

JUDGEMENT

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 8 of 1992

**WENDY SPEERING
Complainant**

- against -

**MINISTRY OF EDUCATION
Respondent**

**BEFORE: Ms C. O'Brien (Deputy President)
Ms B. Buick (Member)
Ms P. Harris (Member)**

**Counsel for the Complainant - Ms H. Andrews
Appearing for the Respondent - Mr J. Ayling**

HEARD: 2 and 7 APRIL 1993

REASONS FOR DECISION

(Delivered: 14 MAY 1993)

The Complainant, Wendy Speering, is a teacher and has been since 1975. She is employed by the Ministry of Education ("the Respondent"). The Respondent is a body corporate within the meaning of Section 5 of the Education Act 1928. At the relevant time (1990-1992) the Complainant was employed as a part-time teacher by the Respondent and was classified as a temporary teacher.

In July 1990 the Respondent introduced measures by which temporary teachers could achieve permanent status. The Complainant says that she has been discriminated against by the Respondent's policy of requiring temporary teachers to complete a years probation by working full-time. In essence she says that that condition discriminated against her on the ground of her sex and/or a characteristic that appertains generally to her sex contrary to Section 11 of the Equal Opportunity Act ("the Act").

The Complainant's allegation of discrimination relates to the Respondent's policy which was introduced in July 1990 and amended (to remove the alleged discriminatory aspect) in August 1992. Accordingly, she asserts that over an approximate period of two years she was discriminated against by the Respondent.

THE COMPLAINANT'S PERSONAL AND TEACHING BACKGROUND

The Complainant is a highly qualified professional teacher. She completed a Bachelor of Arts at the University of Western Australia in 1973. She then attended Claremont Teachers' College where she completed a Teachers' Certificate in 1974. In 1975 she

completed by external study at the University of Western Australia a Diploma in Education. In 1990 the Complainant commenced a Masters Degree in Education Management at the University of Western Australia which she completed in mid 1992. This degree was undertaken by part-time study.

In 1972, before graduating, the Complainant married Patrick James Speering. In 1975 the Complainant commenced her employment with the Respondent at the Dampier Primary School. After two years of full-time employment she achieved permanent status as a teacher. In 1977 the Complainant requested a transfer to Perth. This was granted and she and her husband moved back to Perth.

The Complainant then commenced teaching at Brookman Primary School in mid 1977. This school was classified a priority school in the Priority School Programme ("PSP"). The Complainant testified that the school was in a low socio economic area and that the job was very stressful.

At the end of 1978, the Complainant applied for and was granted twelve months accouchement leave without pay and in February 1979 she gave birth to a baby boy. At that time the Respondent only allowed twelve months accouchement leave. The birth of her first child was difficult and the Complainant spent two months in hospital after the birth. The child was not a well baby being asthmatic and colicky. At the end of the twelve months, the Complainant said that she was faced with three choices - she could return to work full-time, resign and stay at home, or resign and take up part-time work as a temporary teacher.

The Complainant testified that she was keen to maintain her career but also to fulfil her *"family responsibilities"*. Accordingly, she resigned from her employment with the Respondent and took up part-time employment.

Before doing so, the Complainant investigated the child care options at the time and said that they were limited. She did not consider that they were suitable for the needs of her child as he was *"not a well child"*. The child's grandparents were not able to provide child care, at least not on a full-time basis. The Complainant testified that her husband (who is by training an Industrial Chemist) was in a very responsible job and worked a lot on weekends and very long hours.

From 1980 until 1981 the Complainant worked part-time at the Southwell Primary School. Thereafter, from 1982 until 1984 she worked as a relief teacher. This meant that she could be called at any time and at short notice to fill in for a teacher who was absent from class for some reason. The Complainant found this very difficult with a young child to care for but felt that this was a way of keeping in touch with her profession.

The Complainant's second child, another boy, was born at the beginning of 1984. She was not entitled to accouchement leave being a temporary teacher so she stopped work altogether. Accordingly, she broke her continuity of service and lost her entitlements to long service leave. The Complainant worked for a short time towards the end of 1984. She testified that there was no possibility of her returning to work full-time as her husband's work commitments were becoming increasingly more demanding.

In 1985 the Complainant worked at the Langford Primary School on a part-time basis, doing occasional relief work and for about six weeks during that time she worked full-time.

