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## **EMPLOYMENT EQUALITY ACT, 1977**

**EQUALITY OFFICER'S RECOMMENDATION NO: EE 16/2000**

**A Claimant  
( Represented by the Employment Equality Agency  
Now the Equality Authority )**

**AND**

**Minister and Secretary  
Of a Government Department**

**File No. EE 26/1997**

## **1 Dispute**

- 1.1 This dispute concerns a claim by the claimant that subsequent to her pursuit of a claim under the Employment Equality Act 1977 she was discriminated against by the Government Department that employed her, contrary to the provisions of the Employment Equality Act 1977.

## **2 Background**

- 2.1 The claimant commenced work on promotion as a Higher Executive Officer in her current Department on 11th March 1996. She was transferred there on promotion from another Government Department. She claims that from March 1996 to January 1997 she was subjected to sexual harassment by her supervisor who was transferred by management shortly after she made a complaint to management. This allegation of sexual harassment was not formally investigated because the claimant accepted an assurance from the employer that her supervisor was due to be transferred for normal operational reasons unconnected with this complaint. She alleges that she was subsequently treated by her new supervisor in a hostile manner and further penalised by being given a negative performance review.

- 2.2 The claimant claims that this was discrimination by the Department under Section 2(a) of the Employment Equality Act and contrary to Section 3 of the Act. Section 2(a) of the 1977 Act provides that

*“for the purpose of the Act discrimination shall be taken to occur ..... where by reason of his sex a person is treated less favourably than a person of the other sex”.*

- 2.3 The claimant lodged a claim on the 25th August, 1997 with the Labour Court under the terms of the Employment Equality Act 1977. The Labour Court referred the claim for investigation and recommendation to an Equality Officer. In the course of the Equality Officer's investigation she received written submissions from the parties. She also held a joint hearing between the parties and subsequent to that hearing received further correspondence from the parties.

**2.4** In this claim mention has been made of allegations of sexual harassment and bullying made against the claimant's supervisor. As the employer did not investigate the complaint this officer has not had the opportunity to defend himself. He was transferred after these allegations were made and in my opinion this could lead to the inference that in fact these allegations were proven. Consequently although not requested to by either of the parties to the claim I have decided to issue this recommendation on a confidential basis.

### **3 Summary of the Claimant's Case**

**3.1** The Employment Equality Agency (E.E.A.)<sup>1</sup> says that the claimant alleges that she was treated in a discriminatory manner by the Department as a consequence of pursuing a complaint under the Employment Equality Act 1977 contrary to Section 2 and Section 3 of that Act. She alleges that her employer, the Department, victimised her for complaining about her discriminatory working environment.

**3.2** The claimant, who commenced work in the Department on 11 March 1996 as a Higher Executive Officer says that following sexual harassment by her supervisor, an Assistant Principal, for a considerable period, she complained to management. She says subsequent to her complaint the person responsible for the offensive behaviour was transferred and the matter was resolved to her satisfaction.

**3.3** However, the claimant states that the replacement Assistant Principal who was female, (who for ease of reference is referred to as the female Assistant Principal Officer throughout the remainder of this recommendation), treated her in a hostile way and gave her an unsatisfactory performance review, (this was confirmed by the Principal Officer in the section); the claimant states that the female Assistant Principal Officer is a colleague of her former supervisor.

**3.4** The claimant states that the Clerical Assistant, who was a close friend of the alleged harasser, became very hostile towards her following his departure from

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<sup>1</sup> The Employment Equality Agency, now known as the Equality Authority

the section. The claimant states that a number of officers she usually had tea with refused to speak to her and when she entered the tea-room they all stopped talking. The claimant also states that an officer who had transferred from the Department to an outside employment came into the claimant's section and said "well, who stitched "X" up".

**3.5** The claimant says she spoke to the Clerical Assistant about her behaviour which she found unacceptable. She says she also reported the matter informally to the female Assistant Principal. She says that subsequently the Clerical Assistant was transferred from the section without notice to the claimant. The claimant says that when she spoke to the female Assistant Principal about the transfer she said "it has happened and there is no point in whinging about it."

**3.6** The claimant says that she was due a final probationary report in March 1997 and she was anxious when she had not heard if her appointment had been confirmed. She says she spoke to the female Assistant Principal about it who confirmed that she had completed her final probationary report and returned it to Personnel. She says that the female Assistant Principal told her that she stated in the report that she (the claimant) was an excellent officer but that she had a communication problem with colleagues due to domestic difficulties. The claimant says that she was upset by this statement and asked for an explanation for getting a negative report. She states that the female Assistant Principal replied "well you told me yourself you had several deaths in your family".

**3.7** The claimant says that she had further discussions with the female Assistant Principal concerning the report. She says that the female Assistant Principal stated that, as she had both the claimant and the Clerical Assistant in the office making complaints, there must have been a problem and also that other colleagues had complained including a number of outside Agencies with whom the claimant had dealt. She says that the female Assistant Principal also told her she was sharp with people but she would not tell who complained about her. At these meetings the claimant felt that she was being treated in a hostile and intimidatory manner. She sought an explanation in writing concerning the

negative report but she never received a reply.

