

**OFFICE OF THE DIRECTOR OF EQUALITY
INVESTIGATIONS**

EMPLOYMENT EQUALITY ACT 1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE 04/2000

PARTIES

**4 Named Female Complainants
(Represented by the CPSU)**

A N D

**Telecom Eireann
(now Eircom)**

File Ref : EE 19/1993

1 **RECOMMENDATION**

1.1 I find that Telecom Eireann (now Eircom) did not discriminate against each of the claimants on grounds of their sex contrary to the provisions of Section 3(1), (2) and (6) of the Employment Equality Act 1977 (“the Act”) in terms of Section 2 (c) of the Act.

1.2 In view of my conclusion at 1.1 above, I recommend that the allegation of discrimination in this case fails.

2 DISPUTE

- 2.1 This case concerns an allegation by the CPSU (“the Union”) that Telecom Eireann - now Eircom (“the Company”) - held an internal competition for posts as "Major Customer Representatives" and restricted eligibility to staff in certain grades, thereby discriminating against the 4 complainants on grounds of their sex contrary to the provisions of Section 3 of the Employment Equality Act, 1977 in terms of Section 2 of that Act. The Company rejects the allegation.

3 BACKGROUND

- 3.1 The Company (which has evolved from the Department of Posts & Telegraphs) was established in 1984 when it essentially enjoyed a monopoly on all telecommunications services in the marketplace. In the light of emerging competition in recent years and the need to retain its existing business, the Company states that it decided on the development of a major company care programme on a localised basis. It was decided that 42 Major Customer Representatives would be assigned to the its 8 operating districts as follows:

Cork	04
Drogheda	03
Dublin	14
Limerick	06
Galway	04
Portlaoise	03
Sligo	04

3.2 The functions of the Major Customer Representatives were to include advising on products & services, handling problems, ensuring the provision of high quality service and discussing current and future needs etc. Specifically the company described the jobs in its Vacancy Notice 19/93 (copy at Appendix III) as follows:

"acquire a thorough knowledge of all facets of the business of major customers for which he/she is responsible.

Present for management approval specific objectives and plans for the growing of telecommunications business and his/her major customers.

Be actively involved in proposing and pursuing solutions to the IT and telecommunications needs of major customers.

Co-ordinate/facilitate the multiple interfaces of Telecom Eireann Group and his/her major customers.

Ensure that all business objectives and quality requirements of his/her major customers are monitored and facilitated.

Contribute to the introduction of the Major Customer process to the broader business customers of the Company by participation, seminars, training and direct personal contribution."

- 3.3** The Company states that it decided to pitch the Major Customer Representative posts at "Level VIII" and to recruit from amongst staff in the grades of "Telecom Executive VIII", "Technical Officers" and "Customer Team Leaders", all of which are essentially equivalent to Level VIII.
- 3.4** The Union considers that eligibility should not have been restricted to those at Level VIII as the existing agreement for filling Telecom Executive VIII ("TEX VIII") vacancies allows for a wider pool of eligible staff. Accordingly, the Union considers that, by excluding the predominantly female Telecom Eireann Officer 1 ("TEO I") and Telecom Eireann Officer 11 ("TEO II") grades, the company breached the 1977 Act.
- 3.5** The Union referred the case to the Labour Court under the Employment Equality Act, 1977 and the Labour Court then referred the case to an Equality Officer for investigation and recommendation.

4 SUMMARY OF UNION'S CASE

4.1 The Union states that arrangements in the Company for appointment to the grade of Telecom Executive VIII are recorded in Joint Conciliation Council Report No. 376 (copy at Appendix IV). That report provides for the majority of TEX VIII posts to be filled by various means from among the Telecom Eireann Officer I grade. The Union submits that the agreement also provides for situations such as the current one - e.g. at No. 5 it states:

"vacancies in posts with particular requirements e.g., sales posts, will be filled by competition open to all staff with at least 2 years service."

4.2 The Union argues that the provisions outlined in the agreement clearly provide for the majority of TEX 8 posts to be filled from amongst the TEO I grade which is 60% female. The CPSU states that in special circumstances (such as those outlined in this case) a wider competition could take place which would encompass all grades with at least two years service; under this provision the Company's Officer II's ("TEO II") become eligible. The Union points out that this grade is overwhelmingly a female grade and that, likewise, under the "two year rule", lower paid grades such as Telephonists would be eligible to compete. The Union argues, however, that all of these grades were excluded from the competition and that all of them are predominantly female grades.

4.3 The Union submits that the Company is a large employer with a complex workforce involving technical, clerical administrative and operator staff. Within each of these vocational groups there are separate grading structures and promotional streams. The CPSU states that these structures have been reached in agreement with the unions and have evolved from an even more complex historic situation which existed under the Department of Posts & Telegraphs. The Union maintains that the tendency of agreements has been to relax the confined nature of promotional opportunities from that which previously existed and to open up promotional opportunities among staff; thus while agreements provide for limited eligibility in many cases, they always include an element of open competition.

4.4 The Union submits that the Company's workforce is a predominantly male workforce; there is a dominance of males in the Technical grades and also within the higher grades of the clerical administrative structure. While females in the Company appear in many grades, the Union states that there is a crowding of them in the lower clerical and operator service grades. The Union argues that the opening up of competition to all grades with two years service specifically allows an opportunity for those predominantly female grades to achieve promotions which otherwise are not available to them.

