

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 11/1999

PARTIES

MS.DEIRDRE NALLY, MS.CATHERINE KENNEDY, MS MARINA HURLEY,
MS.VERONICA CALLINAN & MS.ITA REID
(Represented by the Civil and Public Service Union)

AND

DEPARTMENT OF FINANCE AND OTHER NAMED GOVERNMENT DEPARTMENTS

FILE NO: EE41/91

Dispute

- 1.1** This dispute concerns an allegation by the five complainants that the Department of Finance, as the main respondent and the then Departments of Labour, Agriculture, Social Welfare and Revenue Commissioners, as secondary parties, discriminated against them contrary to the provisions of the Employment Equality Act, 1977 by denying them access to promotion to Higher Executive Officer.

2 BACKGROUND

- 2.1** On 22 March, 1991 the Department of Finance issued a circular, Circular 14/91: Scheme of promotion to HEO level posts, inviting applications from eligible civil servants. The eligibility requirements were as follows:
Candidates must on 1 January, 1992
- (a) be serving in the civil service in an established capacity as an Executive Officer or,and
 - (b) have not less than 5 years service in their existing grade or not less than 7 years total service of which not less than 2 years was in the eligible grade.
- 2.2** On 1 March 1991, Ms. Deirdre Nally was a Clerical Assistant working in the Department of Labour. She entered the Civil Service as a Clerical Assistant in 1980 and worked for 9 years in the Department of Agriculture and since then in the Department of Labour. She has an Honours Leaving Certificate and also has a BA Degree in English and Classical Civilisation. Ms. Nally submitted an application to compete in the Interdepartmental competition to HEO. Her application was rejected as she did not satisfy the eligibility requirements laid down in the competition circular.
- 2.3** In March 1991 Ms. Marina Hurley was a Clerical Officer working in the Department of Agriculture and Food. She entered the Civil Service as a

Clerical Assistant in 1983. She was a Clerical Assistant in Taxes, Revenue Commissioners for two and a half years, when she was promoted to Clerical Officer. She served for five years as a Clerical Officer in the Revenue Commissioners since then she worked in the Department of Agriculture. She has an Honours Leaving Certificate obtaining honours in English, Biology, Art and French. Ms. Hurley submitted an application to compete in the Interdepartmental Competition to HEO. Her application was rejected as it was stated she did not satisfy the eligibility requirements laid down in the competition circular, Circular 14/91.

2.4 In March 1991 Ms. Veronica Callinan was a Clerical Officer working in the Revenue Commissioners. She entered the Civil Service as a Clerical Assistant in 1977 and worked for six and a half years as a Clerical Assistant in the Revenue Commissioners, after which she was promoted to Clerical Officer. Ms. Callinan has an Honours Leaving Certificate obtaining four honours in English, History, Geography and Biology. Ms. Callinan submitted an application to compete in the Interdepartmental competition to HEO but her application was rejected as she did not satisfy the eligibility requirements as laid down in the competition Circular 14/91.

2.5 In March 1991 Ms. Catherine Kennedy was a Clerical Officer working in the Department of Agriculture and Food. She entered the Civil service in 1977 as a Clerical Assistant and worked for 13 years as a Clerical Assistant in the Department of Agriculture and Food and was subsequently promoted to Clerical Officer. She has an Honours Leaving Certificate, obtained in Economics, Irish and Geography. She also has a Second Class Honours Degree in Public Administration and a Masters Degree in Politics from Dublin City University. Ms. Kennedy submitted an application to compete in the Interdepartmental promotion competition to HEO but her application was not accepted as it was stated she did not meet the eligibility requirements for the competition, Circular 14/91.