- 3.8** The claimant says that she spoke to the Personnel Officer about her report and discovered that she had been given a below average rating under several headings; but the ratings were not sufficient to prevent her being confirmed in her appointment. The claimant says that she requested that the report be removed from her file but this did not happen.
- 3.9** The claimant says that she subsequently agreed to transfer out of the area as she felt she could no longer work for the female Assistant Principal. She says that prior to her transfer she received an e-mail from the female Assistant Principal stating that “I will be on leave all next week so just to say I hope you find your new assignment and colleagues more closely match your expectations.” The claimant believes that the e-mail is another indication of the hostile environment to which she was subjected.
- 3.10** The claimant states that she is happy with her new position but despite a number of requests to Personnel the negative performance review has not been removed from her file. The claimant considers that this review was undeserved and unfair. She states that the female Assistant Principal worked with her for a very short time before completing the report, the number of contact days between them was only thirteen and a half days, her performance review three months earlier was good and this review was also confirmed by the Principal Officer.
- 3.11** The claimant alleges that she was victimised because of her complaint about discriminatory treatment and she further alleges that management has failed to deal with this matter adequately. She believes that the victimisation continues as long as the performance review remains on her file.
- 3.12** The claimant alleges that she was victimised and treated in a discriminatory manner following the reporting of alleged sexual harassment. She alleges that the female Assistant Principal who replaced the alleged harasser knew him well

and she believes she was aware of her complaint. Furthermore she says that the Principal Officer who counter-signed the negative performance review was aware of her complaint and had reported the matter to management. The claimant says that he had also counter-signed good performance reviews in the past and one of these reports was only three months prior to the negative review. She says that she was not made aware of any deterioration in her performance since the review three months previously. She submits therefore that the reporting of the alleged sexual harassment was the reason for the negative review.

- 3.13** The claimant refers to Recommendation EE 9/96 A Kirwan v PWA International Limited concerning a change in a woman's conditions of employment following the referral of complaint under the Act. She says that, in that case, the Equality Officer found that the claimant had been discriminated against contrary to the provisions of the 1977 Act. The Equality Officer stated:

“I consider that as the company was sufficiently satisfied with the claimant's performance prior to October 1993 to have offered two promotions within 5 months, .....that the fact she took a claim under the 1977 Act against the company led to this unfavourable appraisal.”

The claimant argues that the above rationale applies to this case. She says that there was no complaint about her performance until she opposed the alleged sexual harassment and made a complaint to management. She submits that a strong inference of discrimination can be drawn from the facts and that the onus shifts to the employer to justify the alleged discriminatory treatment of the claimant following the reporting of the alleged harassment.

- 3.14** The claimant submits that her assessment could only have been based on subjective/personal views given the comments of the female Assistant Principal concerning the claimant's "domestic difficulties". Furthermore it would not be possible to give her an objective work performance review given the short contact period of thirteen and a half days the claimant had with the female Assistant Principal. The Principal Officer endorsed her view notwithstanding that he had endorsed good reviews of the claimant prior to this, as he had done in the past when she got a good report.

**3.15** The claimant also refers to Recommendation EE 09/93 SIPTU -v- Mary Dunne. She says that the Equality Officer held in that case that Ms. Dunne, who alleged victimisation when she was not promoted, was discriminated against under section 2(d) (i) of the Act because she had in the past referred a dispute with SIPTU to the Labour Court under the 1974 Act. The claimant says that the Equality Officer found in that case that Ms. Dunne was more qualified than one of the successful candidates and stated that:

“I am satisfied that the decision to select the two successful candidates was based on a totally subjective assessment of the performance of the candidates. No effort was made to objectively assess each of the candidates under specific factor headings and the final selection was based on an overall impression that the two successful candidates were more suitable. .... In addition the failure of the interview board to base its selection on an assessment of the candidates under predetermined criteria makes it more difficult for the interview board to show that its decision not to select Ms. Dunne was not related to her reference of her dispute under section 7 of the 1974 Act. .... I consider that the Union has failed to discharge the burden of proof and has failed to give a reasonably credible explanation for the interview board’s selection and its treatment of Ms. Dunne.

The claimant says that the above rationale applies to this case; that her work performance was not objectively assessed and other factors which had nothing to do with her work performance were taken into account.

**3.16** The claimant requests that the Equality Officer finds that the claimant has been discriminated against on the grounds of her sex and penalised as a result of her complaint of sexual harassment and to recommend that (i) the offending performance review be removed from her file and (ii) that she be awarded compensation for the distress suffered by her.

## **4 Summary of the Employer's Submission**

**4.1** The Department totally refutes any allegation that the claimant has been discriminated against on the grounds of her sex and penalised as a result of her complaint of sexual harassment.

**4.2** The spokesman for the employer says that the claimant was appointed to the Department on promotion to the grade of Higher Executive Officer and commenced work on 11 March, 1996. He says that, in accordance with standard practice, her appointment was on the basis of a probationary period of one year. He further says that the practice in the Department is to seek regular reports on officers who are on probation and, accordingly, this practice was followed in her case. Detailed reports were requested in June 1996, September 1996, and March, 1997. It is the report of March, 1997 which has given rise to the complaint lodged by the claimant.

**4.3** In relation to the complaint of sexual harassment the spokesman for the employer says that as Personnel Officer he was advised by the claimant's Principal Officer that she had been to see him and had brought to his attention an allegation of possible sexual harassment against her immediate superior, an Assistant Principal Officer. The Personnel Officer says that, on receipt of this information, he decided to meet immediately with the claimant in view of the seriousness of the allegation. He says that he was conscious of the Guidelines laid down by the Department of Finance for dealing with sexual harassment. He says that he was advised by the claimant that she had been under a lot of personal stress over the previous twelve months and that this had been greatly added to by the attitude of her superior officer. He says that she outlined in some detail to him the atmosphere in her office. He says that she said that she had finally brought this to the attention of the Principal Officer as she could not put up with the strain any longer. He says that she said that once she had done this, she had become much more relaxed. He says that she also mentioned that she had met with the Employee Assistance Officer, who was arranging for counselling in relation to other personal issues. He says that the claimant repeated that having brought this matter to the attention of her Principal Officer, she did not wish to have the matter pursued. He says that he advised the claimant that, as Personnel Officer, he and the staff of the Personnel Unit were committed to ensuring that all staff worked in the best of conditions. He says that he pointed out to her, however, that in saying so, he was not taking sides in relation to the allegation of sexual harassment as it had only been brought to his attention and he had not been