4.5 The CPSU argues that the Major Customer Representatives proposal reversed this entire concept in that it closed off 42 posts which would normally have been available to the female dominated grades and confined them to a level within the Company -

and within vocational streams - which are predominantly male. Further, the union argues that it opened these posts up to male dominated grades which would normally not be eligible. It is contended by the CPSU that this amounted to discrimination within the meaning of the Act and that no reciprocal arrangement which would allow clericals compete for Technical Officer or Customer Team Leader has ever been proposed.

4.6 The CPSU further argues that the discrimination was compounded by the proposal to fill the posts in each District from within their existing Level VIII resources as, not only did this mean that the complainants were not eligible for the specific Major Customer Representatives posts - which were new posts in the organisation - but neither were they available to fill the vacated posts for which they would normally be eligible. The Union maintains, therefore, that promotional opportunities normally either confined to a grade which is 60% female or opened up to include all predominantly female grades, were in fact closed and made available for competition only to predominantly male grades.

4.7 The Union further contends that the Company indirectly discriminated against the claimants contrary to the 1977 Act. Their detailed arguments in this regard are attached at Appendix I. In summary, however, the Union considers that the requirement to be a Level VIII in order to compete for a Major Customer Representative post adversely affects the gender balance of those eligible to compete and that the complainants were obliged to comply with an inessential requirement

relating to employment which is such that the proportion of persons of the other sex able to comply is substantially higher. The Union refers to the European Court judgement in the "Enderby" case in this regard and states that the "crowding" which exists in the Company could only be exacerbated by the proposal as it effectively took away 42 posts which normally would be available to female dominated grades and placed them in a category which would be dominated by males.

4.8 The Union submits that the judgement in "Enderby" highlights that it is not the intent of the employer which determines whether or not discrimination has occurred but rather it is the outcome of the action which is the pivotal issue. The Union states that the outcome on this occasion was that the female grades could not even compete.

4.9 The Union also provided work experience and qualifications details in respect of the four named complainants to support its argument regarding their suitability for the posts in question.

5 SUMMARY OF COMPANY'S CASE

- 5.1** The Company submits that it operates in a dynamic business environment which has been changing significantly since its establishment in 1984. During that time the Company states that it has moved from a near monopolistic situation on all telecommunications markets to a position where active new competition exists. The Company states that its response to the competitive challenges has been founded on the basis that the future prosperity, and indeed survival, of its business depends on the preservation of customer base loyalty and a strong emphasis on cost reduction or, at least, containment.
- 5.2** The Company refers to its Major Customer Division which was established to ensure quality customer service to its major national accounts, these being the initial targets of competitors. While the Major Customer Division helped to protect the income derived from such very large customers, the Company states that, nonetheless, there has been a loss of business to competitors. The Company submits that these competitors have since turned their attention to other large and medium-sized customers who would not have been serviced by the Major Customers Division and that, therefore, it was considered essential, in order to retain and develop the business of this significant market segment, that a major customer care programme be developed which would ensure diligent standards of care for these customers.

- 5.3** The customers in question are dispersed throughout the country. The Company submits that it decided, therefore, to establish the major customer care programme on a local basis with Major Customer Representatives operating in each of its 8 Districts.
- 5.4** The Company argues that one of the underlying principles in this regard was the fact that these customers required an immediately identifiable dedicated contact point through which they could conduct all their business (e.g. they wanted and needed to relay their telecommunications requirements and/or problems, and have them dealt with efficiently without having to make numerous contacts with different areas of the Company). In order to provide such contacts effectively, the Company felt that it was essential for staff employed as Major Customer Representatives to have a sound technical understanding of the Company's services, an appreciation of marketing and sales techniques, and excellent interpersonal skills. When a decision was being made on selection of staff for the programme the Company felt that while, in time, there would be sufficient staff within the organisation who would possess the requisite skills and attributes to carry out all aspects of the job, initially individuals would possess these different skills to varying degrees. For that reason the approach decided on by the Company was to operate the initiative on a team basis using a process which allowed them to select from the range of skills across both administrative and technical areas if necessary. The Company states that it anticipated that individual members of the teams would possess one or more of the requisite skills and would be in a position to develop others while working within a team with a high aggregate of skills.

5.5 The Company submits that in deciding on the method for filling Major Customer Representative positions a number of issues needed to be taken into account, namely, the skills and experience of existing staff and the cost implications of the programme. The company points out that Major Customer Representatives would be charged with handling all the telecommunications requirements of the customers concerned in a proactive way. This would involve advising on products and services, handling problems, ensuring the provision of high quality service, discussing current and future needs, etc. Although sales might arise on occasion, the Company argues that they were not creating sales positions; neither were the new posts purely technical although strong technical knowledge would be frequently needed. The Company described the positions as “marketing through customer care”. It states that these functions had not been carried out by individual members of staff or single grades on a widespread basis previously and, from a business perspective, it was unfortunate but true that the skills required to service the essential requirement were in short supply on an individual or single grade basis. The Company considers that this fact is not surprising in view of the developing sophistication of customers and their need for a single point of contact regardless of the potentially varied nature of their telecommunications requirements.

5.6 The Company maintains that, given the importance of this particular market for current and future success, there was no alternative but to harness the elements of the requirements from a number of sources, namely Technical Officer, Customer Team Leader and Telecom Executive VIII. The Company considered it likely that in assessing staff in these grades it would be possible to draw together sufficient

expertise from which to chose a team wherein the sum of the requirement would reside.