In 1987 through 1988, the Complainant continued to work part-time at the Leeming Primary School which her elder son then attended. In each of these years she worked for a term or so full-time. The Complainant testified that she was able to do this as her responsibilities to her elder son could be fulfilled at the same time as her teaching because he was attending the same school. Further, as she was reliant on the goodwill of the Principal in being asked to do relief work, she wanted to indicate her availability and reliability in that regard. However, she found full-time work to be very stressful and said that if her son had not attended the same school then she would not have been able to cope with the full-time work.

In 1988, the Complainant took up a part-time position at the West Leeming Primary School where she has taught since on a part-time basis. At that time she was requested to fill in full-time for a teacher who was on accouchement leave. However, because her son was not at that school and because her husband was changing jobs, becoming busier and travelling interstate because of his work, she found that she could not meet the necessary requirements and decided not to work full-time again and has not done so. She testified that her circumstances have not changed and that she is still not in a position to work full-time.

When her elder son started school the Complainant's younger son attended day care and

in 1988 he attended Kindergarten two half days a week and in 1989 was in pre-school.

The Complainant's husband described his wife's attitude to her teaching as conscientious, dedicated and professional. He described her as being career minded. He also described her feelings of frustration as she saw her contemporaries *"move up the line"*. Over the years the level of his wife's frustration built up leading to irritability and lack of sleep. He described her as often taking out her feelings of frustration on him and the boys. Mr Speering testified that a couple of times in the last year his wife went to the doctor about her stress and anxiety.

In recent years, Mr Speering has been the Operations Manager of a company in Western Australia and he testified that his job would have suffered had he assisted his wife in the day to day responsibilities of looking after the children. He said that that would have been seen by the management in his company that he was not committed enough to his job. He was working about sixty hours a week and if he had to take time off this would not have been seen in a good light by management.

The Complainant gave evidence about the disadvantages of being a temporary teacher. She said that there was a lack of continuity of employment which meant that her employment finished on the last day of the school year and often it was not until the beginning of the next school year or sometime during the holidays that she was notified whether she would be employed in the following year. She described that as being *"a very stressful end of year, a very stressful vacation time, wondering whether you had a job or not, if you had a job where was it going to be and what was it going to be. It meant that you couldn't plan for future income, you didn't know whether you were going*

to have an income or what proportion of a full-time worker's income it would be, so it was very difficult to plan from that point of view. It made the holidays very stressful and made it difficult to relax over the holidays; it made it difficult to go away because you felt you had to be near the phone, you had to be available in case somebody rang you up and asked you if you wanted a job. That was one big disadvantage."

The Complainant also referred to the requirement for temporary teachers to submit a Temporary Teacher Return every year to the Ministry. The Principal was required to fill out an appraisal form and rank the teacher on a scale from 1 to 5 and then periodically the temporary teacher would be required to undergo a "*very rigorous assessment procedure*" which permanent teachers were not required to undergo. The Complainant testified that this "*... is very stressful and makes you feel as if you are on show all the time, it makes you feel that you can't relax.*" In fact apart from one year when the Complainant was ranked 4/5, all her other rankings were 5, which was the highest ranking.

Further, the Complainant testified that permanent teachers were preferred when it came to sending teachers on professional development courses. The Complainant felt that being overlooked for these courses meant that her career opportunities in the future would be lessened. She testified that she had been rejected on "*one or two occasions*". She cited an example of wishing to attend a particular conference but because she was a temporary teacher she had to do so on a non-working day and pay for it herself.

She also stated that permanent teachers were preferred for membership on school

committees because of the uncertainty that the temporary teachers would be at the school the following year. If a temporary and permanent teacher volunteered to be a convenor of a committee, the permanent teacher would be appointed in the interest of continuity.

Job opportunities at the Ministry's central office were confined to permanent teachers and accordingly the Complainant's opportunities for work outside a school with the Ministry were "*non existent*".

As far as her personal life was concerned, the Complainant testified that she has worked under stress for many years believing that she has to "*perform all the time*". She said that especially towards the end of the year she gets irritable and has had difficulty sleeping and at times gets quite depressed.

The Complainant testified that the advantages of permanent employment include continuity of employment from one year to the next. It entitles the teacher to apply for leave without pay, study leave, employment within the Ministry's central office, and promotion. It also changes the status of the teacher insofar as the Complainant is concerned within a particular school's staff and by way of example the Complainant again referred to the preference for permanent teachers on school committees.

