JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 29 of 1990

CHRISTINE ANNE KEMP
Complainant

- against -

MINISTER FOR EDUCATION
First Respondent

and

STATE SCHOOL TEACHERS' UNION OF WA INC.
Second Respondent

BEFORE: Mr N P Hasluck QC (President)
Ms P Harris (Member)
Ms K French (Member)

Counsel for the Complainant	H K Andrews
Counsel for the First Respondent	J Allanson
Counsel for the Second Respondent	P Quinn

HEARD: 11 JANUARY - 1991

REASON FOR JUDGEMENT

(Delivered: 5 MARCH 1991)

JUDGEMENT

The Complainant, Christine Anne Kemp, was employed by the Minister for Education as a Senior Teacher. In mid 1990 she was appointed to the position of Acting Deputy Principal of Leeming Senior High School. Her appointment was called into question as the result of the application of a Memorandum of Agreement entered into between the First and Second Respondent, and she now seeks relief against the Minister and against the State School Teachers' Union of W.A. (Inc.) ("the Union") pursuant to provisions of the Equal Opportunity Act 1984 ("the Act"). The issue brought before the Tribunal is whether the selection of persons to fill acting and relieving positions by the use of the criteria of total length of service with the Ministry and seniority discriminates against women on the grounds of sex.

Before turning to the facts of this particular matter, it will be useful to look briefly at the way in which previous policies and practices of the Ministry have had an effect on promotions within the state school system. Some years ago a former Minister of Education in the federal government presented to the government of Western Australia a wide ranging report concerning education in this state, a report now commonly known as the Beazley Report. An extract from that report, which was received in the evidence by the Tribunal, notes at paragraph 4.68 that the promotion system for government primary and secondary schools in Western Australia is complex. The report identifies a number of weaknesses in the system at paragraph 4.69 and goes on to say that:

> "The promotional system is strongly correlated with seniority and this correlation operates against the promotion of women whose service has been broken in order to rear a family. In addition, the system requires a high degree of mobility which precludes many

> married women from entering the promotional sequence. The Education Department has retained sex-linked positions at the Deputy Principal level and this had ensured that some women occupy promotional positions. However, the imbalance between the sexes at the Principal level is very pronounced."

An extract from a report prepared by Officers of the Equal Opportunity Branch of the Education Department was also received in evidence. In 1987 this extract was relied on by Robert John Pearce, the Minister for Education at the time, to support an application for exemption from the provisions of the Act. As at that date certain schools were designated two Deputy Principalships. The prevailing policy was that Deputy Principal positions be gender-linked with one Deputy Principal of each sex being required. The Minister was of the opinion that without gender-linked Deputy Principal positions, the number of women in positions of authority within schools in Western Australia would decline and children would not be provided with positive role models for women with authority. The report relied on by the Minister in 1987 said in part:

> "The Education Department employ some 13,250 full time Teachers. Of these, 5,500 are men and 6,200 are women employed in primary and secondary schools. Despite the fact that there are more women than men, men out number women by more than three to one as far as promotional positions are concerned. This imbalance would be far greater if the Department did not have gender-linked Deputy Principal positions in all primary schools with enrolments of three hundred or over, and in all secondary schools.
>
> In July 1985, there were 469 Principal positions in primary schools held by men and 35 by women. At the Deputy Principal level 286 men held the position and 243 women. In secondary schools men outnumbered women by 133 to 10 in Principalship. However, there were equal numbers of Deputy Principalships (108) held by men and women.

The report went on to say that Western Australia was unique in the retention of gender-tagged Deputy Principal positions and examined statistics from other States which suggested that the numbers of women in promotional positions have been declining.

The report continued:

> "In large part the underrepresentation of women in executive positions in schools is attributable to aspects of promotional practices in education systems. For example, married women particularly tend not to have geographic mobility, thus restricting their placement on permanent staff. If they have children, they tend to have had a break in service with resultant loss of seniority. Female Teachers, both single and married, are also disadvantaged in relation to country service. A significant number do not avail themselves of opportunities for country service because of the system's social attitudes and housing difficulty....The Education Department of WA accepts the theory of cognitive development in which the child progressively builds a concept of femaleness or maleness culled from a variety of sources and adjusts her/his behaviour to it with increasing refinement as the concept becomes more sophisticated....The distribution of the balance of power and influence in a school is an important indicator for children about the world outside....If students in our schools do not see women in decision making roles, in roughly equal numbers with men, then they will not perceive women as having an input into decision making when they leave school."

The report then concludes:

> "The Education Department is committed to achieving equality in education for boys and girls, and in employment for men and women. The Department is of the view that in the long term this means having a significant number of women as Principals of schools. As it is believed that this goal will be achieved only in the long term, it is important that for the medium term, there is at least one woman in the administrative triumvirate of secondary schools and larger primary schools. Hence it is necessary to retain gender-linked Deputy Principals positions for the present."