5.7 Furthermore, the Company stresses that the challenging business environment in which it operates demands that it pursues a policy of strict cost control in addition to protecting revenues. The Company states that technological progress and changes in customer demands in this dynamic business environment have resulted in the creation of surplus staffing in both its clerical/administrative and technical streams at all levels. The Company maintains that the grades from which it was decided to select Major Customer Representatives (i.e. Telecom Executive VIII, Technical Officer and Customer Team Leader) are pitched at levels which would permit the re-orientation of staff to the customer Care Programme without increasing the numbers in any of those grades. In these circumstances, the Company felt it was essential to staff the initiative without creating additional positions at Level VIII which would have involved cost increasing promotions into a level of the organisation where surpluses already existed. Any additional costs would, it argues, have resulted in increased costs to customers or degraded service and this would have been counter productive; i.e. to attempt to take care of major customers in a way that would, from a cost point of view, contribute to a poorer or more expensive service.

5.8 The Company states that it did not, in seeking to assign staff to Major Customer Representative posts, offer promotion or afford access to promotion to any staff;

successful candidates who took up the Major Customer Representative jobs retained their own grading, pay and conditions of service.

5.9 The Company refers to the Union's allegation that it imposed a requirement "to be a Level VIII in order to compete for a Major Customer Representative post". The company does not accept that "to be a Level VIII" was a requirement within the meaning of the Act; what the Company maintains it did was to attempt to assign suitable staff (via lateral transfer) to a newly-identified work area by inviting staff already working at the level to which this new work was appropriate, and at which level the company had a surplus of staff. The Company argues that the alleged requirement simply reflects the fact that additional work arose which was appropriate to be performed by staff at Level VIII and that it sought applications from staff at Level VIII to do the work. It is submitted by the Company that there can be no unlawful discrimination when it simply asks employees who work at Level VIII, to carry out new Level VIII duties.

5.10 The Company submits that no evidence has been presented that the alleged requirement, even if it is found to be such, has a disproportionate impact on females ("Martyn - vs - North Western Health Board" refers).

5.11 The Company also submits that the alleged requirement, if it is found to be such, was not imposed because of the claimants' sex ("Nathan - vs - Bailey Gibson Ltd" refers -

re the need to establish a causal link between the alleged requirement and the complainants' sex).

5.12 The Company points out that the main relevant external recruitment grades in the Department of Posts & Telegraphs (the predecessor of the Company) were:

Trainee Installer

Technical Trainee

Engineering Labourer (now Telecom Operative)

Night Telephonist

Postman

Post Office Clerk

Clerical Assistant (now Telecom Officer II)

Clerical Officer (now Telecom Officer I)

Junior Stores Officer

Stores Officer Grade III (now Services Officer)

The Company states that recruitment to these grades was carried out on a non-discriminatory basis after 1977.

5.13 Prior to the introduction of the Employment Equality Act, 1977 only males were eligible for recruitment to the grades of Trainee Installer, Technician Trainee, Night Telephonist, Postman and Junior Stores Officer. Only females were eligible for

recruitment to the grades of Telephonist and Clerical Assistant. These recruitment practices, while discriminatory, were not unlawful prior to the introduction of the Employment Equality Act, 1977 and the Company argues that it has been accepted by the Supreme Court ("Aer Lingus - vs - Labour Court") that the Act is of non-retrospective character and, in effect, "the slate is wiped clean" in respect of matters occurring before its introduction.

5.14 Due to various causes, mainly advances in technology and a steep decline in the level of operator-assisted calls, there has been very little external recruitment by the Company since the early eighties. Therefore, although recruitment since 1977 has been free from sex bias, the Company argues that the existing gender balance in various grades may still be influenced by discriminatory (but lawful) recruitment practices prior to the Act. Consequently, if the alleged requirement is considered to have a disproportionate effect on women, the Company states that it is not because of their sex but is simply historic.

5.15 The Company submits that there is no attribute of the claimants' sex which would result in a substantially higher proportion of males being able to comply with the alleged requirement, even if such a proportion were established.

5.16 Without prejudice to its contention at 5.9 above, the Company submits that the alleged requirement ("to be a Level VIII") is an "essential requirement" for appointment as Major Customer Representative. It argues that it was essential that

conditions of eligibility be attached to the appointment in compliance with the decision of Costello J. in "Vavasour - vs - Northside Centre for the Unemployed". The Company's specific views in this regard are expanded at Appendix II.

5.17 In summary the company reiterates that it decided that the appropriate grading for the position of Major Customer Representative was at Level VIII and it invited applicants from staff serving at Level VIII to perform the work. They state that to have done otherwise, for example to recruit staff externally or to invite lower graded staff to apply for promotion, would have been to ignore the surplus at this level and also to ignore the absolute necessity to control/reduce costs identified by the company and publicly highlighted.

6 Conclusions of Equality Officer.

6.1 In its referral of the complaint under the terms of the Employment Equality Act, 1977 to the Labour Court the Union, under the heading "details of alleged discriminatory act" stated:

"Telecom Eireann held a competition for appointment to Telecom Executive VIII".