- 2.6** In March 1991, Ms. Ita Reid was a Staff Officer in the Department of Social Welfare. She entered the Civil Service as a Clerical Assistant and worked for 3 months in the Department. After her promotion to Clerical Officer she worked for 7 years as a Clerical Officer in the Children's Allowance Section. In 1981 she was promoted to Staff Officer. Ms. Reid has an Honours Leaving Certificate. Ms. Reid submitted an application to compete in the Interdepartmental Competition to HEO. Her application was rejected as it was stated she did not satisfy the eligibility requirements laid down in the competition circular.
- 2.7** On 02 July, 1991, the Civil and Public Service Union referred a dispute to the Labour Court that the Department of Finance and the Departments of Labour, Agriculture, Social Welfare and Revenue Commissioners discriminated against Ms. Nally, Ms. Kennedy, Ms. Hurley, Ms. Callinan, and Ms. Reid in terms of Section 2 of the 1977 Act. On 16 July, 1991 the Court referred the matter to an Equality Officer for investigation and recommendation. Submissions were received for the parties. A joint hearing was held. Following which further detailed submissions were made. In June 1995 the Union requested the investigation to be put on hold pending the outcome of talks between it and the Respondents. Since then despite requests, confirmation has not been forthcoming from the Union as to whether it wishes to proceed with the claim. The latest correspondence was in June 1999. The parties have been advised that the Equality Officer is now issuing her Recommendation.

3 SUMMARY OF THE UNION'S CASE

- 3.1** The Union alleges that the complainants were discriminated against by the Department of Finance and the complainants' respective Departments by denying them access to promotion and by applying a requirement which a substantially higher proportion of men than of women are able to comply,

contrary to Section 3(1) of the 1977 Act when taken in conjunction with Section 2(c) of the Act. The requirement can be stated to be as follows:

- (a) “Candidates must be serving in the Civil Service in an established capacity as Executive Officer or Assistant Auditor in the Office of the Comptroller and Auditor General or, Junior Clerk in the Office of the Houses of the Oireachtas, or Officer of Customs and Excise in the Office of the Revenue Commissioners, or Executive Officer on secondment to FAS or the Health and Safety Authority from the Civil Service.”
- (b) “Have not less than 5 years service in their existing grade or not less than 7 years total service of which not less than 2 years was in an eligible grade.”

The union claims that, in restricting access to the position of HEO in the Civil Service to staff at EO grade and its equivalent, in effect the Department of Finance and the complainants’ respective Departments imposed a requirement on potential applicants/candidates, including the complainants, to be in the “eligible” grades if they wished to have access to the position of HEO in the Civil Service.

3.2 The Union submits that the requirement complained of, although not overtly sex based, in fact, has a disproportionate adverse impact on one sex, in that a substantially higher proportion of males than of females can comply with the stated requirement. In the pool of persons who were considered for promotion the number and percentage of males and of females who could comply with the requirement to be at the “eligible” grades is as follows:

	Total	Males	Females
Executive Officer	1783	963 (54%)	820 (46%)
Assistant Auditor	30	20 (67%)	10 (33%)
Junior Clerk	7	4 (58%)	3 (42%)
C & E Officers	290	289 (99.7%)	1. (3%)
TOTALS	2110	1276 (61%)	834(39%)

[Source: State Directory 1991 & Equal Opportunities Report 1990]

3.3 The Union contends that in the pool of persons of the complainants' grades who could not comply with the requirement to be at the "eligible" grades, the numbers and percentage of males and females is as follows:

	Males	Females	Total
Staff Officer	328 (39%)	514(61%)	842
Clerical Officer	858 (29%)	2102 (71%)	2960
Clerical Assistant	867 (15%)	4913 (85%)	5780
Total	2053 (21%)	7529 (79%)	9582

3.4 It contends that the number of males and of females who could have been in the pool of persons considered for promotion, had the requirement in question not existed, is as follows:

	Males	Females	Total
Executive Officer	963	820	1783
Assistant Auditor	20	10	30
Junior Clerk	4	3	7
C & E Officer	289	1	290
Staff Officer	328	514	842
Clerical Officer	858	2102	2960
Clerical Assistant	867	4913	5780
Total	3329	8363	11692

It states that 38% (1276) of all males (3329) could comply with the requirement compared to only 10% (834) of all females (8363) . Therefore the Union submits that a substantially higher proportion of males than of females could comply with the stated requirement which resulted in a disproportionate adverse impact on the female sex.