It appears from these materials that in recent years the Ministry has been conscious of a need to give special attention to the position of women teachers. It is against this general background that the Tribunal now comes to the statement of agreed facts that was received in evidence at the hearing.

The statement establishes that until 1969 married women within the state school system were required to resign on marriage and could only take up

temporary or relief teaching. The Ministry had an unofficial "breadwinner" policy which meant that employment was allocated in the first instance to those of breadwinner status. A married female with a working spouse was deemed to be of low priority for employment. This policy ended in August 1984.

It appears from the statement that until 1979 all promotional positions were appointed on appropriate qualifications and seniority. "Seniority" means the longest period of continuous full time service as a Teacher calculated from date of appointment and excluding any previous service.

Until about March 1990 it was a requirement to become permanent that a person had to state a willingness to serve anywhere in the State. This was so whether or not a female who had to resign on marriage had previously served in the country.

The statement of agreed facts also established that out of any group of Teachers appointed at the same time, the men are more likely to have a greater total length of service than the women. A greater number of women than men are likely to break service and be out of the workforce for periods of time, for purposes of child bearing and child rearing. The majority of temporary and part time Teachers are women.

The Tribunal now turns to the circumstances of the present case.

On the 31 October 1989 the Government School Teachers Tribunal awarded Teachers employed by the Ministry the first three percent salary increase available under the September 1989 wage fixing principle. In the

Memorandum of Agreement presented to the Tribunal, the parties identified areas where negotiations, consistent with the requirements of the structural efficiency principle, would commence. By a Memorandum of Agreement made between the parties in April 1990 ("the agreement") the Ministry and the Union agreed to address issues of structural efficiency. The agreement notes that one of the key strategies is said to be a process of "devolution" whereby each school will be regarded as a "key decision making unit within the system". As one of the steps towards improving efficiency the agreement provides for the creation of a Third Deputy Principal position in certain schools. The agreement was subsequently reproduced in The Education Circular of May 1990 and at page 134 the matter is expressed in this way:

> "To support the devolution to schools and improve career opportunities for secondary staff, additional promotional positions will be advertised in 1991 for 1992. For secondary schools with over 1,100 students an additional Deputy Principal position will be introduced. Schools between 800 and 1,100 students will gain an additional level 3 position. These new positions will be introduced in order to progress and achieve the goals contained in the schools development plan. The duties and criteria for such promotional positions will be as appropriate to school needs within the parameters of relevant job descriptions."

As appears at page 151 of the same circular, it was also a term of the agreement that:

> "Additional promotional positions will be advertised in 1991 for appointment in 1992....Additional Deputy Principal positions will be filled temporarily in an acting capacity from July 1990, with selection being based on present acting higher duty guidelines."

The guidelines in question had been published in the Education Circular of April 1990 and at page 67 of that document one finds the policy to be applied for acting and relieving positions in schools expressed in these terms ("the guidelines"):

"The general principles to apply in assessing eligibility for acting positions are as follows:

(1) identify the Teachers who hold the qualifications required and who are on the permanent staff;

(2) examine the previous promotional history, if applicable as outlined below;

(3) determine the total teaching service within the Ministry;

(4) if all factors are equal, determine seniority;

(5) if applicants can still not be separated, request the Chief Executive Officer to act as the final arbiter."

The Tribunal pauses to note that according to the guidelines, total service with the Ministry means service as a Teacher. It is therefore said to include part time service counted on a pro rata basis but does not include relief teaching. The service does not need to be continuous to be counted.

In regard to such matters Peter John Ayling, a Senior Officer with the Industrial Relations branch of the Ministry, said in answer to the question concerning the difference between seniority and total service with the Ministry:

"The neatest and simplest way of distinguishing between them would be to say that seniority is the length of service since your last appointment whereas total teaching service is all of your service taking into account that there may well have been more than one or more breaks in your service during that time. Perhaps if I illustrate; if we have two people who commence teaching, say, in 1975 and one teaches through until 1980 and then takes five years break and recommenced service in 1985 and comes through to the present day, their total length of service would be five years plus the second five years from 1985 through to 1990 so that the total length of service there would be ten years. If we were only taking their seniority, then we would only date it from the time that they were last appointed which was 1985 and would completely overlook the previous service that that person had done. So their seniority might only in fact be five years, even though they had put in ten years of service over those fifteen years."

He went on to deal with related matters:

> Maternity breaks don't count as part of a Teachers service but they don't constitute a break in service in other words, there are some actions which can constitute a break in service. For instance, resigning would be the most extreme example. But when a Teacher goes on maternity leave although the Teacher in question is not actually clocking up any further good service they are not breaking the service since their last appointment and therefore maternity leave would effect total teaching service but does not of itself effect seniority."

In answer to a question concerning whether temporary and relief teaching count towards total length of service, he indicated that they do. Temporary service is counted the same as permanent service and this is true also of relief teaching and part time teaching. However, seniority is referable only to permanent staff.