requested to investigate it. He says that he went on to assure the claimant that if the complaint was to be officially referred to him, it would be investigated fairly and thoroughly in accordance with the Guidelines laid down by the Department of Finance. He says that he was most anxious to bring about a remedy which would be acceptable to the claimant. He says that she again confirmed that she did not wish to make an official complaint but was most anxious that her work situation should be improved. He says that he told her in confidence that even before he was aware of the problems in the workplace, it had been decided to transfer her Assistant Principal Officer to different work in the Department in the interests of his own development. He says that he suggested that the appointment of the new Assistant Principal Officer would, lead to significant improvements in the work environment. He says that the claimant thanked him for his concern and repeated that she did not wish to have the allegations of sexual harassment pursued any further.

- 4.4** The Personnel Officer says that as can be seen from the above, he responded immediately to the claimant's allegation of sexual harassment. He says that she was satisfied with the action he had taken and indicated clearly that she did not wish to have the matter pursued. He says that this option was outlined to her and she was made aware that the matter would be thoroughly and fairly investigated. He says that the claimant was satisfied with the action being taken. He also stressed that at that time, or at no time since, had he approached the Assistant Principal in respect of whom these allegations were made. He says that the alleged harasser has not, therefore, been given any opportunity by him to indicate whether or not he accepts the allegations made. The Personnel Officer says that he did not think it appropriate to pursue the matter in the light of the claimant's statements that she was happy with the action taken. The Department contends therefore, that although an allegation was made, it has never been formally investigated nor was such action requested by the person making the allegations. He says that in the light of the statement in the claimant's submission at paragraph 3.2 above it is important to stress that the decision to transfer the Assistant Principal had been taken before any reference was made to a possible allegation of sexual harassment.

- 4.5** The employer says that a female was appointed as a replacement Assistant Principal in the Division at the beginning of February, 1997. He says that she immediately observed that the staff in her new Section were under considerable pressure, with an unusually large volume of tight deadline work. He says that on this account, she was sympathetic to their situation and made it clear to the claimant and her colleagues that one of her priorities in the initial weeks would be to see what could be done to address what seemed to be a crisis situation in regard to the workload.
- 4.6** The employer says that the female Assistant Principal states that on the day after she arrived in the Section, she was approached separately both by the claimant and a Clerical Assistant, each complaining at some length about the other. He says that in her view, an untenable situation existed and there was a palpable “atmosphere” generally within the Section. He says that she hoped that the action which she proposed to take to reduce the workload would in itself ease some of this tension. He says that the female Assistant Principal informed both officers that she was not in a position to make any judgement on the individual allegations being made and was scrupulously careful not to say anything that could, in any way, be interpreted as undermining the claimant’s role as a supervisor.
- 4.7** The employer says that the female Assistant Principal also says that during the course of initial discussions with the claimant, she was advised that the claimant had had difficulties working with the previous Assistant Principal which she understood to be purely in relation to work management. The employer says that, at the time of this discussion, the claimant also pointed out that she had had a series of domestic crises in the preceding twelve to eighteen months. The employer says that the claimant said that she considered herself to be under severe pressure and had consulted the Department’s Employee Assistance Officer. He says that the female Assistant Principal believes that her response in relation to this was to be entirely sympathetic to the claimant and that she regarded as admirable the fact that she had taken the initiative in seeking the services of the Employee Assistance Officer. He says that for these reasons, the female supervisor cannot accept that she treated the claimant “in a hostile way”.

- 4.8** The employer says that with regard to the transfer of the Clerical Assistant, the female Assistant Principal says that the decision on this transfer took place without her knowledge and was designed to meet a priority within another area of the overall Division. He says that while she, as a manager, did not welcome the loss of a head of staff, she nevertheless considered that this might address the situation that existed between the Clerical Assistant and the claimant.
- 4.9** The employer says that as it stated earlier in this submission, the Department require a series of probationary reports on individual staff members. He says that in the claimant's case, a final report was due in March, 1997. He says that as is the practice, this was sent to the female Assistant Principal for completion in view of the fact that she was the claimant's immediate superior. He says that the probation form is countersigned by the Head of the Division, in this case, the Principal Officer. He says that when the completed report was received in Personnel Unit, it was noted that while the overall report was satisfactory and warranted the completion of the probationary period, a number of aspects of the claimant's work were rated as "less than satisfactory". He says that Personnel Unit advised the female Assistant Principal that, although the claimant had satisfactorily completed her one year probationary period, her performance should continue to be monitored and the Personnel Officer advised of the claimant's progress.
- 4.10** The employer says that the female Assistant Principal is convinced that she completed the probation report in a totally fair manner, based solely on her dealings with the claimant. He says that the review was carried out at the request of the Principal Officer in the Division. The employer says that when doing so, he had confidence in the female Assistant Principal's ability to form a reliable opinion of the performance of officers in her Section. He says that this was based on twenty six years service in the Department. In addition, he also argues that, by having the replacement female Assistant Principal complete the report, it guaranteed that the review would be unbiased by the fact that the relationship between the claimant and the previous Assistant Principal had been less than a happy one. He says that the factors known to her in relation to the claimant's

interpersonal skills were of particular concern to the female Assistant Principal but she was satisfied that having spoken to the claimant, that perceived difficulties in this regard were being addressed. He also says that the female Assistant Principal felt that the probationary report should reflect the actual situation and also the fact that the matter was being addressed and says that she also pointed out that taking into account the wider work environment, including the volume of work that this aspect of her performance, in itself, should not militate against her career advancement.