3.4 The Union alleges that the complainants, because of an attribute of their sex, were discriminated against by the Department of Finance and their respective Departments by denying them access to promotion, contrary to the Employment Equality Act, 1977. It refers to the combined gender composition in 1991 of the General Service Grades. The combined gender composition of lower grades (CA/CO/SO) and higher grades (EO/HEO) is as follows:

Combined CA/CO/SO: 79% Female; 21% Male

Combined EO/HEO:39% Female; 61% Male

The Union states that promotional outlets at the time of the claim for Clerical Assistants, Clerical Officers and Staff Officers were as follows:

Clerical Assistant	-	To Clerical Officer and Executive Officer
Clerical Officer	-	To Staff Officer and Executive Officer
Staff Officer	-	To Executive Officer

3.5 The Union contends that the circumstances, which have given rise to the concentration of females in clerical employment, are due to historical, social, cultural and educational factors in Irish Society generally and that this is reflected in the gender composition of the Civil Service grades, as illustrated in the previous figures. In support of this argument the Union quoted a number of reports and research conducted in this area.

3.6 The Union alleges that the complainants were discriminated against by the Department of Finance by denying them access to promotion contrary to Section 3(1) of the Employment Equality Act 1977, by applying a requirement which is not an essential requirement contrary to Section 2(c) of the same Act. The Union asks the question, is it essential to be at the EO grade or its equivalent to compete in the confined HEO competition, when an Executive Officer enters the Civil Service as an open entrant and after 5 years is then eligible to compete for promotion to HEO, but yet a Staff Officer with all the educational qualifications necessary and with also 11 years experience as a

Staff Officer plus additional experience as a Clerical Officer and Clerical Assistant is debarred from competing in the same competition. It also cites the situation in relation to the Administrative Officer grade in the Civil Service, which is in the same tier as that of Higher Executive Officer, where in the open competition, serving Civil Servants, in the complainants' grade have been successful in securing appointments at this level. They had the qualifications necessary and were successful in the appropriate competition.

- 3.7** It also cites the Equality Officers Recommendation EE 19/1990 in FAS and ninety two claimants represented by the CPSU where the Equality Officer said "I am satisfied that the requirement to be in Grades 8, 9 and 10 to apply for the posts of Senior Employment Service Officer and Employment Service Officer does not constitute an essential requirement for employment as a Senior Employment Service Officer and Employment Service Officer". Therefore it argues that the employer, in this case the Department of Finance, and the Claimants respective Departments, can only justify discrimination if they can show that they had a real need to act in the way they did and that this is absolutely essential.
- 3.8** The Union argues that the written competition and interview process should establish a person's suitability for promotion rather than the necessity to be at a particular grade in the organisation. Essentially in this case it is fact that the lower graded predominantly female grades were treated less favourably, than the higher graded predominantly male grades in relation to promotional opportunities. The Union submits that by being denied access to higher graded posts that de facto the complainants were denied access to opportunities for promotion.
- 3.10** The Union alleges that the complainants were discriminated against by the Department of Finance and their respective Departments contrary to Section 3(2) of the Employment Equality Act 1977 by the application of rules and

practices the results of which are in contravention of Section 2(c) of the same Act. It states that the promotion to Higher Executive Officer level - Interdepartmental Scheme, was reviewed by a sub-committee of General Council Report No. 1196 was adopted on 27th February, 1991. This agreement sets down the rules and procedures to be applied for the holding of the Interdepartmental competition for promotion to HEO to fill HEO vacancies arising from 01st January, 1992 to 31st December, 1992. Paragraph 10 of General Council Report laid down the eligibility conditions necessary to compete in the competition. The Union contends that the application of the rules and practises as contained in the agreement is discriminatory when taken in conjunction with Section 2(c) of the Employment Equality Act 1977, for the same reasons as already outlined.