The Tribunal digresses briefly to notice that there is a small discrepancy between the position concerning relief teaching as described in the guidelines and the account given by Mr Ayling. The guidelines suggest that total service does not include relief teaching while as the evidence of Mr Ayling was to the contrary. The discrepancy may be due to a misunderstanding as to the nature of the question put to the witness but, for present purposes, the Tribunal will proceed on the assumption that the written guidelines express the position correctly with the result that total service does not include relief teaching.

Mr Ayling went on to say in referring to the guidelines applicable to appointments for acting and relieving positions in schools:

> "All that this policy in effect is trying to do is to enable a lot of the reasoning and the recommendation for an appointment to be made at the school level rather than being made at the central office level. Before this policy was discussed and agreed between the Ministry and the Union five years ago there was a lack of clarity in schools as to how acting appointments were to be filled. School Principals would make a recommendation to the human resources area of the department and often the Teachers who may have thought that they should be

> considered for the appointment might be extremely disgruntled because they may have thought that they had been unfairly overlooked. So one of the major reasons in agreeing to this policy and making it widely known throughout the organisation was that it would avoid a lot of grievances by having something clearly stated as being an agreed position between the Ministry and the Union which could be referred to whenever a school found itself in a position where it needed to recommend an appointment for an acting position. Equally, there are going to be times when because of unusual circumstances the Chief Executive Officer on the advice of either the school or from Officers in central office may need to vary these general principles."

The views he expressed appear to be generally consistent with the devolution strategy reflected in the agreement made between the Ministry and the Union.

In summary, then, the guidelines were intended to provide a means for decisions concerning acting appointments to be made at school level according to a formula which would alleviate the need to follow formal processes of the kind normally followed for appointment to permanent positions such as a definition of the job, references, detailed written applications and interviews and the like.

It seems that the agreement was not to take effect until it was confirmed in the Industrial Commission. Accordingly, as an interim measure, the Acting Director of Human Resources of the Ministry published a circular containing "information as to the selection processes to be complied with in filling acting positions." The circular to the Principal of the Leeming High School dated the 6th June 1990, being a school which qualified for an Acting Deputy Principal, reads in part:

> "All preliminary discussions should make it clear the planning will remain provisional until the memorandum is ratified. Nevertheless, it is clearly in the interests of schools to be able to begin such planning. I am therefore enclosing information as to the selection process to be undertaken in filling an acting position. You are requested, in particular to note:

(1) the different selection process to be undertaken for a Third General Deputy Principal position compared with that for a Deputy Principal or Programme Coordinator with specific areas of responsibility;

(2) the guidelines regarding the selection process where specific areas of responsibility are being nominated;

(3) the fact that acting appointments will be to the end of 1990 school year in the first instance."

The relevant information is set out in a document headed "Selection Procedures for Additional Acting Promotional Positions for 1990." The document states that these positions may be filled in either one of two ways. If the third deputy is to undertake a range of General Deputy Principal duties then she/he should be selected on the basis of present Acting Higher Duty guidelines as published in The Education Circular of April 1990. If the third deputy is to assume responsibility for a specific aspect of the school's operation then a duty statement should be drawn up and a selection procedure carried out in accordance with guidelines designed to ensure "fair and equitable access of all eligible applicants to advertised positions." These latter guidelines provide for the convening of a selection panel on which various interested parties with appropriate expertise are to be represented and contemplate that the selection made by the panel will be based on the information gained through the application and interview of the shortlisted candidates in accordance with designated criteria. In other words, the school based selection process clearly seeks to identify and prefer the candidate who is best equipped to fill the position rather than providing for appointment in accordance with the guidelines whereby total teaching service within the Ministry and, ultimately, seniority, may prove to be decisive.

It was against this background that the Complainant applied for the

position of Acting Deputy Principal at the Leeming High School. She was then aged 44 years. She had married young but owing to the ill health of her husband she commenced Teacher training in 1973 and graduated at the end of 1976 as a Home Economics Teacher. Her husband died in 1977. She taught at Thornlie Senior High School from 1977 until the end of 1982. She was promoted to Lynwood Senior High School as a Senior Teacher in 1983.

While at the Lynwood Senior High School she worked on curriculum packages for the Home Management studies and worked there until the end of 1988. During 1986 she was the Acting Deputy Principal (female). In 1989 she transferred to Leeming Senior High School as Senior Teacher of Home Economics. She said in evidence that she has been with the Education Department for fourteen years and it should be noted that owing to the fact that she had children prior to commencing her teaching career, and took up teaching at a later stage in life, her fourteen years with the Education Department represents continuous service.

It appears from the narrative set out above that the new Deputy Principal positions were to be filled in 1992 with selection taking place during 1991. In the meantime Acting Deputy's were to be appointed from within the school. These acting appointments were for the remainder of the 1990 year and were to be renewed for 1991 unless the enrolments at the school dropped below the required number.