In 1990 the opportunity to achieve permanency was introduced requiring, inter alia, working for a probationary period of one year full-time. The Complainant testified that her circumstances had not changed that she "*still had very many family responsibilities and a very busy husband*". Thus she was still unable to work full-time. She said that her

two boys were very involved in extra-curricular activities and she believed that at least one of them would have a sporting career. This boy is an excellent athlete and his *"out of school activities are almost every day and his weekend activities are also very hectic"*. Working part-time enabled the Complainant to help out in the class-room when required (at her son's school), attend to her sons' dental appointments in school time and she felt that this type of activity was part of the *"parents' responsibilities in bringing up children"*. Her husband, because of his work commitments, considered that he was unable to assist her in these parental responsibilities.

In August 1992 the conditions relating to eligibility for appointment as permanent staff changed again. This will be considered in more detail below. In essence, though, the requirement to serve the probation period of one year full-time was amended so that the probation period could be served by teaching part-time at 40% (0.4) of a teaching load or more. The Complainant testified that she considered she would be able to comply with that condition and *"... successfully juggle my family responsibilities with my career, and so I subsequently applied"*.

On 12 March this year, the Complainant was advised that she had been appointed to the permanent-on-probation category. That means if she complies, inter alia, with working part-time for a year at 0.4 or more she will achieve permanency. So in fact, the alleged discriminatory policy no longer exists.

Following the announcement in 1990 of the Respondent's strategies relating to achieving permanency, the Complainant wrote to the Respondent on 11 July 1990 in effect outlining

her grievances with the strategy. The reply from the Minister for Education dated 27 July 1990 focussed on the progressive implementation of strategies to assist temporary teachers achieve permanency.

THE POLICIES OF THE MINISTRY OF EDUCATION

In 1988, the Respondent published a review of the Temporary Teacher Appraisal Procedures. It was a key finding of that review that there was dissatisfaction amongst temporary teachers with permanency requirements. Indeed, the Taskforce report acknowledged that *"lack of permanency is a major barrier to the career aspirations of large numbers of teachers and is discouraging to potential entrants to teaching. It also adds to instability of school staffing and restricts the ability of schools to plan from year to year"*.

In 1990 strategies were introduced to assist temporary teachers in achieving permanent status.

Prior to November 1968, women were obliged to resign their employment as teachers upon their marriage thereby losing their permanent status. In March 1990 as part of the Respondent's strategies to improve the lot of temporary teachers, it was announced that teachers affected by the *"marriage bar"* were to have their permanency reinstated. Since then, 176 eligible teachers have had their permanency restored. Prior to 1990 an essential criterion for (but impediment to) permanency was, availability for statewide appointment. In 1990 there was also the introduction of procedures whereby long standing temporary teachers located in one particular country area could apply for

permanency and long serving metropolitan temporary teachers could apply by making themselves available to teach in an "*area of need*" metropolitan school. The Complainant sought to comply with the latter strategy. Complete details are outlined in the Education Circular of July 1990. It is clear from the circular that certain prerequisites were required before a teacher could achieve a permanent appointment. Although it was not specifically conceded by the Respondent, no arguments were advanced to contest the Complainant's assertion that these prerequisites fell within the meaning of "*a requirement or condition*" in Section 8(2) of the Act. The Tribunal has no hesitation in so finding. Indeed, the wording in the Education Circular itself supports the finding.

In brief, the conditions for eligibility to achieve permanent status were (relevantly insofar as the Complainant was concerned):

1. The completion of at least three years continuous service at 1 February 1990 in order to be eligible to apply. (It was uncontested that the Complainant fulfilled that requirement);
2. Part-time teachers were required to complete a probation period full-time;
3. The period of probation was one year;
4. Teachers had to make themselves available for appointment to a PSP school which was situated in an area of need;

There were other factors affecting permanent appointments such as selection on the basis of merit and the permanent establishment figure.

Of these conditions, the Complainant complains of the second and third listed conditions namely, the requirement that the probation period of one year be completed on a full-time

basis (hereinafter referred to as "the requirement").