The Company states that the Major Customer Representative competition was not a competition for promotion to Telecom Executive VIII; applications were invited from staff in the grades of Telecom Executive VIII, Technical Officer and Customer Team Leader, and successful candidates who have taken up Major Customer Representative jobs have retained their grading. I consider this issue to be pivotal in reaching a conclusion in this case. I accept that there were four competitions held for Major Customer Representatives. The first two competitions (Vacancy Notice 19/93 - which is the subject of this complaint - and Vacancy Notice 10/94) confined eligibility to staff serving at Level VIII in the Company. Having exhausted this process, however, applications in respect of subsequent vacancy notices (19/94 and 2/95) were opened up to all staff with 2 years service in the Company whose pay was at or below Level VIII. Accordingly, no promotions were involved in the first two competitions, whereas in the subsequent two competitions promotion was available to staff below Level 8 who were successful.

6.2 The union, in its submission, refers to the job specification for Major Customer Representative, and asserts that:

"....it falls clearly within the sales administration ambit..."

In this regard, however, I accept the Company's contention that the role of Major Customer Representative is more than a traditional sales role with a focus on customer care.

6.3 As outlined earlier, the Union's submission refers to Joint Conciliation Council Report No. 376 (copy at Appendix IV). The Company has pointed out that this Report is a collective agreement on promotional opportunities to the grade of Telecom Executive VIII. In filling the position of Major Customer Representative in accordance with Vacancy Notice 19/93 (the subject of this claim), I consider that the Company was not simply filling Telecom Executive VIII vacancies on foot of a competition for promotion. Rather, selected staff retained their existing grading. Accordingly, I consider that promotional opportunities to the grade of Telecom Executive VIII did not arise through Vacancy Notice 19/93 and so the terms of Joint Conciliation Council Report No. 376 are not relevant to the posts which were filled in this instance.

6.4 The Union also stated that:

"By dictating that Districts would have to fill these posts from within their existing Level VIII resources they were in effect compounding the discrimination. Not only did this mean that the claimants were not eligible for the specific Major Customer Representatives posts which are new posts in the organisation, but neither were they available to fill the vacated posts for which they would normally be eligible. This means that promotional opportunities normally either confined to a grade which is 60% female or opened to include all grades predominantly female, were in fact deemed closed and available only to grades or other vocational streams and a predominantly male field for competition".

- 6.5** The Company's position in this regard is that, in general, Districts were required to meet their need for Major Customer Representatives from within existing Level VIII resources. I consider that this essentially amounts to standard resource management.
- 6.6** While the union alleges the closing of promotional opportunities to predominantly female grades and opening them to predominantly male grades, I have concluded that there were no promotional opportunities involved for any staff male or female in this case and, accordingly, I do not accept the Union's arguments to the contrary.
- 6.7** Essentially, therefore, what I consider the Company attempted to do was to redeploy resources from one area to another. I accept that the tasks applicable to the Major Customer Representative jobs as advertised by the Company were appropriate to

Level VIII. I also accept that, on the basis of the evidence furnished by the Union, each of the complainants was suitably experienced and qualified to compete for such a post. The fact that two of the complainants were promoted to equivalent posts on foot of subsequent competitions provides further convincing evidence in this regard. However, in my opinion, this is not the point at issue in this case. The pivotal issue is whether the new Grade VIII posts created by the Company should have been open to applicants serving in grades other than at Level VIII.

- 6.8** I accept that, in circumstances where no surplus resources existed, this would probably be the case (i.e. that a confined or open competition would be held to fill new posts). However, for the reasons cited above, it is clear that the company already had an excess of staff at practically every grade, including Level VIII.
- 6.9** In my opinion, flexibility to deploy human resources (and indeed all resources) on a non-discriminatory basis to meet demands is an integral part of business. The Company in this case was in the process of moving from a situation where it had enjoyed all the benefits of a State monopolist to a situation where markets were being opened up and where efficiency by reducing costs and maximising resources was crucial in succeeding in the face of emerging competition. The fact remains that no-one was promoted under Vacancy Notice 19/93 and all appointees to posts under that Notice retained their existing pay and grading.

6.10 The Union has also alleged indirect discrimination whereby the Claimants were obliged to comply with a requirement (i.e. to be a Level VIII in order to compete) which is not an essential requirement and which is such that the proportion of persons of the other sex able to comply is substantially higher. However, as I have found that no promotional competition was held (see Para 6.3), I do not consider that any requirement within the meaning of the 1977 Act was imposed. On the contrary I consider that the alleged requirement simply reflects the allocation of additional work at a particular level to staff already serving at that level.

6.11 As the Company submitted a detailed rebuttal in response to the Union's allegation of indirect discrimination, as indicated above I have included their substantial arguments in this regard at Appendix II for information. (Appendix I comprises the Union's specific arguments on indirect discrimination).

6.12 In view of my conclusions above, I consider that the Company did not discriminate against the complainants on grounds of their sex contrary to the provisions of Section 3 of the Employment Equality Act 1977 in terms of Section 2 of that Act and, accordingly, I find that the allegation of discrimination in this case is not sustained.

G. Dixon
Equality Officer
2 March 2000

APPENDIX I

Extracts from Union Submissions regarding Indirect Discrimination.

1. THE REQUIREMENT

The Company in vacancy notice 19/93 sought applications for the jobs of 42 major customer representatives from which staff would be selected through an interview process. Paragraph 5 of the vacancy notice states

“Eligibility

Staff currently serving in the grade of Telecom Executive VIII, Technical Officer and customer Team Leader will be eligible for appointment.....”

These are Level VIII grades across the Clerical Administrative and Technical Streams. So the requirement for the post of major customer representative **is to be serving in the Grades of either Telecom Executive VIII, Technical Officer or Customer Team, i.e. Level VIII.**

However the European Court of Justice decision in the Enderby Case effectively means it is no longer necessary for claimants to point to a specific hurdle by means of a requirement or condition as a result of which women suffer a disadvantage. It is now sufficient to show disparate impact by means of significant statistical evidence.