3.11 The Union alleges that the complainants were discriminated against by the Department of Finance and the complainants respective Departments by denying them access to opportunities for promotion contrary to Section 3(6) of the Employment Equality Act 1977 when taken in conjunction with Section 2(c) of the same Act. The Union contends that there can be no question but that the posts of Higher Executive Officer are promotional posts. Secondly, it is clear that in being denied access to higher graded posts, de facto the claimants were denied access to opportunities for promotion. It contends that this denial of access to opportunities for promotion contrary to Section 3(6) of the Act when taken in conjunction with section 2(c) of the Act, for the same reason as already outlined earlier.

3.12 The Union alleges that the complainants were discriminated against by the Department of Finance and the complainants respective Departments by denying them access to promotion contrary to Section 10(1)(b)(1) of the Employment Equality Act 1977 in contravention of Section 2(c) of the same Act.

Section 10(1) of the Act states

- a) where an agreement or order to which this subsection applies contains a provision constituting discrimination, the provision shall be null and void
- b) This subsection applies to
 - i) a collective agreement

General Council Report No. 1196 referred to at Paragraph 3.9 as adopted on 27th February 1991 is a collective agreement. The Union contends that that agreement contains a provision which it alleges is discriminatory. This provision can be stated to be contained in Paragraph 10 which sets down eligibility requirements which it alleges are discriminatory and contrary to Section 10(1)(b)(i) of the 1977 Act when taken in conjunction with Section 2(c) of the Act for the reasons as already detailed in submission.

3.13 The Union seeks the following remedy for the claimants

- (i) That the requirement to be in the Executive Officer grade or its equivalent to compete in the promotion competition to HEO is discriminatory under the 1977 Act and contrary to Section 3(1), Section 3(2), Section 3(6) and Section 10(1)(b)(i) of the Employment Equality Act 1977 in contravention of Section 2(c) of the same Act.
- (ii) That the promotion competition to Higher Executive Officer advertised in Circular 14/91 be re-advertised on an unrestricted basis.
- (iii) That compensation be paid to the claimants.

4 **Summary of Respondents Case**

4.1 The Respondents submit that the competition which is the subject of this complaint was held in accordance with a scheme of promotion to Higher

Executive Officer agreed at the General Council between the Official Side and the Staff Side (the latter comprises all of the unions recognised to represent grades coming within the C&A Scheme, including the Civil and Public Service Union). Circular 14/91 which announced the competition was cleared by the Staff Side prior to issue. At no stage was any objection raised to the provision of the scheme or of the circular which has been challenged in this case.

4.2 The Respondents contend that in discussions on promotion competitions it is normal for unions to attempt to maximise the promotion outlets for members of the grades which they represent. The C.P.S.U has consistently attempted to limit open recruitment at levels above Clerical Assistant. Traditionally, 50% of Clerical Officer posts were filled by way of open competition. The last such competition was held in 1986 and the C.P.S.U have indicated that they would oppose any resumption of such recruitment. In 1990, the C.P.S.U threatened strike action in the Department of Social Welfare and the Office of the Revenue Commissioners in protest at the recruitment of Executive Officers by way of open competition (an agreement dating from 1973 provided for 50% of Executive Officers to be recruited in this way). Following lengthy discussions, agreement was reached to increase the proportion of posts filled by serving staff for a limited period. In confined competitions unions generally seek to limit access to their own members, excluding grades which they do not represent even if they are in the same structure. For example, the C.P.S.U has resisted attempts by the Messengers to gain access to the confined Clerical Officer competition. Frequently such restrictions result in a gender balance in the eligible candidature which differs significantly from the gender balance in an open competition or in a confined competition in which all civil servants at the relevant levels could compete.

