EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number 35 of 1997

IN THE MATTER OF A COMPLAINT BY:

BEVERLEY LEONORA BOGLE Complainant

- against -

METROPOLITAN HEALTH SERVICES BOARD Respondent

REASONS FOR DECISION

BEFORE: President N. Hasluck QC

Counsel for the Complainant: Ms P. Giles

Counsel for the Respondent: Ms C. Thatcher

HEARD: 3 November 1997

REASONS FOR DECISION Delivered **6 November 1997**

The complainant, Beverley Bogle, seeks an interim order pursuant to section 126 of the Equal Opportunity Act to preserve the status quo between the parties to the complaint, or the rights of the parties to the complaint, pending determination of the matter that is the subject of the complaint lodged with the Equal Opportunity Commission on the 28th day of August 1997. The complainant is a dental nurse who alleges indirect discrimination on the grounds of sex, marital status and family responsibilities. The complaint is advanced against the respondent as her employer, the respondent being a Board established pursuant to section 15 of the Hospitals Act 1927 which governs the operation of the Perth Dental Hospital and the Fremantle Dental Clinic.

Before turning to section 126 of the Equal Opportunity Act and the nature of the interim relief applied for, it will be useful to look at the background of the dispute. The relevant circumstances are set out in three affidavits filed on behalf of the complainant, being her own affidavit sworn 17 October 1997; the affidavit of a colleague, Robin May, sworn 28 October and the affidavit of the complainant's solicitor, Penelope Giles, sworn 3 November 1997.

On the respondent's side, the Tribunal has received the answering affidavit of Peter Jarman sworn 29 October 1997. It emerges from these materials that the matter in issue is whether the respondent can be required to employ the complainant on a part time basis.

The respondent graduated in dental nursing in 1979. In 1981 she obtained employment with the Fremantle Dental Clinic as a dental nurse and has worked continuously with the clinic since that time. In 1983 she was promoted to the position of charge nurse at the Fremantle Dental Clinic. This involved the following duties, namely, to act generally as clinic manager, to assist the head of unit in the administration of the clinic and to supervise other staff including nine or ten other nurses and three receptionists. She was also required to ensure adequate supplies of stocks, equipment and materials, maintenance of inventories and requisitions as necessary; to co-ordinate patient reception activities; to arrange deployment of dental assisting staff in consultation with the head of unit including the drawing up of rosters; to assist the head of unit with performance management for nursing and reception staff; to conduct orientation and induction for new staff and training of dental assisted trainees and other staff as required; to provide chair-side assistance to dental officers as required and particularly where there are staff shortages; to assist with provision of radiographic and dental health education services; to ensure infection control, occupational health and safety procedures are implemented in accordance with dental service policies.

I pause to note that it was common ground at the hearing of the application for interim relief that the position of charge nurse has always been a full time position at the Fremantle

Dental Clinic and this continues to be a requirement attached to the position. It also seemed to be common ground that under the relevant award the employer was at liberty to employ on a part time basis if it wished to do so.

It seems that the complaint suffers from a medical condition known as lupus. One of the consequences of this condition has meant that it has been difficult for her to have children. Approximately 12 years ago she gave birth to a stillborn child. About 5 years after this, she gave birth to a second stillborn child. She has been informed that the reason for the death of both children related to her lupus condition.

In 1986 she and her husband applied to adopt a child. This application was eventually successful, in 1995, when they adopted a daughter, Jade, who was then 4 months old. The complainant took adoption leave from November 1995 to November 1996 and this was extended by a period of long service leave and annual leave on half pay until 26 March 1997. Prior to taking adoption leave she spoke to Mr Peter Neesham, regional dental officer for the Southern Region, being her immediate supervisor and asked him whether it would be possible for her to return to her position on a part time basis after she returned from adoption leave. Mr Neesham allegedly said:

"We'd definitely fit you in."

On the 24 February 1997, the complainant wrote to Mr Y Kee of the Fremantle Dental Clinic noting that she was due to return to her position as a charge nurse on 26 March 1997 and requesting that her hours be reduced from full time to part time. Her letter reads in part:

> "I would like to reduce my working days to 2 days (i.e. 15.34 hours) as discussed previously with Peter Neesham and yourself."

She went on to say in the same letter:

> "As you know, I have a 19 month old baby girl and at present I feel I need to spent as much time with her as possible."

The respondent did not agree to her request and offered the complainant three options. First, she could make application for regression to a part time dental nurse and have her charge nurse position held over until 22 July 1997 after which time she would have to resume as a full time charge nurse.

Second, she could take up a position as a part time dental chair assistant and relinquish her charge nurse position to

the intent that the respondent would endeavour to find her a position after 22 July 1997. Third, she could go to a position as a part time dental nurse but only until 22 July 1997.