So the Union is clearly stating that the Requirement, as defined under the act is clearly,

“to be in the grade of Telecom Executive VIII, Technical Officer or Customer Team Leader i.e. Level VIII”

We are also saying that because of the Enderby decision it is no longer necessary for a complainant to prove an obstacle or hurdle to be overcome but it is now rather a matter for the Employer to justify the discriminatory result.

The Union is also saying that the Company

- Issued a vacancy notice inviting applications for 42 post of major customer representatives
- Curriculum vitae had to be submitted.
- Interviews were held
- Selected staff were assigned as a result of these interviews.

It really doesn't matter what the Company wants to call these posts. Section 3(6) of the Act clearly refers to **an employees access to opportunities for promotion** and therefore it is clear that in being denied access to higher graded post, de facto the claimants were denied access to opportunities for promotions.

Section 3(2) of the Act provides that;

“An Employer shall not, in relation to his employees or to employment by him have rules or instructions which would discriminate against an employee or class of employee and shall not otherwise apply or operate a practice which results or would be likely to result in an Act which is a contravention of any provision of this Act when taken in conjunction with Section 2(C).

The Supreme Court decision in the **Bailey Gibson** case clearly states:

“The primary and clear obligation placed on an employer by this Sub-Section is not to have rules or instructions which would discriminate either directly or indirectly against an employee”.

The question that must be answered by the Employer is was that requirement “essential for Employment” under Irish Law and “objectively justified” under European Law.

2. **DISPARATE IMPACT**

The second question that must be answered is: **was that requirement such that a substantially higher proportion of males than of females could comply with it.**

Paragraph 4.3 of the Company’s submission provides the following statistics.

Total staff in the Company at or below the max. of		
Telecom Executive VIII	=	11,000
Males	=	8,000
Females	=	2,200

So the “Pool” can be identified as 11,000 of whom 8,800 were males and 2,200 were females. There were 3 grades who were eligible and could therefore meet the “requirement”. These are broken down as follows:

		Male	Female
Telecom Executive VIII	239	91	
Customer Team Leader	286	0	
Technical Officer	=	1027	5
Total	=	1552(males)	96(females)

So the 1552 males (18%) from the “pool” of 8800 males were able to comply with the requirement and 96 females (4%) from the “pool” of 2200 females were able to comply with the requirement.

The Union argues that at substantially higher proportion of males than of females could comply with the requirement.

3. ATTRIBUTE OF SEX

It is a fact that women in Telecom Eireann are concentrated in the lowest clerical grades and that indeed such grades were in fact confined to women prior to 1977 the enactment of the Employment Equality Act.

The Labour Force Survey 1994 shows that 79% clerical workers in Ireland are female - 21% male. A comparison with the 1988 Labour Force Survey shows that there has been an increase from 74% females in 1988 to 79% in 1994 and a corresponding decrease of males from 26% in 1988 to 21% in 1994.

This proportional imbalance of the sexes in clerical jobs is also reflected in the Department of Labours Economic Survey of School Leavers for 1988 and 1989.

1988	72% Females	-	28% Males
1989	77% Females	-	23% Males

A recent Labour Force Survey conducted by the Employment Equality Agency in 1995 shows “that the proportion of females in clerical positions has increased from 74% to 78% maintaining the typecasting of this job category as a female one.

This is also reflected in the recruitment figures provided by the Company (in their letter of 1st September, ‘95).

Clerical Female Workers Recruited	-	587 (70%)
Clerical Male Workers Recruited	-	257 (30%)

The Company refers to High Court decision in the Bailey Gibson Case which was a complex case where even the Judge said there are no problems in construing this important legislation when talking of the causal link with sex.

The case involved a claim of both direct and indirect discrimination where the Equality Officer found against direct discrimination but in favour of indirect discrimination which in turn was appealed to the Labour Court and overturned and referred to the High Court. This case involved membership of the Irish Print Union as the requirement for specific jobs. He specifically referred to the closed shop agreements negotiated through the collective bargaining process and said that although such agreements may in a general sense be discriminatory in that they favour one group of workers at the expense of others he did not think the 1977 Act attempted to address that issue.

He also said that his interpretation of Section 2(c) could be at variance with the Supreme Court decision in the North Western Health Board versus Martyn case.

The European Court of Justice decision of 13 November 1990 in the Marleasing Case clearly stated that courts are bound to interpret their national laws in the light of the wording and purpose of the relevant EC directive and any ECJ Rulings interpreting that Directive.

We submit that in effect the Enderby decision supersedes the Bailey Gibson High Court decision case on 2 counts.

1. It is now no longer necessary where a prima facie case of discrimination exists to prove a hurdle or requirement but rather to show disproportionate impact and the burden of proof then shifts to the Employer.
2. The Collective Bargaining process can no longer be used by the Employer as objective justification.

The recent Supreme Court decision in the Bailey Gibson case clearly underpins the Enderby ECJ case and clearly establishes that it is sufficient for the complainants to show that the practise/requirement complained of bears significantly more heavily on members of the complainants sex than on members of the other sex. It goes on to say:

“At this stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practise complained of is based on objectively verifiable factors which have no relation to the Plaintiffs sex”. (Our emphasis).