**4.11** The Personnel Officer says that he met with the claimant to discuss her probationary report with her. He accepts that she requested that this report be removed from her file. He says that following his discussion with the claimant he raised the matter again with the female Assistant Principal who was satisfied that her report was fair and accurate and on reconfirming this view she advised the Personnel Officer that she had discussed the matter again with her Principal Officer, who supported her views. The employer says that while it is acknowledged that the Principal Officer countersigned previous reports prepared by the claimant's previous Assistant Principal, which would have been more favourable than the final report, it has to be accepted that over a period of time an officer's performance may improve or disimprove. He also says that each superior officer will bring his or her own traits and management style to an office and this will very often be reflected in reporting on their staff. He says that it is not therefore unusual for different superiors to identify strengths or weaknesses in a particular officer.

**4.12** The Personnel Officer says that in the light of the female Assistant Principal's reconsideration of the probation report, and the fact that she was fully satisfied following further discussion with her superior officer, that this accurately reflected the claimant's performance, there was no question of him withdrawing the report from the file.

**4.13** The employer says that the female Assistant Principal wished to refute strongly any suggestion that she was in any way biased in completing the report. He says

that she says categorically that she did not become aware of the allegation of sexual harassment until after the probationary report had been submitted. He says that it would have been literally impossible for her to have been in any way influenced therefore by this episode. The Personnel Officer confirms that on her appointment to the new Section, he did not give any indication to her of the sexual harassment allegation. He says that it would have been totally incorrect of him to do so because, as is stated earlier in this submission, he did not carry out any investigation into this allegation.

**4.14** The employer says that the female Assistant Principal also wishes to point out, in the strongest terms possible, that there was no collusion between herself and the former Assistant Principal in giving the claimant a less than fair assessment. He says that not least out of the desire to be scrupulously fair to the claimant, in the light of her initial statements regarding her working relationship with the previous Assistant Principal, the female Assistant Principal contends that she chose to have only minimal contact with him in regard to the work of the Section. He says that it is her recollection that she had three brief phone calls with him, none of which involved any staff matters. He says that she takes grave exception to the inference that she would in any way be influenced by any external circumstance or person in undertaking an assessment of a member of her staff.

**4.15** In summary the Department refutes any suggestion that the claimant was victimised because of her complaint about discriminatory treatment. Furthermore, it denies that management failed to deal with this matter adequately. The employer says that, as has been pointed out in this submission, as soon as the Personnel Officer became aware of an allegation of sexual harassment he met with the claimant and discussed the matter in detail with her. He says that she clearly accepted that no further action in this regard was required, although he pointed out to her that should she decide to initiate further action then the Department would deal with it promptly and fairly. The Personnel Officer is satisfied that there was no malice in the preparation of the final probationary report by the female Assistant Principal which reflected her view of the claimant's work performance. He says that he met with the female Assistant Principal to afford her the opportunity of reconsidering her original report and,

having consulted with her superior officer, she confirmed that she was satisfied that this report fairly reflected the situation. He says that furthermore, when the claimant requested a transfer out of the Section or the Department, he advised her that he would try to arrange an internal transfer as speedily as possible but pointed out the difficulties in arranging a transfer to another Department. He says that he is satisfied that the claimant's internal transfer was implemented as speedily as possible.

## **5 Summary of a further submission made by the Employment Equality Agency**

- 5.1** The Agency says that the Personnel Officer's memo in relation to the transfer is dated 14 January 1997 and in it he states that the decision to make the transfers was made on 13 January 1997. The claimant made the complaint of alleged sexual harassment to the Personnel Officer on Friday 10 January 1997 and again on Monday 13th. The Agency claims that the Assistant Secretary spoke to the claimant about the complaint on Tuesday 14 January. It submits therefore that senior management were aware of the complaint of alleged sexual harassment at the time the decision was made to transfer the alleged harasser.
- 5.2** The Agency claims that the reports for June 1996 and September 1996 were very good overall and there were no below average marks. In relation to the September 1996 report the claimant submits that by this time she had objected to the alleged offensive treatment and for example she had refused to attend the "staff meetings" in the pub and this could account for the fact it is not as favourable report as the June 1996 report. She also submits that the report of 1 March 1997 was consistently lower than the two previous reports and under four headings she was marked below the average.
- 5.3** The Agency says that in the March 1997 report the female Assistant Principal states: "This officer is essentially able and a hard worker but has had some difficulty in adopting to the less structured work environment than she was used to. Some interpersonal problems are in process of resolution". The Agency submitted that the female Assistant Principal was not in a position to comment in

such a way on the claimant's performance in her current job or on her previous work environment unless she had been appraised of the situation given that she had only commenced working with her a short time previously. In relation to the claimant's interpersonal skills the female Assistant Principal stated at the oral hearing that she took into consideration issues which were brought to her attention by the Clerical Assistant. (The Clerical Assistant worked in the section and was a friend of the alleged harasser). The female Assistant Principal also stated in the report that the claimant was willing to take the necessary steps to ameliorate working relationships where necessary. The Agency submits that none of the perceived problems or complaints were ever brought to the claimant's attention and she was not given an opportunity to defend herself, but it says that it appears that the complaint by the Clerical Assistant together with other factors in relation to her work environment were relied on and used against the claimant by the female Assistant Principal in compiling the report.