At a staff meeting on the first day back after the semester break in July 1990 the Complainant was informed by the Leeming High School's Principal, Mr Pat McMannis, that there were two methods of appointing the Acting Deputy Principal. If the Third Deputy was to undertake a range of general

Deputy Principal duties then she/he was to be selected on the basis of present acting higher duty guidelines i.e. appointment to be on the basis of length of service in the teacher's current promotional position, total length of service and finally seniority.

If on the other hand the Third Deputy was to assume responsibility for a specific aspect of the schools operation then a duty statement was to be drawn up and a selection procedure carried out. The Principal's advice to those present was that this process was in accordance with the circular from the Ministry of Education which attached the guidelines for selection procedure. The Tribunal concludes that the advice given by Mr McMannis reflected and sought to carry into effect the recommendation contained in the circular of the 6th June 1990 referred to earlier.

The new Deputy Principal of the Leeming Senior High School was to be called the Deputy Principal (Curriculum). He or she was to look at special areas of need within the school for example English as a second language, programmes for talented students and programmes for low achieving students, as well as school development planning and coordination of the managing student behaviour programme. Because of this the staff voted to use the second selection process, that is, the school based selection process whereby the decisive factor was to be merit rather than length of service (or possibly seniority should the comparison between candidates proceed to that further point). The Ministry's recommendation of the 6th June 1990 was followed. The Complainant applied and was appointed and commenced in the new position on the 23rd August 1990.

There were two other applicants for the Acting Deputy position, both men.

One of these men, Mr Lawrence Sutton, had more years of service than the Complainant even though he is the same age as the Complainant. It seems from evidence given by Mr Ayling at the hearing that the Complainant may have been preferred because of her more substantial background in the development of curriculum.

Mr Sutton referred the matter to the Union. In his view, the guidelines published at page 67 of the Education Circular of April 1990 should have governed the situation, such guidelines having been endorsed by the agreement. On that basis, having more years of service than the Complainant, he would have obtained the appointment. His stance led to the Union initiating an appeal against the Complainant's appointment to the Western Australian Industrial Relations Commission. The ground of the appeal was that the Ministry had failed to comply with the terms of the agreement in the appointment of the Acting Deputy Principal (Curriculum) because it had failed to apply the requirements of the agreement. A conference was held before Commissioner Kennedy of the State School Teachers Tribunal on the 6th September 1990 from which Commissioner Kennedy made a recommendation that the guidelines represented an agreed policy and formed part of a total agreement between the Respondents which should be honoured. Thus as a result of the appeal the Ministry appointed Mr Sutton to the Acting Deputy Principal (Curriculum) position. It is common ground that this appointment was inevitable in the event of it being determined that the guidelines governed the situation because Mr Sutton undeniably had a longer total length of service than the Complainant in these proceedings, Ms Kemp.

The Ministry of Education may have assumed, following the appeal which

resulted in Sutton being appointed in her place, that the Complainant would simply step down, but she did not do so. She was determined to retain the position and was supported in her claim by the Principal of the school. The Principal negotiated with the Human Resources Services Branch of the Ministry and the Complainant was allowed to keep her position until the end of 1990. Prior to her complaint to the Equal Opportunity Commission she was told she could not keep the position for 1991.

Although the original appointment to the acting position was until December 1990, it was indicated in the Complainant's letter of appointment that unless the enrolments for the 1991 school year dropped below the required number then she could expect the appointment to be renewed. When the substantive position is advertised her evidence is that she intends to apply for it. Although it is obviously not the only factor to be taken into account, it is likely that experience gained in the Acting Deputy Principal position will be of assistance to the applicant. She said in evidence that she was the only female Senior Teacher at the school who was eligible for the position. Shortly before the hearing commenced it was agreed between the parties that the Complainant would retain her position until the end of first term in 1991. This step was taken in the expectation that the Tribunal's ruling would be available by then.

The Tribunal pauses to note that although the Ministry was not directly responsible for application of the guidelines contained in the agreement - this being the result of an appeal initiated by the Union on behalf of Mr Sutton - the Ministry had an influential role in the matter. At the hearing before the Equal Opportunity Tribunal it was conceded by Counsel for the Ministry that so long as the policy reflected in the guidelines

existed, with the Ministry being a party to an agreement approving the policy, then there was a real likelihood that at some stage the policy would have to be applied. It follows that both Respondents must take responsibility for the application of the policy to the circumstances of this case. The crucial question is whether the policy reflected in the guidelines discriminated against the Complainant in the circumstances of the present case on the ground of her sex.

Section 8 of the Act provides:

" (1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if by reason of:

(a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person.

the discriminator treats the aggrieved person less favourably than in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply.

(b) which is not reasonable having regard to the circumstances of the case and

(c) with which the aggrieved person does not is not able to comply."