In her Points of Claim the Complainant alleges

12. *The Respondent has unlawfully discriminated against the Complainant on the ground of her sex and/or a characteristic that appertains generally to her sex;*
 - a) *in the terms and conditions of employment that the Respondent affects (sic) the Complainant;*
 - b) *by denying the Complainant and limiting her access to opportunities for promotion, transfer or a benefit associated with her employment;*
 - c) *by subjecting her to a detriment contrary to Section 11 of the Equal Opportunity Act 1984*

Particulars of the Complainant's claim included:

...

- (ii) *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 less likely to be able to work full-time and substantially fewer females can comply with a requirement of working full-time than males.*
- (iii) *The Respondent treated the Complainant less favourably than males when it applied a condition or requirement that long standing temporary teachers must be able to work a minimum of one year full time in order to obtain permanency.*
- (iv) *A greater proportion of temporary teachers are female rather than male. Temporary teachers suffer detriment and less favourable terms and condition of employment;*
 - a) *no security of tenure;*
 - b) *no access to government superannuation; (This was not pressed as the Complainant mistakenly believed this to be the case)*
 - c) *continual assessment even when very experienced;*
 - d) *no career path or promotional opportunity;*
 - e) *reduced job satisfaction.*

(v) *The condition or requirement is not reasonable in the circumstances.*

The Complainant further asserted that in effect the requirements for a permanent-on-probation appointment included the requirement to serve three years in a metropolitan school before being eligible for transfer. However, despite the apparent ambiguity of the wording in the Education Circular of July 1990, the Tribunal accepts the evidence of Mr Robert Boyd (a Senior Personnel Officer working with primary personnel) who was called on behalf of the Respondent. He testified that the three year service is applicable only to full-time teachers and those teachers who achieved permanent-on-probation status would at the end of the full-time probationary period of one year be eligible to apply for a part-time appointment in a school other than one in which the probationary period was undertaken. Mr Boyd testified that such a move would not be classified as a transfer as such because of the Principal's recommendation that the teacher be appointed to another school as a part-time teacher.

A Ministerial Taskforce was set up following the appointment of a new Executive Director for Human Resources. Ms Lynette Cheryl Genoni, a Senior Policy Officer in Equal Opportunity employed by the Respondent, testified that at the time the Respondent focussed in the area of human resources more on operational matters such as paying and transferring staff and there was not much emphasis on *"future planning policy perspective to human resources"*.

The Ministerial Taskforce reported in November 1990 (Exhibit 13 is chapter 8 of the Report entitled "Increasing the Opportunities for Permanency for Temporary Teachers). In that context, the report indicates that statistics show that:

- . 30% of temporary teachers are in country schools and 21% of country teachers are temporary;
- . 87% of temporary teachers are women (this is quite disproportionate as women comprise 70% of all teachers and 64% of permanent teachers); and
- . 47% of temporary teachers are part-time compared with 9% of permanent teachers and 18% of all teachers.

We further consider this document later in this judgement.

Ms Genoni testified that whilst the Respondent acknowledged that it was desirable for temporary teachers to become permanent, a strategy needed to be worked out. Factors to be considered included the logistics of organising approximately 22,000 employees of the Respondent, negotiations with "*key stakeholders*", such as the Union, economic considerations in putting resources towards policy development of that kind and operational issues.

Much of Ms Genoni's evidence focussed upon the advantages to the Respondent in staffing PSP schools with skilled staff.

However, in none of the material tendered to the Tribunal nor indeed in the oral evidence was there any cogent or logical explanation as to why there was the requirement to serve the probationary period full-time. Ms Genoni referred to the need to introduce strategies to assist temporary teachers achieve permanency progressively. But there was no explanation as to why the requirement was necessary in the progressive introduction of the strategies or why generally it was necessary. The 1990 report of the Ministerial Taskforce (Exhibit 13) simply referred to the reduction of the probation period from two

years which was applicable to new graduates to one year because the long term temporary teachers were "experienced teachers". Accordingly, the group targeted by the 1990 strategies to achieve permanency for long term temporary teachers comprised teachers who had already successfully completed a probationary period of two years and were generally experienced and skilled teachers.

No explanation was given to the Tribunal as to why, in 1992, the requirement to serve out the probationary period full-time was dispensed with.