4.3 The following table shows the gender balance of the eligible candidature in competitions for Clerical Officer, Staff Officer and Executive Officer (a) as it is at present given the manner in which access to the competitions is restricted, (b)

as it would be if the posts were filled by open competition and (c) as it would be if all civil servants at the relevant levels were eligible to compete:

	(a)		(b)		(c)	
	M	F	M	F	M	F
	%	%	%	%	%	%
Clerical Officer	19	81	50	50	46	54
Staff Officer	21	79	50	50	46	54
Executive Officer	22	78	50	50	46	54

The Respondents submit that the thrust of the argument being put forward by the Union in this case is wholly inconsistent with their practice in negotiations on promotion systems in the service and the impact of the general application of the principles for which they contend in this case could be considerable.

4.4 The Respondents also submit that this complaint does not comply with the six month limitations period provided for Section 19(5) of the Act. The act alleged to constitute discrimination in this case was the exclusion of Clerical Assistants, Clerical Officers and Staff Officers for the eligible candidature for a competition for promotion to Higher Executive Officer. The date on which the discriminatory act is alleged to have occurred is stated (in the reference to the Labour Court) to be 22 March, 1991, the date on which Circular 14/91, announcing the competition, issued. However, the respondents submitted the competition announced in this Circular was the same, in all relevant respects, as numerous earlier competitions going back to before the passing of the Employment Equality Act, 1977. The first such competition following the passing of the Act was announced in Circular 4/78 issued on 13th January, 1978. Accordingly, they contend that the act alleged to constitute the discrimination first occurred more than 13 years before the complaint was referred to the Court. The complaint clearly does not comply with the six month limitation period provided

for in Section 19(5) of the 1977 Act and they submitted that no reasonable cause has, or can be, shown for the delay in lodging the complaint.

4.5 The Respondents' arguments in relation to the Union's contention that the requirement that applications for the competition for posts at Higher Executive Officer announced in Circular 14/91 must be serving in the civil service as Executive Officers or in specified equivalent grades indirectly discriminated against the complainants are set out in subsequent paragraphs.

4.6 In regard to the requirement having a disproportionate effect on women they submit that the Union are not seeking the removal of the requirement in its entirety but rather that the list of eligible grades should be extended to include the grades of Clerical Assistant, Clerical Officer and Staff Officer which they represent. Such a requirement would continue to exclude all other civil servants and all non-civil servants from the competition. The Respondents submit that this amounts to a fundamental flaw in the case made. In the North Western Health Board - vs - Martyn (1985) (ILRM 226), Justice Barron said in the High Court that, to establish whether a condition for access to employment is such that the proportion of persons of one sex able to comply with it is substantially higher than the proportion of the other sex, two sets of statistics need to be considered.

- (1)** the actual statistics of the particular application for employment;
- (2)** the actual statistics of an application for similar employment on the same condition but without the impugned condition.

4.7 The Respondents contend that the comparison made by the Union is between the effects of the restrictive condition contained in Circular 14/91 and the effects of an alternative restrictive condition. They submit that the correct application of the test approved by Justice Barron would require a comparison of the gender balance of the eligible candidature in the competition as it was held and

the gender balance of the eligible candidature for a competition held on the same conditions but without the impugned condition. In this case the deletion of the impugned condition - that candidates must be serving in the civil service in the grade of Executive Officer or certain equivalent grades - would result in an open competition. Even if the traditional practice of confining access to these posts to serving civil servants were presumed to be beyond question (and there is no obvious basis for such a presumption), the comparison should be with the gender balance of the eligible candidature if all civil servants, or, perhaps more realistically, all civil servants at equivalent or lower levels, were allowed to compete. The figures on which a proper analysis can be made are set out in the following table:

Gender composition of eligible candidature if access were

		Male	Female
(i)	restricted as in Circular 14/91	55%	45%
(ii)	open to all civil servants and non-civil servants	50%	50%
(iii)	open to all civil servants	55%	45%
(iv)	open to all civil servants at equivalent and lower levels	49%	51%
(v)	as sought by C.P.S.U.	27%	73%

It is clear that, when the test adopted by Justice Barron is applied, the composition of the legible candidature which would result from the deletion of the requirement, either in its entirety or insofar as it specifies particular grades in which applicants must be serving, would not differ significantly from the composition of the eligible candidature in the actual competitions. However, it would differ significantly from the composition which would result from the requirement contended for by the Union. Accordingly, the respondents submit that the requirement challenged did not have a disproportionate impact on potential female candidates but that the alternative requirement proposed by the union would have such an impact on potential male candidates.