Section 11 then goes on to deal with discrimination in work and provides:

> "(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy.
>
> (a) in the arrangements made for the purpose of determining who should be offered employment;
>
> (b) in determining who should be offered employment or
>
> (c) in the terms or conditions on which employment is offered.
>
> (2) It is unlawful for an employer to discriminate against an employee on the grounds of the employees sex, marital status or pregnancy.
>
> (a) in the terms or conditions of employment that the employer affords the employee;
>
> (b) by denying the employee access or limiting the employees access to opportunities for promotion, transfer or training or to any other benefits associated with employment;
>
> (c) by dismissing the employee or
>
> (d) by subjecting the employee to any other detriment."

The Act also provides in Section 5 that a reference in these provisions to the doing of act by reason of a particular matter includes a reference to the doing of an act by reason of two or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act. By Section 6 the Act binds the Crown.

In the present case the Complainant says in the points of claim filed on her behalf that she has been unlawfully discriminated against in the terms or conditions of employment that the First Respondent affords the Complainant by denying the Complainant or limiting her access to opportunities for promotion, transfer or a benefit associated with her employment and by subjecting her to a detriment contrary to Section 11 of

the Act. She says that it is a characteristic that appertains generally to females that they have children and have the main responsibility for child rearing. As a result a female is more likely to have a shorter period of total teaching service than a male and less seniority. She alleges that the Ministry treated the Complainant less favourably to males when it applied the policy contained in the guidelines published in The Education Circular of April 1990 to the Acting Deputy Principal position.

She goes on to refer to the past policies of the Ministry mentioned earlier including the "breadwinner" policy and the promotional policy favouring persons prepared to work outside the metropolitan area, and states that as a result of such matters a substantial proportion of the females who are employed as Teachers by the Ministry are less able to comply with the policy than males who are employed as Teachers by the Ministry. She refers to the fact that she did not commence service with the First Respondent until the age of 30 as a result of child bearing and child rearing responsibilities, and to the fact that Mr Sutton who is the same age as the Complainant, namely, 44 years of age, did not delay commencement of service with the First Respondent because of child bearing and child rearing responsibilities. The Complainant says that Mr Sutton was able to comply with the policy contained in the guidelines or policy in relation to the Acting Deputy Principal position but she was not able to do so. It is pleaded that the policy is not reasonable in the circumstances.

The Complainant also asserts that when the Union enforced the agreement with respect to the Acting Deputy Principal position to which the Complainant was appointed it caused, instructed, induced and aided the Ministry to unlawfully discriminate against the Complainant. She says that

as a result of the unlawful discrimination she has suffered loss and damage in that when she was appointed to the Acting Deputy Principal position she had a reasonable expectation of retaining that position until it was filled on a substantive basis in 1992. By enforcing the policy in relation to the said position the Respondents denied the Complainant the opportunity of gaining relevant experience which would assist her in competing for the substantive position in 1992. The Complainant contends that she will lose the difference between the salary of a senior teacher and Acting Deputy Principal if she is unable to continue to act in that position.

This pleading must be read in light of the fact that the parties have now agreed, as an interim measure, that the Complainant will retain her position until the end of the first term in 1991. It follows that to date the Complainant has not suffered any financial detriment. However, the real matter in issue concerns the application of the policy reflected in the guidelines and the further question of whether the Complainant will be denied the opportunity to obtain experience as an Acting Deputy Principal which may assist her application in respect of the substantive position in due course.

By their Points of Defence both respondents deny liability. The Ministry denies that the policy is discriminatory and denies that the policy is not reasonable in the circumstances. It says that the requirement that females resign on marriage ended in 1968 and did not ever affect the Complainant. She has never been affected by any breadwinner policy, and that policy ended in any event ended in 1984. She has not been required to work outside the metropolitan area. By its pleading the Ministry agrees that as regards senior high school positions the policy has resulted in 12 out of a

total of 14 appointments going to male teachers, while in 11 primary schools 5 out of 11 appointments went to male teachers.

The figures showing the proportion of males/females appointed to Third Deputy Principal positions were amended and set out in greater detail at the hearing. The figures reveal that the total Teachers/Senior Teachers employed by the Ministry as at the 16th February 1990 on a full time basis were 4,288 males and 7,183 females. In regard to Third Deputy Principal appointments (which the Tribunal understands to be to the status of Acting Deputy Principal) the position was that 12 males and 2 females were appointed to such positions in Senior High Schools and 6 males and 4 females were appointed to such positions in primary schools. The percentage of total appointments in the case of males was 0.419 and for females was 0.083.

During the course of argument reference was made to the decision of the High Court in Australian Iron and Steel Pty Ltd v Banovic (1989) EOC 92-271 ("AIS"). In that case the First Respondents were eight women iron workers who on or after the 30th September 1980 obtained employment with the Appellant Company. Some of them were dismissed in 1982 when employees were retrenched on the basis of "last on first off". Until 1980 the Company pursued recruitment practices that resulted in women constituting only a very small proportion of its iron worker workforce. Thereafter the number of women employed as ironworkers increased in absolute numbers and also as a proportion of the total iron worker workforce. In dealing with provisions corresponding to Sections 8(1) and 8(2) of the West Australian Act the Court held that the practice of the Company was discriminatory.