- 5.4** The Agency also submits that the report of March 1997 is inconsistent. The female Assistant Principal stated in one part of the report that the claimant was a hard worker and she marked another part stating that she was occasionally behind in her work and inclined to be slow. At the hearing the female Assistant Principal stated that the claimant was a good worker and carried out her work but in her report she stated that the claimant's output fell behind.
- 5.5** The Agency also states that in the March 97 report the female Assistant Principal says that "the overall work environment was not conducive to best performance". It infers from this statement that the female Assistant Principal was aware of the complaint of alleged sexual harassment when she completed the probationary report. It is difficult to know how the female Assistant Principal could have come to such a conclusion unless she had known of the complaint given that she was such a short time in the section and had only about thirteen and a half contact days with the claimant.
- 5.6** The Agency argues that in the report dated 1 April 1998, where it varied between good and very good, the claimant's supervisor at that time consulted with the claimant's previous supervisor (the female Assistant Principal). It accepts that the

female Assistant Principal's statement that she did not contact the claimant's previous Supervisor as she stated that she did not do so because she was aware of work difficulties between them. The claimant states she never discussed with her female Assistant Principal any aspect of her working relationship with the alleged harasser prior to the completion of the report. It is submitted therefore that the female Assistant Principal must have been aware of the nature of the complaint otherwise she would have followed the usual procedures and discussed the report with her previous Supervisor.

**5.7** The Agency also says that the September and March reports were countersigned by the Principal Officer. In his e-mail of 10 December 1997 he states that reports "should justly reflect any significant changes in performance or attitude ..... Performance can improve. It can also, for a range of reasons, disimprove." It is submitted that if there was a significant change in the claimant's performance or attitude (which is not accepted) the report did not justly reflect the situation given that the Principal Officer was aware of a possible reason for a disimprovement; the claimant had reported the alleged sexual harassment to him. It appears that the fact the claimant reported the matter to him put her at a disadvantage. The Agency argues that there was an onus on him to ensure that the claimant did not suffer any disadvantage because of her complaint to him, but he allowed a less than satisfactory report to be put on her personnel file thus penalising the claimant further for making a complaint. He further states that the probationary report was shown to the claimant and was discussed by the Supervisor with her prior to signing it, but this did not occur until after the claimant queried her about the completion of her probation.

**5.8** The Agency says that the Principal Officer also states in his memo that assessments are completed by the officer who works most closely with the person being assessed and are shown to the individual involved. It argues that this assessment was not completed by the officer who worked most closely with her for the past year but by a very new supervisor. Furthermore the report was never shown to the claimant at the time of completion and it is only as a result of pursuing the case has she had an opportunity to have sight of it. The claimant learned of its contents from the Personnel Officer and she states that when she

tried to pursue clarification with her Supervisor she was treated in a hostile manner.

**5.9** The Agency says that at the hearing the female Assistant Principal stated that both the Principal Officer and herself had a difficulty in dealing with the claimant, that the relationship had broken down between them and a decision had been taken by the Principal Officer that no further replies would be given to the claimant. It submits that there was no reason to treat the claimant in such a manner and it can be inferred from this treatment that the claimant was viewed as a trouble maker because she choose to exercise her right to complain about alleged unlawful behaviour.

**5.10** The Agency submits that out of the four reports completed on the claimant's performance the one completed by the female Assistant Principal and the Principal Officer was by far the least favourable. This treatment of the claimant in conjunction with the hostile working environment to which she was subjected raises an inference of discrimination and supports the claimant's case that she was treated less favourably and penalised as a direct result of making a complaint of alleged sexual harassment to senior management.

**5.11** The Agency refers to the case of **A O Donoghue v Guardian Royal Exchange ASS PLC EE 06/94** where the Equality Officer considered a complaint under Section 2(d) of the 1977 Act. The Equality Officer stated in that case:

*"The company argue that these events as referred to by the claimant are not connected with her first claim. However, I consider that as the Company was aware of the existence of the first claim it should have been vigilant in its treatment of the claimant to ensure that no further allegations of discriminatory treatment could be made by the claimant. Instead the claimant was given work not of her grade..... All these changes came about subsequent to the claimant lodging the first claim. I consider that the claimant was discriminated against by the Company because she made the original claim."*

**5.12** The Agency claims that the above rationale applies to this case as the claimant was given an unfavourable report and treated in a hostile manner subsequent to the reporting of alleged sexual harassment to management.

## **6 Summary of a further submission made by the Employer.**

- 6.1.** This further submission was made by the employer in response to the issues raised, in writing, by the claimant's representative following the hearing held in this case. The employer argues that although the final and formal decision regarding the transfers of four APs, including the claimant's former supervisor, was made on 13 January, the transfers had been under consideration for at least a month before, as is normal in such cases. The decision to transfer the claimant was unrelated to the allegation of harassment. The employer says that, while it would normally regard the transfer of either party as a possible option in such cases, it would occur only after at least a preliminary investigation and, as far as possible, with the agreement of the parties to the dispute.
- 6.2.** The employer says that it is possible that an Officer's performance may deteriorate. This also could account for less favourable reports later.
- 6.3.** The employer says that the female Assistant Principal who carried out the disputed assessment of the claimant is a very experienced Officer who is expected by the management of the Department to be, and indeed is, capable of assessing the demands of different work environments. She is also experienced at assessing staff as part of her duties. The employer says that shortly after the female Assistant Principal's arrival in the section the claimant appraised her, both of her comparative view of her work environment and of her intention to avail of the services of the Department's Welfare Officer to alleviate the stress-related difficulties she was experiencing. It says that it is incorrect to state that the Clerical Assistant's complaints were "used against" the claimant. The employer says that both it and the female Assistant Principal recognise that it would be quite improper to make a judgement of any kind solely on an uncorroborated allegation of the difficulties as described to her.
- 6.4** The employer says that the female Assistant Principal concluded that it was entirely appropriate to refer to interpersonal difficulties in the report only after due

consideration of the following facts:

- (i) The claimant's own statements to the female Assistant Principal regarding both her difficulties with the previous supervisor (she did not at this stage advert to the sexual harassment issue, only the working relationship) and with the Clerical Assistant;
- (ii) her further assertion that the circumstances in (i) had led to her being treated in an unfriendly way within her coffee/smoking group;
- (iii) the Clerical Assistant's complaints in regard to the claimant;
- (iv) the female Assistant Principal's own overall observation of the situation prior to completion of the report.