4.8 The Respondents state that even if it were established that a substantially higher proportion of one sex within the pool of persons who would otherwise be eligible to compete were excluded by the requirement which has been challenged, they do not accept that this effect could be regarded as resulting from an attribute of their sex. In the first place, the failure of the complainants to comply with the requirement arose, not because they were serving in the eligible grades and there are no grounds for maintaining that women are less capable than men of complying with the requirements for access to the eligible grades. Women comprise 51% of the Executive Officer grade and 45% of all the eligible grades. Indeed, 57% of recruits to the Executive Officer grade over the last five years have been female. Secondly, while it is accepted that the gender imbalance in the complainants' grades may be due, at least in part, to social conditioning, it is not accepted that this is sufficient to establish that such imbalance has resulted from an attribute of the complainants' sex. It is contended that the phrase "because of his sex or marital status" in Section 2(c) of the 1977 Act should be construed in accordance with the approach taken by Justice Barron in *North Western Health - vs - Martyn* when he said

"A condition to offend this provision does not have to refer specifically to sex or marital status. It is sufficient that it is such that as a result of an attribute of a person's sex or of the circumstance of a person's marital status such persons are substantially more affected than persons of a different sex or of a different marital status as the case may be. An age qualification may not be discriminatory if the reason for the ability of a substantially higher number of married persons to comply in the absence of the condition is no more than that the age requirement is below the age at which persons of that particular sex normally marry."

- 4.9** In the light of these views, the Respondent submit that a complainant is required to establish a causal link between the relative inability of persons of one sex or of one marital status to comply with a requirement and an attribute of the sex of those persons or the circumstances of their marital status, as the case may be. They contend that no such casual link has been or can be, established in this case. The fact that women tend to apply for clerical positions in the civil service in greater numbers than men is not explicable by any lack of capacity resulting from an attribute of their sex, such as physical characteristics or educational experience. Career choices are clearly influenced by historical, social and cultural factors but they are nonetheless choices and the actual patterns of application are not attributable to any constraints on the capacity of men or women to comply with the requirements for entry to the service at clerical or other levels. In lacking this casual link, the Respondents submit that the circumstances in this case are similar to those in the case of Revenue Commissioners - vs - Kelly (EE 091987). In that case the Equality Officer rejected a complaint that a requirement to hold a driving licence was discriminatory partly on the grounds that, even if it could be established that such a requirement disproportionately disadvantaged women, she was unable to identify any attribute of their sex from which such a fact could be held to result.
- 4.10** The Respondents submit that the grade of Higher Executive Officer is a key middle management grade in the civil service. The duties encompass both managerial and administrative responsibilities. In the former capacity a Higher Executive Officer could be required to supervise a large number of staff in the lower grades, with full responsibility for the organisation and control of work, reporting on staff performance and staff training and development. On the administrative side, the job could entail making decisions on non-routine cases of a high level of complexity, the preparation of legislation or analytical and research work in connection with policy development and formulation.