THE LAW

This is a case where the Complainant alleges indirect discrimination. Indirect discrimination is more concerned with policies and practices which have a discriminatory effect than with discriminatory behaviour in itself. On the face of the policy in question there may appear to be no discrimination. It is sometimes described as "*facially neutral*". However the effect of the policy may be discriminatory. Indirect discrimination has been described as arising in a situation of "*practices which are fair in form and intention but discriminatory in impact and outcome*" (The Secretary of the Department of Foreign Affairs and Trade v Styles and Another (1989) EOC 92-265 at page 77,636).

The relevant sections of the Act are set out as follows:

- S.8 (1) *For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, on the ground of-*
- (a) *the sex of the aggrieved person;*

- (b) *a characteristic that appertains generally to the 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 sub-section 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 or is not able to comply.*

S.11 (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.*
- (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 ground of the employee's 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 employee's 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.*
- (3) *Nothing in subsection (1) (a) and (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.*

Section 6 of the Act binds the Crown.

There are four recognised "elements" of indirect discrimination and we deal with them separately.

1. **The discriminator must require the aggrieved person to comply with a condition or requirement.**

There was no dispute about this element. We have already found that the "requirement" as outlined in the Education Circular 1990 that a teacher must complete a probation period of one year on a full-time basis constitutes a "requirement or condition" as referred to in Section 8(2) of the Act.

2. **A substantially higher proportion of persons of a different status than the aggrieved person must be able to comply with the requirement or condition than persons of the same status as the aggrieved person.**

In essence, the Complainant says that females bear children and have the prime responsibility for looking after them. Therefore they are less likely than males to be able

to work full time. By requiring the probation period of one year to be worked full time, the Respondent was treating women less favourably than men.

The leading case on this "element" of indirect discrimination is Australian Iron and Steel Pty v Banovic and Another (1989) EOC 92-271 ("Banovic"). The High Court was considering, inter alia, the application of Sections 24 and 25 of The Anti-Discrimination Act (NSW) which are the equivalent of Sections 8 and 11 respectively of the Act. Deane and Gaudron J.J. considered that the word "proportion" requires more than mere numerical comparison.

Having regard to the purpose of the Act, Section 24(3)(a) is to be seen as requiring a calculation with which will reveal whether sex, as distinct from the sexual composition of the group, is a factor in influencing the number of complying men as compared with the number of complying women. For that purpose it is necessary that complying men be ascertained as a proportion of other men and that complying women be ascertained as a proportion of other women (ibid at page 77,733)

The Act is silent as to the identification of the groups of men and women which will enable the proportions of complying men and women to be calculated (ibid at page 77,734).

The determination of the appropriate base groups will ordinarily involve the making of findings of fact. But it also involves a reasoning process which is not dissimilar from that involved in the process of determining whether or not evidence is relevant to an issue in a

trial. A decision to select particular base groups involves a question of law, at least insofar as it is a question of law whether the base groups selected produce the exercise required by Sec. 24(3)(a), namely, the ascertainment whether sex is significant to compliance (ibid at page 77-734)

The statistics tendered to the Tribunal unfortunately do not reveal:

1. How many of the total workforce of temporary workers applied for permanency;
2. More importantly the breakdown by the reference to gender by the numbers who applied for permanency.

Two categories of statistics were presented to the Tribunal.

a) **Ministry of Education Statistics**

Between 1987 and 1992 the proportion of female teachers in government schools who were employed part-time varied between 18.73% and 25.20%. In comparison, the proportion of male teachers who worked part-time varied between 2.01% and 4.64%.

In 1990 the comparative figures were 21.53% of female teachers employed part-time compared with 3.34% of males. (see Exhibit 6 : Percentage of total male and female teachers employed part-time for the years 1987 to 1992).

Insofar as the target group of the 1990 policy changes is concerned, that is,

temporary teachers, these were more likely to be female than male. In this respect, the Respondent's statistics were provided indicating the strong association between the female gender and temporary status. The statistics provided revealed that:

87% of temporary teachers were women (Exhibit 5 : Statement of Respondent in response to request for information)

17.5% of female teachers were temporary compared with 3.6% of male teachers (Exhibit 7 : Technical report of the Equal Employment Opportunity Survey, Table 4.2.1.A)

Only 72.9% of female teachers were permanent compared with 90% of male teachers (Ibid).

b) **National Information**

The Australian Bureau of Statistics (ABS) conducted a survey of part-time workers between 1990 and 1992. In percentage terms male part-time workers accounted for 5.7% of all workers. A significantly higher proportion of all workers were female part-time workers who accounted for 16.4% of all workers.