**6.5** The employer says that the female Assistant Principal has already indicated that she considered it a plus in the claimant's favour that she had taken the initiative in seeking help to alleviate her difficulties. The employer says that neither the female Assistant Principal or subsequently, the Personnel Officer, conclude that this element of the report was necessarily either a permanent or irreversible factor affecting the claimant's career advancement.

**6.6** The employer says in reference to the comment at 5.4 above where the Agency has alleged that the female Assistant Principal stated in one part of the report that the claimant was a hard worker and she marked another part stating that she was occasionally behind in her work and inclined to be slow. The Department believes that the two statements are not mutually exclusive. It argues that the female Assistant Principal believes that the claimant was a good worker and was happy to confirm that view. Being a good worker does not always necessarily mean that an Officer's output is correspondingly high. Factors such as familiarity with subject matter and procedures, ability to prioritise and make quick judgements etc. all have a bearing on actual output. The Department says that again however, the female Assistant Principal did not and does not see this as a negative factor as such but an area where there would be room for improvement with experience gained. The report required an assessment of the Officer's performance at that point in time.

- 6.7** The Department does not agree that the female Assistant Principal's comment regarding the overall work environment suggested or meant that she was aware of the sexual harassment complaint. It says that, on the contrary, the claimant had already spoken to the female Assistant Principal about her view of the environment. The Department says that besides this, an Officer of the female Assistant Principal's experience would be capable of (and would be expected to) detect difficulties in a work environment. Such difficulties are not uncommon. The Department goes on to say that both the Personnel Officer and the female Assistant Principal have already confirmed that the latter was not informed of the sexual harassment complaint until the claimant chose to disclose it.
- 6.8** The Department points out that while consultation with previous supervisors is something which the Personnel Division would encourage, it is by no means the invariable practice. Leaving that aside, in cases where there have been difficulties - and the Department says that as already noted in paragraph 6.3 above that the female Assistant Principal was made aware of these difficulties by the claimant herself - it would be normal not to consult in the interests of fairness to all concerned. So in fact the female Assistant Principal followed the norm in such cases.
- 6.9** The Department says that in summary it can only repeat the following:

the report was completed by the appropriate Officer as to grade and position; moreover, she was an Officer of considerable experience; the report on the claimant was completed in an honest and fair way and without knowledge of the complaint the claimant had made, so no question of disadvantage because of making the complaint arises.

## **7 Conclusions of the Equality Officer**

- 7.1** In reaching my conclusions in this case I have taken into account all the submissions both oral and written made by the parties to me.

**7.2** The claimant following a promotion, was assigned to the Department against whom the claim is made. She was placed on probation and, as part of the conditions of the probation, reports were required to be completed on her, for the Personnel Division, by her supervisor (an Assistant Principal) and countersigned by his superior. The Employment Equality Agency has alleged that the employer discriminated against the claimant because her third/final probationary report gave her lower grades than her two previous ones. It argues that this final report on her was made by a different supervisor to the first two reports and that it was made on her following a complaint she made about the behaviour of her former Assistant Principal (a man she alleges sexually harassed her). The claimant also alleges that she was subjected to hostile working conditions following this complaint. At the hearing the claimant confirmed that she is seeking to have the offending report on her performance deleted from her file and compensation for the distress that the incident caused her.

**7.3** The employer has denied that it discriminated against the claimant and argues that while the claimant made a complaint about her former Assistant Principal it was not a formal complaint and so it did not investigate it. The employer argues that when she made the complaint the claimant had a meeting with the Personnel Officer who told her in confidence that there were moves afoot to move the officer that she complained of, due to the length of service that he had in that area of work. He was transferred shortly afterwards. The employer says that the claimant accepted the assurances given to her that in future her working conditions would be free from the harassment complained of and consequently she did not make a formal claim regarding the alleged harassment. The employer argues that this transfer was preplanned and a matter of policy due to the male Assistant Principal Officer's length of service in the area.

**7.4** I note the claimant alleges that the male Assistant Principal sexually harassed her and that she reported this to their Principal Officer who then confronted him about the allegations. The claimant alleges that subsequent to his conversation with the Principal Officer the male Assistant Principal initially denied these allegations to her, but she says that when she pointed out to him that some of the alleged acts took place in front of witnesses that he conceded that these incidents did in fact

take place. However this matter was not referred to me for investigation but rather referred to and discussed in the context of it being the background to this claim of discriminatory treatment of the claimant by the employer. Further this claim was not investigated formally so these allegations remain just that, allegations.

**7.5** I consider that the main issue to be examined in this case is whether or not the claimant was discriminated against by her employer when her third/final probationary report gave her lower grades than her two previous ones and whether or not she was subjected to hostile treatment by her supervisor and generally in her working conditions because she made a complaint under the Employment Equality Act, 1977, alleging sexual harassment by her supervisor at that time.