In the Company’s Submission they make reference to the Aer Lingus Supreme Court decision that the 1977 Act is of a non-retrospective character and in effect the disproportionate impact is not because of their sex but is for historic reasons concerning recruitment prior to 1972.

The Aer Lingus Supreme Court decision involved a decision by the Employer in a situation where the claimants in that case had severed their employment relationship and were re-employed thereby affecting their seniority.

This case does not involve the severing of the employment relationship. The Union would further argue that recruitment is merely the start of a myriad of employment consequences and so cannot be spent in its effect at all.

However, as quoted above the Supreme Court Case in the recent Bailey Gibson case has clearly overtaken the Aer Lingus case where a clear prima facie case of discrimination has been established where the recruitment was imposed for reasons other than a persons sex, the issue fails to be considered in the light of the directive and Section 3 of the Act.

4. REQUIREMENT - ESSENTIAL?

The Employer in Paragraph 3.9 of their Submission have argued that the “requirement” was essential and they quote the Vavasour case as justification for imposing conditions of eligibility.

The Union would accept the right of the Employer to set down eligibility criteria provided they are not discriminatory and are “essential for the employment” as defined by the 1977 Act or “objectively justified” as defined by the European Court of Justice.

The Supreme Court in the Bailey Gibson reiterates the obligation imposed by the 1977 Act when it defines the requirement as being essential for the employment or the job to be performed when it states.

“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 table to comply is substantially higher may amount to indirect discrimination even when a person is obliged to comply therewith for reasons other than a persons sex or marital status”. (Our emphasis).

The Supreme Court goes on to elaborate when it says

“Section 2 (c) only applies where the obligation is imposed on a person because of his sex on marital status.

When the obligation was imposed for reasons other than an person’s sex or marital status, the issue fails to be considered in the light of the provisions of the Directive and Section 3 of the Act”.

The Company’s defences are numerous and varied as they seek to justify their decision to confine access to promotion posts of Major Customer Representative to those grades of Telecom Executive VIII, Technical Officer and Customer Team Leader.

However their defences can be summarised as follows:

1. The skills necessary for the job were only to be found in the 3 specified grades (Company’s Submission).

This is clearly disproven by the following figures:

Vacancy Notice 1 (Restricted Access) 29 appointed (23 men 6 women)

Vacancy Notice 2 (Restricted Access) 6 appointed (5 men 1 woman)

Vacancy Notice 3 (2 years Service Eligibility) 9 appointed (3 men 6 women)

Vacancy Notice 4 (2 years Service Eligibility) 3 appointed (2 men 1 woman)

TOTAL 47 appointed

10 (21%) outside of restricted grades under Vacancy Notices 3 and 4.

Two of the Claimants were successful candidates when Vacancy Notice No. 3 were advertised thereby displaying their obvious ability to do the job required.

2. Secondly, they argue that there were surplus staff in the Clerical Administrative and Technical Structures at Level 8.

The Company states

“Surplus exist in both the Clerical/Administrative and Technical streams at all levels”. (Our emphasis).

So the Company have admitted that there were surpluses at all levels not just at Level 8 yet they made a decision to restrict access to the posts only to Level 8 on the basis that they say in their submission that it would not entail increasing the staffing levels in the 3 specified grades.

However, as stated at the Hearing and in the Company’s submission, they did in fact fill some of the resulting vacancies as follows:

“13 Telecom Executive VIII vacant posts were filled”.

The Union did ask at the Hearing for the surplus staff at the time of the advertisement of Vacancy No. 19/93 for all grades. The Company said that there were 175 surplus staff at Level 8.

3. The Company argues that these were not “promotions” but rather evolved lateral transfer arrangements at existing pay and conditions.

This assertion is not sustained by the facts.

- * The Company issued a Vacancy Notice inviting applications for 42 new posts of Major Customer Representative with a restriction.
- * Curriculum Vitae were requested.
- * Interviews were held.
- * Staff were assigned as a result of these interviews.
- * 21% of the final 47 posts were filled by promotion when eventually posts were advertised on an unrestricted basis with a two year eligibility requirement.

As already stated Section 3 (6) of the 1977 Act refers to “employees access to opportunities for promotion” while the Directive states that there shall be no discrimination whatsoever “in the selection criteria for access to all jobs”.

APPENDIX II

Extracts form Company Submissions regarding Indirect Discrimination

1. Preliminary Point.

- 1.1 The company decided to implement the Major Customer Service Programme to improve customer service and to meet competitive threats. Identified major customers were to be provided with dedicated personnel to pro-actively co-ordinate the development of the whole range of their business with the Company. (These customers are a vital revenue source for the Company). The threat to this revenue from competitors, including some of the largest telecommunications companies in the world (BT, AT&T etc.) is very real. The need for an immediately identifiable dedicated contact point with the company through which major customers can transact all of their business was identified through research with these customers themselves.
- 1.2 The Company can identify a surplus of staff at Level VIII, which would be a minimum of 175 at the time the competition was advertised. Advancements in digital technology have reduced the employment opportunities for Technical Officers. Most telephone lines are now connected to digital exchanges. These exchanges require considerably less maintenance than their predecessors, crossbar or step by step exchanges. A current collective agreement provides for one Technical Officer per 8,000 lines. This agreement more than halved the requirement for Technical Officers in the exchange maintenance area. New technology relating to order processing and customers' accounts has impacted on the work of staff in the grade of Telecom Executive VIII also. To meet the threats posed by competitor companies the Company must control costs.
- 1.3 Indeed the issue of the company's cost had been the subject of much comment in the "Culliton" Group Report, the "Moriarty Task Force" and the Government decisions in relation to these. In particular, the "Culliton" Report concluded that Ireland's telecommunications costs are highly priced. The "Moriarty" Task Force recommended:

"the cost structure of Telecom Eireann should be brought into line with what modern technology has been achieving in our competitor countries. Irish business will be at a very serious disadvantage if low productivity in Telecom Eireann (i.e. high operating costs per line or per call made) is not corrected."