Analysis by gender of part-time workers only reflects a similar trend. Male part-time workers comprised 26% of all part-time workers and females comprised 74% of all part-time workers.

39.3% of all females who work, do so part-time. 9.89% of all males are part-time workers.

Unfortunately, although the Tribunal was presented with statistics from a variety of sources, they were not of the type which would assist it in making the calculation envisaged in the Banovic case. In order to determine whether "*sex is significant to compliance*" with the requirement, statistics as to the number of temporary teachers who applied for permanency and then breakdown by reference to gender would be required. These statistics were not available.

However, the statistics do show that across the board, there is a greater proportion of the female workforce who work part-time compared to the proportion of the male workforce who work part-time. Similarly, in the context of teachers employed by the Respondent, there are not only numerically more women than men who work part-time, but of the female workforce there is a greater proportion of women who work part-time compared to the proportion of male workforce who work part-time.

As has been mentioned there are no records kept of applications made for permanency either in 1990 or in 1992. Even if through a process of manual examination of the records these numbers could be revealed, each party apparently was of the view that that information would not take the matter any further. In any event, whatever figures might be available as to the number of teachers who applied for permanency following the 1990 policy change, there is no breakdown by reference to gender. There are no statistics to indicate how many women who are temporary teachers are mothers or how many permanent female teachers are mothers. There is no information as to how many male temporary teacher are fathers with family responsibilities. It is only this year that the Respondent is conducting a research project to ascertain why there are so many teachers

taking up part-time work.

As to the meaning of the term "*comply or able to comply*" in Section 8(2), this should not be interpreted narrowly. It should not be said that a person can do something merely because it is theoretically possible to do so. Such a narrow construction would be out of keeping with the spirit and intent of the Act (Price v Civil Service Commission & Anor 1977 1 BEQ 124 at 127 and 128.)

In the absence of more precise statistical evidence which might demonstrate whether a higher proportion of men than women comply or are able to comply with the requirement it is open for the Tribunal to take "*judicial notice*" of the respective roles women and men take in the family. (Home Office v Holmes 1984 BEQ 8011; Briggs v North Eastern Education and Library Board 1990 IRLR 181). In general terms we find, despite the changing role of women in modern society, that women generally take a more active role in the day to day responsibilities of rearing children than do men. The day to day responsibilities we speak of include transporting children to and from school and out of school activities, attending school functions and appointments with teachers, looking after children when they are ill and so on. These are the kinds of activities that parents who work full-time are generally unable to attend to.

Given the greater burden on women than on men in fulfilling "*family responsibilities*" insofar as they impact on the care of children and given the high proportion of women who are temporary teachers compared to the proportion of male teachers who are temporary and that a greater proportion of women than men work part-time, the Tribunal

finds that a greater proportion of male temporary teachers are able to comply with the requirement of working full time for a year whilst on probation than the proportion of female temporary teachers.

3. The Complainant must not be able to comply with the condition

The comments above relating to the interpretation of the term "comply" apply to this element. In this case it is not to the point to say that the Complainant chose to have children, chose not to put them in care, chose to work part-time. The fact is that her lifestyle as it concerned the upbringing of her children is in keeping with that of women with children generally. It is generally the man who continues with his job and the woman who stops working or makes a career change either in occupation or in hours of work. It is not the role of the Tribunal to comment whether in the context of our society this is a desirable state of affairs - it is the status quo, generally speaking.

The Tribunal refers to the Complainant's personal circumstances as outlined above. The Tribunal has no hesitation in finding as a matter of fact during the relevant time (from July 1990 until August 1992) the Complainant was not able to comply with the requirement that she work full-time for a year before being eligible for a permanent position with the Respondent. The theoretical possibility of being able to comply with the condition is not the test (Mandla v Dowell Lee 1983 2 AC 548 at 565-566; approved in the Australian Public Service Association v The Australian Trade Commission (1988) EOC 92-228 at p 7162 and Styles v The Secretary of the Department of Foreign Affairs

and Trade & Anor (1988) EOC 92-239 at p 77,238)

So far, three of the four elements necessary to establish discrimination have been made out. We now turn to the fourth element.