4.11 They submit that in filling any post it is clearly essential that the selection process establish that candidates have the capacity to undertake the duties and responsibilities of the post. Written tests and interviews are employed for this purpose but employers rarely rely solely on such tests in recruiting staff to managerial positions. It is normal to require that candidates have demonstrated their potential by a record of achievement. The higher the post in the organisation the greater will be the emphasis on a candidate's "track record". It would be most unusual for an employer to select a candidate for a management position unless that candidate could demonstrate a record of achievement at a broadly equivalent level regardless of the candidate's qualifications or performance at interview. Candidates in confined competitions in the civil service are normally required to have satisfactorily performed duties which are close in terms of complexity and responsibility to the duties of the posts being competed for (candidates may not be sent forward to the competition unless the Head of their Department has certified that they have satisfactorily performed their duties in their current grade). The Respondents submit that it is entirely unreasonable and inconsistent with normal recruitment practice for the Union to maintain that Departments should be required to rely on written tests and interview in the selection process for posts at the level of Higher Executive Officer and should not be permitted to require that candidates have demonstrated their potential for the duties of the higher level by the satisfactory performance of the duties of the closest subordinate level.

4.12 In reference to the Union's statement that Clerical Assistants, Clerical Officers and Staff Officers have access to the grade of Administrative Officer which is at the same level as Higher Executive Officer; the respondent contend that as recruitment to Administrative Officer is by way of open competition in which many of the candidates would not have work experience, candidates are required to demonstrate a specified level of educational attainment rather than work experience, and lower levels of qualifications are required of serving civil servants (honours Leaving Certificate) than of non-civil servants (honours

degree). The Respondents reject the contention in the Union's submission that this is evidence that service at Executive Officer level could not be an essential requirement for recruitment to Higher Executive Officer, and state that the Administrative Officer grade is a training grade. Recruits are closely supervised in the early years following their appointments and are not expected to undertake certain tasks, such as staff management, until they have gained the necessary experience. They submit that it is not valid to claim that allowing the clerical grades access to Administrative Officer undermines the argument that a confined recruit to the grade of Higher Executive Officer can reasonably be required to have gained experience at the closest subordinate level.

- 4.13** The Respondents in conclusion submit that the complaints should be rejected on the grounds that
- (a)** the act alleged to constitute the discrimination first occurred more than 13 years before the complaint was lodged and no reasonable cause has been, or can be, shown for the delay in lodging the complaint;
 - (b)** when the proper test to determine the effect of the condition which has been challenged is applied, it can be shown that the condition does not have a disproportionate effect on potential female candidates and, indeed, that the alternative restrictive condition contended for by the Union would have a disproportionate effect on potential male candidates;
 - (c)** even if there were such a disproportionate effect it could not be said to derive from an attribute of the complainants' sex;
 - (d)** it is essential to establish that the candidates are capable of performing the duties of the posts competed for. The requirement that candidates should have satisfactorily performed the duties of the closest subordinate level is both a reasonable means of seeking to ensure this and is fully in accord with normal recruitment practice.

5 Conclusions of Equality Officer

5.1 The Respondents have argued that the time limit provision of Section 19(5) of the Act was not satisfied by the claimants in referring the dispute for investigation. Section 19(5) of the Act states:

“Save only where a reasonable cause can be shown, a reference under this section shall be lodged not later than six months from the date of the first occurrence of the act alleged to constitute the discrimination.”

The Respondents’ arguments in relation to this are outlined at paragraph 4.13.

I have advised both parties of the Supreme Court judgement in *Aer Lingus - vs - The Labour Court (141/1988)* in which the Supreme Court stated that an “Equality Officer has no function to deal with any matter concerning the question of the time span and therefore any findings he makes is strictly without prejudice to what the Labour Court may decide about the latter point”. Taking this judgement into account I do not consider that I have jurisdiction to deal with the time limit issue.

5.2 The next matter for consideration is whether the Respondents indirectly discriminated against the claimants on grounds of their sex by denying them access to promotion to Higher Executive Officer. The Union alleged that the Respondents indirectly discriminated against the claimants contrary to Sections 3 and 10 in conjunction with Section 2(c) of the Act. The findings of the Supreme Court in *Nathan V Bailey Gibson & others (1996) [ELR 114]* and the High Court in *Conlon V University of Limerick (1997)* are pertinent to these claims. Mr. Justice McCracken in his judgement¹ outlined that the Supreme Court² established the following principles

1. Section 2 of the Act only refers to direct discrimination and the examples given in it are examples of direct discrimination rather than indirect discrimination.