A number of general points emerge from the AIS case. Sec. 24(1) of the Anti-Discrimination Act 1988, (N.S.W.) which corresponds to Sec. 8(1) of the W.A. Act, refers to direct discrimination while as Sec. 24(3), which corresponds to Sec. 8(2), refers to indirect discrimination. The presence of the latter provision weighs against Sec. 24(1) being given a broad application as happens in the United States and Canada, but a requirement may fall within Sec. 24(3) even though it is apparently non-discriminatory (sometimes referred to as "facially neutral").

A requirement or condition means a stipulation which must be satisfied if there is to be a practical (and not merely a theoretical) chance of selection. See also Styles v Department of Foreign Affairs and Trade (188) 92/265. In determining whether more men than women comply with the requirement Sec. 24(3) demands that a comparison be made between the compliance rates for each sex but not by merely comparing the raw figures of each sex who comply (because, in the case of a sexually imbalanced work force, such a comparison might give a distorted result). The proportion of men who comply must be compared with the proportion of women who comply. It is therefore necessary to determine the appropriate group or base pool within which to calculate the proportions to be compared.

The High Court held that the decision to select a particular base group involves a question of law which is to be determined by the Tribunal. Depending on the circumstances the base group could be as broad as the entire population of a state divided into males or females but is more likely to be identified by reference to the particular activity or work force under notice although, as was held by a majority of the High Court in the AIS case, where selection of the work force as a base group might mask

the effect of a previous discriminatory practice it may be necessary to confine the base group to a portion of the work force (notwithstanding, as was noted by the dissenting minority Brennan J. and McHugh J. that this would have the effect of adding to the express language of Sec. 24(3)(a) such words as "not being proportions which are affected by previous acts of discrimination").

Dawson J had this to say at page 77737:

> "Section 24 (3), which defines indirect discrimination, has a much wider application and covers discrimination which is revealed by the different impact upon the sexes of a requirement or condition. The starting point for Section 24 (3) must be the identification of the requirement or condition. Upon principle and having regard to the objects of the Act it is clear that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees....Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision....The requirement having been identified, Section 24 (3) then demands that a comparison be made between the compliance rates for each sex, in order to determine whether a substantially higher proportion of persons of the opposite sex to the sex of the Complainant comply or are able to comply. There is more than one possible method of making the comparison....Where, as in this case, the men employed outnumbered the women by a ratio of fifteen to one, it was only to be expected that the number of men who complied with any condition, however genuinely neutral or non-discriminatory, would greatly outnumber the number of women who could comply. Upon this approach, the fact that sexes in a workforce are unequal is itself a significant factor in determining whether a requirement imposed upon that workforce amounts to discrimination within the meaning of Section 24 (3) regardless of whether or not that inequality is the result of a prior discriminatory practice. Such an approach could only be justified by treating Section 24 (3) as being aimed at discouraging workforces in which the sexes are unequally represented and there is, in my view, no basis for interpreting the subsection in such a far reaching manner. Obviously, the reach of the subsection was intended to be far less ambitious and to extend only to discriminatory requirements or conditions imposed upon a workforce, whether the sexes in the workforce happen to be unequal or not. The subsection was not intended to embrace requirements which are truly non-discriminatory and it must, therefore, require something more than a direct comparison between the number of men who comply and the number of women who comply with a requirement imposed by an employer."

The passage just quoted shows that Sec 24 (3) is to be seen as requiring a

calculation which will reveal whether sex, as distinct from the sexual composition of the group, is a factor influencing the number of complying men as compared with the number of complying women. For that purpose it is necessary that the number of complying men be ascertained as a proportion of other men and that complying women be ascertained as a proportion of other women. Dawson J. noted that a broad approach to the determination of a base group was adopted initially in Price v Civil Service Commission (1977) 1WLR1417. In that case an industrial tribunal dismissed a complaint by a female civil servant that she had been discriminated against by imposition of an age requirement. The industrial tribunal adopted as the appropriate base group the whole population of England, divided into males and females, and held that the proportion of women within the specified age group was not considerably smaller than the proportion of men. In allowing an appeal the Employment Appeal Tribunal considered that the base group might better have been restricted to qualified men and women of the relevant ages. In the AIS case Dawson J. concluded that a base group should be selected consisting of those employees who applied for employment at about the same time as the complainant i.e. a comparatively small portion of the work force.

In the present case it was argued on behalf of the Respondents that by definition the length of service criterion reflected in the guidelines will favour those who qualify and commence their teaching careers immediately after leaving school over those who enter teaching later because of a career change, late commencement, prolonged study or other reasons. Older teachers over younger teachers. Those whose service is continuous or substantially continuous over those who interrupt their service. Those who teach full time over those who teach part time, part time teaching counting

towards length of service only on a pro rata basis. The criterion of length of service, it was suggested is neutral on its face as between men and women, married and single. Further, in giving preference to the experienced over the inexperienced it is reasonable and accords with common notions of justice and fairness, particularly when it is kept in mind that the criterion is used for appointment to acting and relieving positions and not for substantive promotion.