The complainant says that after considering these options she reluctantly decided to take up the first option as it was the only one which allowed her to keep her charge nurse position. Thus she returned to work on 1 April 1997 as a part time dental nurse. This involved a reduction in salary and status but she found that she could manage her family responsibilities and particularly her responsibilities to Jade much more easily with the reduced hours. During this time Jade was being cared for by the complainant for part of the time and by family members and a family day care service while the complainant was at work.

The complainant performed this part time position until about 22 July 1997 when she was required to resume her full time position as a charge nurse. When she was required to resume work full time, her husband then took leave from his job until 20 August 1997 in order to care for Jade. This was only a temporary measure as it was hoped that Dental Services would reconsider its position.

In or about July 1997, the complainant approached her union, the Australian Nursing Federation, for assistance in negotiating a part time nurse position. The union requested

that the decision concerning the complainant working part time as a charge nurse be reconsidered. By letter dated 23 July 1997, Mr Neesham said in reply:

> "Your request of 18 July 1997 has been further considered. However Dental Nurse Services position remains that the charge nurse position cannot be effectively job-shared. Should Ms Bogle wish to explore other part time opportunities, we would be prepared to further investigate this option. In the interim, Ms Bogle's required to resume in her substantive full time position."

On or about 2 October 1997 the complainant received a letter from Dental Services outlining the basis upon which it would be prepared to offer her part time employment. This repeated the respondent's position that:

> "Your request to work part time in your substantive position of charge nurse level 2 is not approved as all charge nurse level 2 positions are full time."

In the weeks that followed, some alternative proposals were canvassed. The complainant says at paragraph 22 of her affidavit that:

"My major concern with the proposals put to me by the respondent is its refusal to permit charge nurses to work part time. My most preferred option is that I be permitted to continue working as a charge nurse but at fewer hours per week for a period of time until my family circumstances permit full time work. My other concern is that if I were to accept a regression to a lesser status to work part time, which is not and has never been my preferred option, the respondent will not agree to leave my charge nurse position open for any period of time."

The complainant is currently on leave from her employment but will be expected to resume work full time in the next few days. In paragraph 28 of her affidavit, she says:

"I find it extremely difficult to work full time and to care adequately for Jade. My major concerns about working full time are - one, adequate and acceptable full time child care is often difficult to find; two, my part time family day care arrangement, which I find to be ideal for my needs, is not available on a full time basis. If I work full time it is necessary to me to have a patchwork of child care arrangements involving three or four different family members which is a very stressful thing to have to cope with, particularly in organising complicated travel and hand-over arrangements for Jade as she moves from one carer to another during the day.

Three, I have tried using commercial day care. However I found that Jade often picked up colds and other infections from the other children and suffered repeated illnesses. I have been advised by my doctor that I should endeavour to place her in a smaller day care arrangement where there is less contact with a large group of children. I have found Jade's health to be better whilst in family day care which is operated in the carer's home with a small group of children. Four, I believe that while Jade is very young and until she is ready to go to school, it is in her best interest that I am at home with her as much as possible. Five, as the adoptive parent and having suffered the deaths of two children previously, I believe that it is in my best interests to spend as much time as possible with Jade whilst she is very young."

The complainant goes on to say at paragraph 29 of her affidavit:

"I believe that if I'm required to resume full time work, I may have no alternative but to resign. This will involve me relinquishing my career - a job that I love and believe that I perform well - my income, job security, job satisfaction and opportunities for advancement within the field of dental nursing in the future. I would also lose my accrued long service leave and other financial benefits. I believe that the

respondent is imposing unreasonable requirements on me which are in breach of section 8(2), 9(2) and 35A(2) of the Equal Opportunity Act 1984. In particular, the following requirements are being imposed upon me - one, that in order to retain my charge nurse position I work full time; two, that in order to regress to a part time position at a lesser status than a charge nurse, I lose my substantive position as a charge nurse; and three, that in order to take leave without pay while a part time position is located for me that I lose my charge nurse status and that my substantive position as a charge nurse is vacated by myself. I believe that a substantially higher proportion of men or unmarried persons, and persons without family responsibilities, comply or are able to comply with the requirement to work full time. My family circumstances make it impossible for me to work full time. If I am required to work full time I feel that I will have no alternative but to resign in order to care for Jade. My situation as an adoptive parent, having suffered the previous deaths of two children make it very important to me that I spend as much time as possible with Jade while she is very young."

The complainant goes on to say that the policy of Dental Services in not permitting charge nurses to work part time is unreasonable because in her lengthy experience as a senior dental nurse, she is of the opinion that there is no reason why a charge nurse cannot work part time. She's aware of a number of qualified senior dental nurses who would be willing

to job share the position if the option became available. She supervises a registered dental nurse described as her second in charge who is well qualified to job share the current position. According to the complainant this person has acted in her position for lengthy periods while the complainant has been absent on leave. The complainant believes that there would be no disruption to the respondent's operations if she were permitted to work part time.