**7.6** The claimant has also alleged that following her complaint she was subjected to further hostile treatment. This included, the disputed report, hostile treatment by the female Assistant Principal and generally in her working conditions. The claimant alleges that a junior member of staff caused her to be shunned in the canteen/smoking room. This is described in more detail in the following paragraph. As a result of her difficulties the claimant sought a transfer to another Government Department but agreed to a transfer within her own Department to a different office building on totally different work and this was effected some time after this dispute arose. The claimant is satisfied with her working environment in this new office, where she had been working for nearly a year at the time the hearing in this case was held. I note that she alleged at the hearing that some of her present colleagues learned about her claim under the Employment Equality Act, 1977, from the staff of the Labour Court and she said that this compounded the distress that was caused to her by these incidents. I further note that she said that while this caused her difficulties it was not nearly as difficult to deal with as her original difficulties.

**7.7** I note that the claimant alleges that difficulties arose due to the behaviour of the Clerical Assistant in relation to her general working conditions after she made her original complaint about the sexual harassment. The claimant argues that the Clerical Assistant's attitude to her changed following a long private conversation

she had with the male Assistant Principal in his private office shortly after he was confronted with the claimant's allegations. This meeting was visible to staff as there is a glass partition between his room and the remainder of the general staff room. She claims that after this long discussion the Clerical Assistant more or less ignored her and she alleges that because of her influence, she was shunned in the canteen/smoke room when staff who had previously spoken to her, ignored her. The difficulties that arose after this conversation also affected general working relations in the office and the claimant has argued that the Clerical Assistant was very unco-operative in relation to work. The female Assistant Principal acknowledged that she had complaints made to her by the Clerical Assistant concerning the claimant but she declined to elaborate on these either at the hearing or on request by the claimant. The female Assistant Principal acknowledged that the Clerical Assistant was subsequently transferred to work to a different supervisor in the same room on an area of work that had a much smaller workload. The female Assistant Principal, at the hearing, was unable to give any reason for the Clerical Assistant's transfer and said that it was organised by her superiors. Although she was transferred to other work and no longer reported to the claimant the Clerical Assistant continued to occupy the seat opposite the claimant. Also at the hearing the female Assistant Principal stated that she could see no problem with having the Clerical Assistant seated opposite to the claimant although she no longer reported to her.

- 7.8** I note that even though the female Assistant Principal accepted that the Clerical Assistant had complained to her about the claimant (about matters that she refused to divulge) and had caused difficulties for the claimant, by influencing her general work and social/work environment, she could not understand that this could have caused any difficulties for the claimant. The claimant also alleged that almost all communication in the section was carried out by e-mail and the female Assistant Principal in acknowledging this argued that the work load was very heavy and claimed that this was the most effective manner to communicate. I consider, from my investigations, that after the claimant objected to her final probation report, the female Assistant Principal allowed the atmosphere in the office to deteriorate to such an extent that practically all her communication with the claimant was written whether by e-mail or otherwise. A final incident referred to by the claimant to

illustrate the hostile attitude of her supervisor towards her, happened on the last day that both of them were in the office together before her transfer. She finished work at 6.40p.m. The female Assistant Principal who had also been there all day sent her an e-mail five minutes after she had left to comment on her new posting. The text of this e-mail is as follows *"I will be on leave all next week so just to say I hope you find your new assignment and colleagues more closely match your expectations."* I consider that the female Assistant Principal could have just as easily spoken to her as she had been sitting at her desk all day until that late hour of the evening but she said that pressure of work led to her communication in this format. I accept that that the office was very busy and that certain new services were being launched but I consider taking the foregoing facts into consideration, I find that the claimant was subjected to a hostile working environment.

- 7.9** From my investigations I note a female Assistant Principal was appointed to replace the previous male Assistant Principal who was the claimant's previous supervisor. After a very short contact period with the claimant this new supervisor completed a report on her that, while giving her a grading level which ensured that her probationary period was successfully finished, the grades she gave the claimant were lower than those that she had received in two reports made on her during the course of the previous nine months. The regulations governing these reports meant that they had to be countersigned by the Principal Officer (a superior officer) and discussed with the officer under review. The female Assistant Principal has argued that the claimant lacked interpersonal skills and that her report reflects this. On questioning the female Assistant Principal who made this report on the claimant I note that this perception arose mostly in relation to the claimant's relationship with the Clerical Assistant in the section. I accept that the report was of a lower grade than the previous two made on the claimant during her probation. I also note that, at the time this report was made, the claimant had worked in contact with the reporting supervisor for thirteen and a half days. The claimant has argued that her assessment could only have been based on subjective/personal views given the comments of the female Assistant Principal concerning the claimant's "domestic difficulties". The supervisor was required to give a work performance review on the claimant after a very short period of time working in her new post. I consider that it would have been difficult to give an objective work performance

review given the short contact period of thirteen and a half days the claimant had with the female Assistant Principal. I consider, from my investigations that this report was influenced also by the effect that the complaints made by the junior member of staff to her. I note that the Principal Officer endorsed the view of this latter supervisor notwithstanding the fact that he had endorsed a good review of the claimant prior to this, as he had done in the past when she got a good report. Also I note that supervisors when completing these probationary forms, in addition to having them countersigned by their own line supervisor, are also required to discuss them with the person under review in order to allow them a right of reply. This was not done in this case. In fact the female Assistant Principal refused to discuss the matter with the claimant and it was the Personnel Officer that showed the report to her. The claimant would not have been aware of the content of the report otherwise.