4. The requirement or condition is unreasonable in the circumstances

The question of what is reasonable in the circumstances is a question of fact to be determined by the Tribunal.

The reasons for taking action on the numbers of temporary teachers were summarised in the Report of the Ministerial Taskforce (Exhibit 13) as:

- . The need to effect equal employment opportunity;
- . The need to improve the currently restricted career prospects for temporary teachers;
- . The need to ameliorate the negative effects on temporary teachers' personal lives;
- . The need to address the instability of staffing for some schools; and
- . The need to reduce high administrative workloads for school and central office staff.

Where 87% of temporary teachers are women, there will be numerically more women than men who will be affected by the Respondent's measure to reduce the number of temporary teachers. The requirement therefore cannot be reasonable when in effect by discriminating against women it prevents its own objects from being achieved. It was not clear from the evidence called by the Respondent how the condition could assist in achieving the "needs" outlined above. Indeed, as we have observed there was no

evidence to explain why the requirement to serve out the probationary period of a year had to be served full-time. The evidence of Ms Genoni was that the temporary teachers were largely very experienced and highly skilled. In the circumstances, the Tribunal finds that:

1. The requirement discriminated against women and against the Complainant specifically; and
2. Because women, who were less able to comply with the requirement, comprised the majority of those teachers affected by the requirement the strategies adopted by the Respondent to secure permanency for part-time temporary teachers could not be effective.

Further, in November 1991 the requirement was amended to allow the probationary period to be worked part-time. However, because of "problems" with the Union, the new policy was not introduced until 1992.

It is implicit from the evidence that long time temporary teachers (whether full or part-time) had already completed a two year probationary period after graduation. In those circumstances, given their acknowledged experience and skills, the Tribunal cannot see the necessity for a further year on probation to be served full-time. If it is not the case that all temporary teachers had completed a two year probationary period, the Complainant certainly had.

Therefore, it cannot be argued with any logic that the requirement was reasonable and the Tribunal finds that in the circumstances it was unreasonable. In so finding the Tribunal adopts the observations by Einfeld J relating to the onus of proof in establishing reasonableness in The Australian Public Service Association v The Australian Trade

Commission (1988) EOC 92-228 at P 77,165.

"...I believe that an administrative Tribunal..should address and consider all the evidence, not from the point of view of the discharge of a formal onus of proof, but as to whether all relevant matters raised by the evidence to meet the legislative prescription have been adequately or satisfactorily made out."

THE ISSUE OF COMPENSATION

The Complainant claims compensation. The Complainant testified as to the effect of the discriminatory policy on her professional and personal life. Insofar as her professional life was affected, in summary, she said that as a temporary teacher there was no continuity of employment and thus uncertainty at the end of each school year as to whether she would be employed the next year. There was no leave without pay, no study leave, no opportunity for employment in the Ministry's head office and no opportunity for promotion. She was subjected to continual assessment of a type which permanent teachers did not undergo and this caused her to feel that she always had to "perform". As a temporary teacher, she was not eligible to attend professional courses paid for by the Respondent and was overlooked for membership of school committees. On the evidence before it the Tribunal finds that the Complainant is a dedicated, highly qualified and competent teacher who was and is anxious to contribute to the betterment of education for children. Although there was no specific evidence on the point, given the evidence as to the rankings she received when assessed by various principals coupled with her

experience and qualifications, the Tribunal considers that the Complainant would, if she had been permanent, been a prime candidate for promotion.

As to the effect of the discriminatory policy on her personal life, it is clear that the Complainant suffered a great deal of stress which affected the quality of life with her family. However, the Tribunal finds this stress cannot be attributed solely to the discriminatory policy alone. It is apparent that since the Complainant was required to resign after the birth of her first son, that she became increasingly frustrated with the loss of opportunity for advancement and the comparative advancement of her contemporaries who were permanent teachers. The professional and personal effects on her life were the result of years of working as a temporary teacher. She complains only of the Respondent's policy from July 1990 until August 1992. Accordingly, it is difficult for the Tribunal to identify with any exactitude what effect the discriminatory policy had on the Complainant during that time. However, the Tribunal is satisfied that the Complainant should be compensated for the loss of opportunities in her employment and for the stress she suffered. In all the circumstances orders that the Respondent pays her the sum of \$4,000.00.