The Government's published decision on these comments is:

"Telecom Eireann's high costs will be reduced."

Both the Culliton and Moriarty Reports recommended increased competition for the services provided by the company and the Government decision is that competition across all services and areas of the Telecommunications System will be encouraged.

It is clear that, both in the national interest and in the interest of the Company's own survival, significant cost reductions in the Company's operations need to be made.

- 1.4 The job of a Major Customer Representative is a challenging one. The company now provides a diverse range of products and services, many of which are technologically very advanced. These particular customers have a high-level appreciation of technology/telecommunications and, of course, will have been approached by the Company's competitors.

2. The Requirement

- 2.1 The Company does not accept that "to be a level 8" was a requirement within the meaning of the Employment Equality Act, 1977. The alleged requirement simply reflects the assignment of additional work at a particular level to staff serving at that level.
- 2.2 The Union states that because of the Enderby decision "it is no longer necessary for a complainant to prove an obstacle or hurdle to overcome but it is now rather a matter for the employer to justify the discriminatory result". For the record a copy of the judgement together with the Advocate General's opinion was appended to the Company's original submission. The claim in the Enderby decision involved an equal pay claim. The main question addressed by the Court was whether or not the "principle of equal pay enshrined in Article 119 of the Treaty of Rome required the employer to justify objectively the difference in pay between job A and the job B". The Court ruled that "where significant statistics disclose the principle difference in pay between two jobs of equal value, one of which is carried on almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show the difference is based on objectively justified factors unrelated to any discrimination on grounds of sex".
- 2.3 In addressing the issue of burden of proof the Court found that "where there is a prima facie case of discrimination" (defined in that case as where significant statistics disclose an appreciable difference in pay between two jobs of equal value one carried out almost exclusively by women and the other predominantly by men), that the onus shifts to the employer. To rely on the Enderby decision in this case, it would be necessary to demonstrate that the candidates excluded from the competition (vacancy notice 19/93) were "almost exclusively women". This is not the case. If the competition had been open to all staff below level 8 (i.e. staff who would in such circumstances have been afforded an opportunity for promotion), 7,235 males would have been eligible to apply as opposed to 2,010 females. Thus there is no prima facie case of discrimination by reference to the statistical criteria applied in the Enderby ruling. Notwithstanding same, the Company has fully demonstrated that the decision to confine the competition to staff at level 8 was based on objectively justifiable reasons.

- 2.4 The Union refers to the Supreme Court Decision in the case of Nathan - vs - Bailey Gibson Ltd. The Court ruled that:

“It is sufficient for him or her [the claimant] 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”.

- 2.5 The Company does not accept that the exclusion of staff below level 8 from the competition for appointment to Major Customer Representative bore significantly more heavily on members of the claimants’ sex (females) than on male staff. The Company has fully demonstrated that the exclusion of staff below level 8 was based on factors not related to sex.

3. Disparate Impact

- 3.1 Based on the approximate figures referred to in Paragraph 4.3 of the Company’s original submission, the Union state that 1,552 males at level 8 out of a total of 8,800 males at and below level 8 (i.e. 18%) could comply with the alleged requirement (to be level 8) whereas 96 females at level 8 out of a total of 2,200 females at or below level 8 could comply (i.e. 4%). If the precise figures attached at Appendix 4 to the Company’s original submission were used, then 1,552 male staff out of a total of 8,787 (i.e. 17.66%) could comply with the alleged requirement whereas 96 female staff out of a total of 2,106 (i.e. 4.56%) could comply.
- 3.2 The Company contends that the proportion of males who could comply is not substantially higher. In this regard the Company relies on the decision of the Labour Court in the case of Irish Press Newspapers - vs - Mandate (Reference No. DEP595 - copy attached). In that case the Court found that the difference between the proportion of female workers and the proportion of male workers who could comply with the requirement was not substantial. The Court stated:
- “for a difference in treatment to have an indirectly discriminatory result within the meaning of the Act, that difference must be considerable, and the Court does not consider a difference of approximately 18% as considerable”.
- 3.3 The difference in the proportion which can comply with the alleged requirement in this instance is 13.1%. Accordingly the proportion of male workers who can comply with the alleged requirement is not substantially higher than the proportion of female workers who can comply.
- 3.4 As the Labour Court has already ruled that a difference of approximately 18% is not considerable in the context of claims of indirect discrimination, the Company submits

that the Equality Officer must find that a difference of 13.1% is not considerable and that the claim must accordingly fail.

4. Attribute of Sex

4.1 The Union alleges that it is a fact that in Telecom Eireann women are concentrated in the lowest clerical grades. The Union subsequently relies on statistics from labour force surveys which indicate that the majority of clerical workers in Ireland are female. The Union does not specify the relationship between the labour force survey and the allegation of discrimination in the context of the competition for Major Customer Representatives.