**7.10** As I have found in the previous paragraph that the claimant's final probationary report was of a lower grade than those made on her before she made her allegations of sexual harassment and in paragraph 7.8 that the claimant was subjected to a hostile working environment the issue for consideration is whether or not the claimant was discriminated against, on grounds of sex, when she was given a lower rating than previously and if she was subjected to the hostile working conditions described above as a result of making a claim under the Employment Equality Act, 1977.

**7.11** The claimant has argued that there was no complaint about her performance until she raised the alleged sexual harassment with her Principal Officer. She referred to a recommendation made by an Equality Officer (Rec No EE 9/96 Kirwan v PWA International) in support of her argument.

"I consider that as the company was sufficiently satisfied with the claimant's performance prior to October 1993 to have offered two promotions within 5 months, .....that the fact she took a claim under the 1977 Act against the company led to this unfavourable appraisal."

The claimant argues that the above rationale applies to this case. She says that there was no complaint about her performance until she opposed the alleged sexual harassment and made a complaint to management. She submits that a

strong inference of discrimination can be drawn from the facts and that the onus shifts to the employer to prove that this was not the case. I consider that the working conditions of the claimant were allowed to deteriorate following the complaint that she made under the Employment Equality Act, 1977 concerning sexual harassment. While she did not make a formal complaint, management undertook to redress the informal one made and so while unproven it was a matter of fact that it had been raised. I consider that management should have been alert to any possibility of any further discrimination that might be suffered by the claimant and consider that it should have endeavoured to ensure that a work environment without any possible taint of discrimination was provided for the claimant. Instead this report was made on her performance, it was not shown to her or discussed with her as was required by the regulations. Her female Assistant Principal says that with the agreement of her own supervisor she refused to discuss the matter with the claimant. Following this refusal the working atmosphere was allowed by the female Assistant Principal to deteriorate to the extent that the claimant was not circulated with the meetings diary (a method of informing all staff of meetings scheduled for the forthcoming week), and consequently was unaware of the ongoing commitments of the office or whether the female Assistant Principal was in the office on any given day. Further the female Assistant Principal only communicated with the claimant in writing to the extent that the post staff complained that they were carrying post directed at the claimant past her desk to the sorting station and back into the room again. I note that the female Assistant Principal had to pass close to the claimant to enter or leave her own office.

I further note that the claimant was working in what has been accepted by the management as difficult circumstances. Quite apart from the reported alleged sexual harassment there was an acknowledged heavy workload, uncertainty about travel arrangements etc. which appears to have been accepted as the norm in the day to day functioning of the office. No allowances appear to have been made when the assessment was compiled. While accepting that the Department acted swiftly in responding to the claimant's difficulties when she made her original claim I consider that it did not then ensure that there was no subsequent problems arising from her initiation of a sexual harassment claim. It effected a transfer of the

alleged harasser and the claimant's subsequent transfer, when she sought it, in a speedy manner. I consider that the claimant was effectively discriminated against on the basis of her sex when she was given a lower rating on her final probation report.

**7.12** I consider the claimant's disputed probationary report was graded based on the female Assistant Principal's perception of the claimant's performance in the section. I note that the female Assistant Principal, other than to say that her interpersonal skills were lacking, did not give any reason why the report on the claimant gave her lower grades than in the previous nine months. The female Assistant Principal agreed at the hearing that her perceptions of the claimant's interpersonal skills were influenced by the remarks of the Clerical Assistant to her. This attitude which the Clerical Assistant adopted to the claimant following a long private conversation that she had with the male Assistant Principal shortly after he was confronted with the claimant's allegations. I note that subsequently the Clerical Assistant treated the claimant in a very hostile manner and as agreed by the female Assistant Principal had made complaints to her about the claimant. I consider that this change in attitude came about as a direct result of the claimant making a complaint, as she was entitled, under the Employment Equality Act, 1977. The fact that the female Assistant Principal claims that she was unaware of the allegations made by the claimant under the Act at the time that she made the report on the claimant does not alter the fact the previous events coloured the attitudes of both her and other staff.

**7.13** I have also considered this claim in relation to the man against whom the allegations of sexual harassment and bullying were made. I accept that after these allegations were made that the man concerned complained to his colleagues (and hers) about these allegations, thereby bringing them to the attention of other staff in a manner was that was unnecessary and with the effect of undermining the claimant's working conditions. I consider that the employer by not investigating the complaint has left the officer complained of in an invidious position. He has not been able to defend himself publicly from the allegations but was transferred when they were made. This could lead to the inference that in fact the allegations were proven and a further claim such as this one can but further confirm this to other

staff not in possession of the full facts. Consequently I have decided to issue this recommendation on a confidential basis although not requested to by either of the parties to the claim.

From my investigations I also accept that the employer would have moved the officer against whom the allegations were made as this was part of a larger re-shuffle that had been planned, for officers of his grade, prior to the complaint made by the claimant.

**7.14** I have also considered the claimant's points made in relation to the breach of confidentiality concerning her claim and note that while I accept that the Personnel function of the Department in question treated this claim confidentially, it is important that all claims/allegations of this nature should remain confidential to the parties. In this regard I consider that all staff that deal with claims of this nature should maintain the utmost confidentiality in these matters.

## **8. RECOMMENDATION**

- 8.1** In view of my conclusions in paragraph 7.11 I find that the Department discriminated against the claimant on the basis of her sex in 1996. I recommend that the disputed probationary report is removed from the claimant's record and that the Department pay the claimant £500 in compensation for the needless distress caused to the claimant by the continuing discriminatory treatment. I further recommend that the claimant is not subjected to further adverse treatment by her superiors as a result of taking this claim.

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Mary Solan Avison  
Equality Officer.

25th May, 2000