to consider whether or not that there was unlawful discrimination attached to Ms Forde's failure to be considered for promotion.

**4.4** Ms Forde's claim is that the reason she was not considered for the post was "related solely to the fact that she was a job sharer". Having regard to the method of calculating job-sharers service operated by the respondents, at the time of the promotion, it seems to me as it would have been clear to the Commissioners that Ms Forde was not first on the seniority list that there was no necessity to give full consideration to her as a candidate for promotion.

**4.5** I note that the complainant, if she had received full credit for her service at the material time, would have been first on the promotion list. The promotion list consists of four persons, a female follows the complainant and two males complete the list. I further note that the person promoted here was the female. As the reality is that the female promoted is of the same marital status as the complainant and as a male was not promoted it follows that the complainant suffered no direct discrimination because of her sex or her marital status.

- 4.6 I note that the complainant's claim of indirect discrimination focuses on the calculation of the service of part-time employees vis a vis full-time employees. In cases of alleged indirect discrimination the first issue to be considered is whether or not the requirement (or practice) set by the employer, which on the face of it makes no reference to sex (or marital status), adversely impacts on application on more females than males (or on the same sex but of a different marital status).
- 4.7 I note that the Union in its initial submission states that "The discrimination alleged relates to the opportunity to be promoted, which in the Revenue Solicitors office is dependent upon seniority/suitability". I further note the Commissioners maintain that Ms Forde, at the time of the vacancy, would not have been considered for promotion without the Commissioners having regard to the instructions contained in the circular entitled "Clearance of candidates for promotion or establishment; sick absences and health considerations", (Circular 34/76). It seems to me that seniority/suitability and sick record are all components that constitute a requirement which must be taken into account in order to give full consideration to an officer for promotion.
- 4.8 It is clear that Ms Forde was not given full credit for reckonable service at the material time. I note that the respondents accept that she was suitable for promotion. However on the question of her sick leave record the Commissioners maintain that she would not

have met the sick leave regulations. I note that the requirement identified of seniority/suitability and sick record, apply regardless of employment status, to those under consideration for promotion. Accordingly I cannot find that the implementation of the requirement of seniority/suitability and sick record places one sex at a disadvantage as against the other sex (or the same sex but of a different marital status). I therefore find that there was no indirect discrimination against the complainant.

**4.9** In reaching my conclusions in this case I have taken into account all the submissions made by the parties and relevant case law. Having regard to the views that I have expressed in the preceding paragraphs I am satisfied that there was no unlawful discrimination, either direct in nature or indirect in nature, against the complainant. Accordingly, I find that the respondent did not discriminate against Ms Forde in contravention of the Act.

## **5 Recommendation**

**5.1** In view of my conclusions in the preceding paragraphs, I find that the Office of the Revenue Commissioners did not discriminate against Ms Forde contrary to the provisions of the Employment Equality Act, 1977.

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Jim Clerkin,  
Equality Officer,  
25th. June, 1999

25 June, 1999.                    **PER REGISTERED POST**

Ms Angela Brennan,  
Assistant Principal,.  
Office of the Revenue Commissioners,  
Human Resources Division,  
Dublin Castle,  
Dublin 2.

**EMPLOYMENT EQUALITY ACT, 1977**

**MS PAULINE FORDE**  
**(Represented by IMPACT)**

- vs -  
OFFICE OF THE REVENUE COMMISSIONERS

Dear Ms. Brennan,  
My investigation in regard to the dispute under the above Act has been completed and my recommendation is enclosed.

Yours sincerely,

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Jim Clerkin,  
Equality Officer.

**Note** The Act provides that any appeal against or request for implementation of an Equality Officer's recommendation must be lodged in the Labour Court within **forty two days** after the date of the Recommendation. The notice of appeal must specify the grounds on which the appeal is being made.

25 June, 1999.

PER REGISTERED POST

Ms Marie Levis,  
Assistant General Secretary,  
IMPACT,  
Nerney's Court,  
Dublin 1.

EMPLOYMENT EQUALITY ACT, 1977

MS PAULINE FORDE  
(Represented by IMPACT)  
- vs -  
OFFICE OF THE REVENUE COMMISSIONERS

Dear Ms Levis,

My investigation in regard to the dispute under the above Act has been completed and my recommendation is enclosed.

Yours sincerely,

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Jim Clerkin,  
Equality Officer.

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25 June, 1999.

EMPLOYMENT EQUALITY ACT, 1977

MS PAULINE FORDE  
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- vs -  
OFFICE OF THE REVENUE COMMISSIONERS

Mr. F. Flood,  
Chairman,

Labour Court.

Copy of Equality Officer's Recommendation No:EE 10/1999 is  
attached for your information.

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Jim Clerkin,  
Equality Officer.

25 June, 1999.

EMPLOYMENT EQUALITY ACT, 1977

<p>MS PAULINE FORDE (Represented by IMPACT) - vs - OFFICE OF THE REVENUE COMMISSIONERS</p>
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Mr. Kieran Mulvey,

Copy of Equality Officer's Recommendation No:EE 10/1999 is  
attached for your information.

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Jim Clerkin,  
Equality Officer.