¹Conlon v University of Limerick (1997)

² Nathan v Bailey Gibson & others (1996) [ELR 114]

2. Section 3 of the Act applies to both direct and indirect discrimination.
3. The interpretation of Section 3 of the Act is not limited in any way by the provisions of Section 2, because the interpretation of Section 3 must be approached in the light of the Directive.
4. Initially it is for the worker to show that the practice complained of bears more heavily on one sex than on the other. Once this is established it is for the employer to show that, notwithstanding this fact, the practice complained of is in fact based on factors which are unconnected with the sex of the worker. In this regard the onus of proof is clearly on the employer.

5.3 In relation to the requirement or practice with which the claimants were obliged to comply, the Union submitted that the requirement applied by the Respondents was that

- (a) “Candidates must be serving in the Civil Service in an established capacity as Executive Officer or Assistant Auditor in the Office of the Comptroller and Auditor General or, Junior Clerk in the Office of the Houses of the Oireachtas, or Officer of Customs and Excise in the Office of the Revenue Commissioners, or Executive Officer on secondment to FAS or the Health and Safety Authority from the Civil Service.”
- (b) “Have not less than 5 years service in their existing grade or not less than 7 years total service of which not less than 2 years was in an eligible grade”

5.4 In restricting access to the position of HEO in the Civil Service to staff at EO grade and its equivalent, the Union claims, in effect, the Department of Finance and the complainants’ respective Department imposed a requirement on potential applicants/candidate, including the claimants, to be in the “eligible” grades if they wished to have access to the position of HEO in the

Civil Service. The Respondents accepted that there was a requirement on applicants for the competition for posts at Higher Executive Officer that they be serving in the civil service as Executive Officers or in specified grades. I am satisfied that the requirement with which the claimants were obliged to comply was to be in the “eligible” grades as detailed above.

5.5 The next question to be addressed is whether the requirement was such that a higher proportion of males than of females could comply with. In this regard, two sets of statistics must be considered³

- (1) the actual statistics of the particular application for employment;
- (2) the actual statistics of an application for similar employment on the same conditions but without the impugned condition.

Having considered the arguments of the parties in regard to this second set of statistics, I consider the deletion of the impugned condition “to be in the eligible grade” would result in a competition confined to all civil servants with the requisite service at equivalent or lower levels.

5.6 In the course of my investigation I was provided with statistics of officers who would have had the requisite service at the appropriate time if there had been no grade restriction. A total of 17365 officers at equivalent or lower levels could have applied for this competition had the requirement to be in the “eligible” grades not applied (Appendix 1). Of this total, 8527 were male and 8838 were female. A total of 1454 officers, 906 male and 548 female were in fact eligible to compete in the competition as they were in the “eligible” grades with the requisite service. Consequently, I note that if a requirement to be in the “eligible” grades is imposed, approximately 10.6% of all males at the equivalent or lower level could comply with the requirement and approximately 6.2% of females at the equivalent or lower level could comply.

³Northwestern Health Board v Martyn (1984)

While the proportion of males who were able to comply was somewhat greater than the proportion of females, I do not consider that the requirement “bears significantly more heavily on members of the complainant’s sex than on members of the other sex”.⁴ As I have not established that the practice complained of has a disproportionate effect on the claimants I must conclude that a prima facie case of discrimination has not been established. Accordingly I hold that the complainants were not indirectly discriminated against by the Respondents,

6 Recommendation

- 6.1** I find that the Respondents did not indirectly discriminate against the complainants on grounds of sex contrary to the Employment Equality Act 1977.

Deirdre Sweeney
Equality Officer

22 July 1999.

⁴Nathan V Bailey Gibson & others (1996) [ELR 114]