4.2 The allegation regarding the “concentration” of females in Telecom Eireann in the lowest clerical grades was comprehensively addressed in the Company’s submission. Whilst it is true that the predominance of females in the Company are in grades below level 8, it is equally true that the predominance of males are also in those grades. If the competition had been opened to all staff at and below level 8, the pool would have been opened to 8,800 males approx. and 2,000 females approx. in 31 grades (not just clerical grades). In addition, the majority of females excluded from the competition were serving in the grade of Senior Telephonist.

4.3 The Union refers to the Enderby decision that states:

“It is no longer necessary where a prima facie case of discrimination exists to prove a hurdle or requirement but rather to show disproportionate impact and the burden of proof then shifts to the Employer.”

4.4 By confining the competition to staff at level 8, 7,235 males and 2,010 females below this level were ineligible to compete. The Union states that 18% of males could not comply with the alleged requirement and 4% of females could not comply. These statistics do not constitute a prima facie case of discrimination against females. Notwithstanding that fact that a prima case does not exist (and therefore the onus of proof would subsequently shift to the employer), the Company has fully demonstrated that the terms of the competition notice were based on objectively justifiable reasons unrelated to gender.

4.5 The Union also quotes from the Supreme Court decision in Nathan - v - Bailey Gibson namely:

“at this 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 plaintiffs sex”.

No prima facie case of discrimination exists in this claim and the Company has demonstrated objectively verifiable factors which have no relation to the claimants sex.

- 4.6 In its original written submission, the Company made reference to the decision of the Supreme Court in *Aer Lingus - v - Labour Court* [1990] I.L.R.M. 485. The Company contended that the existing gender balance was still influenced by discriminatory (but lawful) recruitment practices prior to 1977. The Supreme Court's decision was to the effect that the slate was wiped clean in respect of matters occurring before the Employment Equality Act, 1977. Thus, if the alleged requirement is considered to have a disproportionate impact it is not because of sex but is simply historic. The Union have advanced two reasons why they consider the *Aer Lingus* decision may not be relied upon.
- (i) The Union state that the *Aer Lingus* case concerned a situation where the claimants had severed their employment relationship with their employer and were subsequently re-employed which affected their seniority. The Union states "this case does not involve the severing of the employment relationship. The Union would further argue that recruitment is merely the start of a myriad of employment consequences and so cannot be spent in its effect at all".
 - (ii) The Union contend that the Supreme Court decision has been "overtaken" by the Supreme Court decision in the *Bailey Gibson* case.
- 4.7 There is nothing contained in the Supreme Court decision in the *Aer Lingus* case which suggests that the decision (regarding the Act not being retrospective in character) is confined solely to situations involving the severing of employment followed by subsequent re-employment. The Union cannot choose to be selective in regard to which cases events prior to 1977 are/are not relevant.
- 4.8 There is nothing in the Supreme Court decision in the *Bailey Gibson* case to suggest that the *Aer Lingus* decision has been superseded. Even if a prima facie case of discrimination existed (which it does not) the consideration of the issue in the light of the directive and section 3 of the Act does not preclude examination to ascertain if the alleged disproportionate impact is attributable to events which occurred prior to 1977 and which may (in accordance with the terms of the Supreme Court decision in the *Aer Lingus* case) be thereby discounted.

5. Essential Requirement

- 5.1 The Company notes the Union's acknowledgement of the right of the employer to set down eligibility criteria. (The Company had made reference in this regard to the *Vavasour* decision). The Union's difficulty centres on their allegation that the eligibility criteria were "not essential for employment" or "objectively justified" as defined by the European Court of Justice. The Union quotes the following extract from the Supreme Court decision in *Nathan - v - Bailey Gibson*:

"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 may amount to indirect discrimination even when a person is obliged to comply therewith for reasons other than a person's sex or marital status".

(Union's emphasis)

The Supreme Court also ruled:

"it is sufficient for him or her [the complainant] to show that the practice complained of bears more 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".

- 5.2 It follows that the onus of proof does not shift to the employer in any instances where there is not a prima facie case of discrimination and that, even where it does, discrimination contrary to section 3 and the Directive cannot be deemed to have occurred where the reasons for the practice complained of are based on objectively verifiable factors which are unrelated to sex. In the current claim the Company again contends that there is no prima facie case of discrimination. Notwithstanding same, the Company has fully demonstrated the necessity for confining the competition for Major Customer Representatives to staff at level 8 had nothing to do with gender but were due to operational/cost issues associated with seeking resources to fill newly identified work.
- 5.3 The Union alleges that the Company contended that the skills required were only to be found in the three grades of Telecom Executive 8, Customer Team Leader and Technical Officer. This is incorrect. The Company contended that there was a need to confine eligibility to these grades. It was only after the process was exhausted that the eligibility was opened to other staff below this level. The Company would also point out that the Union has cited four vacancy notices but that it is only the first vacancy notice which is the subject of this complaint.
- 5.4 The Union refers to the Company's arguments regarding the necessity to address this issue of surplus staff. The records show that of the 47 appointments to Major Customer Representative under the 4 separate competitions, only 10 were by means of promotion to level 8. There were no promotions under vacancy notice 19/93 (the subject of complaint). Thus, the method by which the positions were filled addressed the subject of surplus staff in a manner which would not have been possible if the competition has been open to all staff at and below level 8.
- 5.5 The Union also refers to promotions arising from resultant vacancies caused by level 8 staff and states that there were 13 Telecom Executive 8 positions filled. Only 7 of these 13 resultant positions were filled by promotion to Telecom Executive VIII and