The Tribunal sees the matter in a different light. As Dawson J. indicated in the AIS case, when an allegation of indirect discrimination is raised pursuant to a provision one must begin by ascertaining whether a requirement or condition exists which might arguably be applied in a discriminatory manner. The concept is broad enough to embrace any stipulation which must be satisfied if there is to be a practical (and not merely a theoretical) chance of selection. In the present case, any qualified senior teacher could theoretically be appointed to the position of Acting Deputy Principal, but the Tribunal is satisfied on the evidence that the Ministry's minimum requirement or stipulation in practical terms, having regard to the devolution policy embodied in the agreement, was that the appointee be a senior teacher with a substantial period of full time teaching service. The guidelines contemplate, however, that where there is a contest between two suitably qualified candidates, all other facts being equal, the minimum requirement may not be enough. The issue may have to be resolved by reference to length of service and seniority. In such a case, in practical terms, the requirement was that the appointee be a senior teacher whose total length of service and seniority exceeded that of any other candidate in the field. The only way of giving precise expression of such a concept is to use the maximum or strongest hypothetical case allowed

by the guidelines as a yardstick, that is to say; the requirement is that the appointee be a senior teacher with a substantial period of uninterrupted full time service. It is inherent in the guidelines that such a teacher will have the best prospects of success, and he or she will have even better prospects of success if he or she commenced teaching early in adult life and has been teaching since commencement without interruption.

Once the condition or requirement has been identified a comparison must then be made between the compliance rates for each sex by selecting an appropriate group or base pool within which to calculate the proportions to be compared, this being a question of law for the Tribunal. In the present case, for much the same reasons as were adverted to by Dawson J., it would not be appropriate to take the population of the state as a base group because this would be too broad. A more suitable choice would be to take the workforce in question that is to say the teachers employed by the Ministry. In that way one narrows the base group to the particular group of persons to whom the requirement is directed. The figures before the Tribunal showed that as at the 16th February 1990 the total teachers/senior teachers employed by the Ministry on a full time basis were 4,288 males and 7,183 females. These figures illustrate the danger addressed by the majority of the High Court in the AIS case of comparing raw figures in circumstances where there is a sexually imbalanced work force owing to the nature of the particular activity. It might well emerge on a comparison of raw figures that more female teachers than male teachers could comply with the condition but this would be largely due to the fact that there were more women than men in the particular work force. What is required is a comparison which will reveal whether sex is significant to

compliance, and that involves ascertaining the number of complying men as a proportion of other men within the base group and the number of complying women as a proportion of other women.

The Tribunal did not have before it figures showing precisely what proportion of the 4,288 males comprising the base group just mentioned were male teachers able to comply with the condition or requirement in question, that is to say, that an Acting Deputy Principal be a senior teacher with a substantial period of uninterrupted full time teaching service, and what proportion of the 7,183 female teachers comprising the base group were able to comply. However, it emerges from a consideration of the agreed statement of facts and the other materials tendered to the Tribunal including especially the Report of the Equal Opportunity Survey of the Ministry of Education of 1988 that a much higher proportion of men (considered as a percentage of all male teachers) would be able to comply than women (considered as a percentage of all female teachers) because a greater number of women than men are likely to break service and be out of the workforce for periods of time, for purposes of child bearing and child rearing. This conclusion is reinforced to some extent by an examination of what actually occurred in the present case. The updated figures show that, at a time when guidelines allowing for total length of service and for seniority to influence appointments as Acting Deputy Principal were in force, 12 males and 2 females were appointed to such positions in senior high schools and 6 males and 4 females were appointed to such positions in primary schools. The percentage of total appointments in the case of males was 0.419 and for females was 0.083.

As in the AIS case, however, a question arises as to whether selection of

the workforce of the particular employer as a base group is casting the net too widely. As Dawson J. noted in the AIS case where a requirement is imposed upon an existing group of employees, the relevant base group may be the class of employees affected. Where a requirement is contained in a published offer of employment, the relevant base group may be made up of a narrower class, namely, those who might be expected to take up the employment based upon geographical, educational and other constraints. The latter view may arguably be more akin to the circumstances of the present case because what is being offered is an internally advertised position available to only a portion of the total work force. In other words, those likely to apply for the position could be characterised as senior teachers with a substantial length of service.

The difficulty is, however, as appears from the statement of agreed facts, that out of any group of teachers appointed at the same time, the men are more likely to have a greater total length of service than the women. A greater number of women interrupt their service for the purposes of child bearing and rearing. Selection of a base group of the kind now being considered would produce a distorted result because such an approach, by excluding a large number of women who had interrupted their career for domestic purposes, would mask the reality that it is generally more difficult for a woman to amass the same amount of teaching experience as a male teacher of her own age. The Tribunal therefore, concludes that in the circumstances of this case that the appropriate base group within which the proportions are to be calculated is the full time teaching staff employed by the Ministry.

As emerges from earlier discussion, although a comparison of raw figures

might suggest that as many women as men have the necessary length of service and seniority to qualify for appointment, this being due to the sexual imbalance of the workforce, it appears, in the case of a contest between two otherwise equal candidates that a substantially higher proportion of men will be able to comply with the requirement, that the appointee be a senior teacher with a substantial period of uninterrupted full time service. Accordingly, prima facie, subject to the comments which follow concerning reasonableness of the policy and the circumstances of the complainant in the present case, the policy reflected in guidelines is discriminatory.

According to Section 8(2) of the Act a person discriminates on the ground of sex if the discriminator requires the Complainant to comply with a condition with which a substantially higher proportion of the persons of the opposite sex comply or are able to comply and which is also not reasonable having regard to the circumstances of the case.

In looking at the concept of reasonableness in the circumstances of the present case the Tribunal refers to evidence and observations touched on earlier. There has been a gradual recognition within the Ministry that women must be given a greater opportunity to assume decision-making roles and positions of authority within the school system. The Ministry itself appears to accept that the school system has an important role to shaping attitudes and it is necessary and desirable that in the modern age, steps are taken to ensure that women teachers are accorded a status equal to their male colleagues hence. The Ministry has taken affirmative action to ensure that Deputy Principal positions be gender linked with one Deputy Principal of each sex being required. It follows that a policy which might

obstruct the movement of women into senior positions such as an Acting Deputy Principal in the present climate of opinion and practice is not reasonable. The fact that the appointment is to an acting or temporary position does not alter this conclusion because there is force in the Complainant's contention that experience gained in the temporary position may influence the substantive permanent appointment.

The Tribunal has now reached a point where it is apparent that two of the three constituents of discrimination exist in the circumstances of the present case, namely, there is a condition or requirement with which a substantially higher proportion of men comply or able to comply (section 8(2)(a)) and this is not reasonable (section 8(2)(b)). But can it be said that the third constituent is present also, namely, that the complainant does not or is not able to comply with the condition or requirement (section 8(2)(c)). The Tribunal considers that the policy will certainly be discriminatory as against female teachers who commenced teaching early in adult life but were obliged to interrupt their career for child bearing and rearing because, in the case of a contested application involving male teachers of the same age who also commenced teaching early in adult life, the agreed statement of facts reveals that in such a case the guidelines will favour the male teacher as a direct consequence of the female having interrupted her career. Can this be said of the Complainant in the present case? It might be argued that she does or is able to comply with the requirement. She started her teaching career at a later stage in life. She had children before commencing her career. At the time of the application she was a senior teacher with fourteen years of uninterrupted full time service to her credit, and her prospects of success according to the guidelines would therefore be equal to a male colleague who commenced

teaching in the year that she commenced. It became apparent, however, in the course of defining the condition or requirement applicable to a contested application that what is a substantial period of uninterrupted full time service will depend upon the circumstances and upon what is sufficient to establish an entitlement to the position sought, having regard to the total length of service and seniority of the other candidates. When the guidelines were applied to the Complainant's situation her length of service and seniority did not exceed the length of service and seniority of one of the other male candidates, Mr Sutton and were not sufficient. The Tribunal considers that in the context of the present case the complainant did not or was not able to comply with the condition or requirement because she did not have a period of uninterrupted full time service that was substantial as compared with a male candidate of her own age who was able to and had commenced teaching earlier in adult life. That she was unable to comply with the requirement necessary to obtain the appointment is demonstrated by the fact that when the guidelines were applied the male candidate of her own age had a superior claim to the position.

In the circumstances of the present case, then, the Tribunal concludes that the policy complained of is discriminatory because by providing for length of service and seniority as criteria the guidelines must inevitably weigh against the claims to a senior position of a woman such as the Complainant who has not been able to amass the same years of continuous service as her male counterpart because of a characteristic that appertains to her sex, namely, to use the language of the agreed statement of facts, a greater number of women than men are likely to break service and be out of the workforce for periods of time, for purposes of child bearing and child

rearing. In light of the aims and objectives being enforced by the Ministry the policy in question, which still partially reflects the habits of an earlier era, cannot be characterised as 'reasonable' within the language of the Act because the Ministry itself is gradually seeking to change the status quo.

Section 127(b)(iv) of the Act permits the Tribunal to make an order declaring void in whole or in part any agreement made in contravention of the Act. It follows from a finding that the policy contained in the guidelines is discriminatory in the circumstances of this case that a declaration will be made by the Tribunal that as from the making of the agreement the guidelines were void and of no effect in respect of appointments as Acting Deputy Principal. It seems to follow that the Complainant's original appointment, which was made pursuant to criteria enunciated in the circular letter of the 6th June 1990, remains valid and cannot be upset by application of a policy which infringes the Act. The claim for compensation was not pressed at the hearing and the Tribunal makes no orders in that regard. As consequential orders may be required the Tribunal will allow to each party general liberty to apply.