The complainant also believes that any concern about maintaining continuity and performance concerning the management of other staff would be misplaced because performance management of other staff as an ongoing task does not require the manager to be present every day of the working week. It generally requires observation and monitoring of staff over a lengthy period of time together with advice and counselling of the employee. Rarely, if ever, do issues arise which are so pressing that they need to be dealt with immediately. She says also that in the unlikely event that urgent issues do arise, they can adequately be dealt with by a person acting in the position. Problems which might arise through any lack of continuity can be prevented by adequate consultation and hand-over between staff-sharing responsibilities which are processes which occur every day in nursing and which all staff are familiar with.

The complainant's evidence in regard to these latter matters is backed up by the affidavit of Robin May sworn 28 October 1997 to which reference has already been made. Robin May has

worked as a dental nurse for a total of 23 years. She spent all her dental nursing career with the Perth Dental Hospital. For 16 years she acted in a senior supervisory role and for 9 of those years she was formally a charge staff nurse. She says that in her extensive experience in comparable situations she can see no reason why the charge staff nurse position held by Beverley Bogle cannot be job shared.

According to Robin May, when working as a charge staff nurse, uniform procedures and work practices are adhered to. As a result if the charge staff nurse position was job shared, there would be no problems with inconsistent work practices. Procedures and work practices are set out in the Procedure Manual Specialist and General Dental Services Manual. The manual sets out the goals and objectives of Dental Services and provides a comprehensive guide to all administrative procedures. For example, the manual explains the hospital's approach to staff performance appraisals, infection control procedures and emergency procedures. In addition, standard procedures are in place for ordering stock.

In Robin May's experience, all charge staff nurses maintain a daily diary planner. This serves as a reminder of tasks which need to be followed up or undertaken in the future. In a job sharing situation this would function to prevent any communication or continuity problems. She goes on to say that in her experience dental nurses have left their employment with the hospital because there are no suitable part time

positions available and they have been unable to work full time. The new dental nurses who fill these positions require training and orientation. This creates inefficiency as time has to be dedicated to each new dental nurse until they become familiar with the clinic. Robin May believes that inefficiencies are caused by the refusal of part time work.

In weighing up the evidence presented by the complainant, the Tribunal has to take account of the affidavit of Peter Jarman filed on behalf of the respondent. He is currently employed with Hospital Dental Services section of the Dental Services branch which is a branch of the Health Department of Western Australia as the acting manager, Hospital Dental Services, which is a class 1 public service position. The Hospital Dental Services section is situated in Perth Dental Hospital, 96 Goderich Street, East Perth. His substantial position is regional dental officer, which is a level 9 public service position. His key responsibilities as the acting manager, Hospital Dental Services, are to be responsible for the effective and efficient management of the Hospital Dental Services section and to act as a member of the Dental Services' executive.

Mr Jarman goes on to say that the general duties of the acting manager, Hospital Dental Services are: A) to contribute to decisions on all matters which come before the statewide Dental Services' executive; B) to co-ordinate the activities of the Hospital Dental Services section in optimising the use of human financial material resources to ensure the efficient

and effective delivery of Hospital Dental Services throughout the state; C) to co-ordinate the activities of the Hospital Dental Services section in implementing approved Dental Service policies and programs, developing and implementing systems or evaluating the cost effectiveness of Hospital Dental programs; D) to assist the director, Dental Services, which is a class 2 public service position in the development of dental policy initiatives; and E) to facilitate the development of strategic planning for Hospital Dental Services.

Mr Jarman does not deny that exchanges of correspondence took place concerning the complainant's future and that various proposals were canvassed. He goes on to say, however, that on the basis of his experience within the Perth Dental Hospital and the Dental Services branch it is his view that the position of charge nurse, such as the position presently occupied by the complainant at the Fremantle clinic, cannot be properly and adequately performed on a part time basis and would lead to considerable problems from a human resource prospective.

He says at paragraph 18, that the charge nurse position is an important and senior supervisory position. The charge nurse is responsible for direct supervision of up to 8 dental nurses, being dental clinic assistants, 3 receptionists and oversees the operations of the clinic cleaner or cleaning contract and works closely with the head of unit in assisting

the efficient operation of the clinic. The charge nurse interacts regularly with the supply and maintenance sections with regional staff on human resource and operational matters and with the Dental Service branch Information Technology section as well as private and hospital laboratories. He believes that to permit the charge nurse position to be shared by two persons working part time would lead to inconsistency in the management of low level staff and in the operation of the relevant clinic in question.

He goes on to say that additionally the clinic would be required to locate an appropriately qualified person to share the charge nurse position with the person who wished to work part time. When one of the persons sharing the charge nurse position left the Dental Hospital's employment, the clinic would need to locate a replacement person who wished to work part time as a charge nurse. This is likely to lead to situations where given the relatively small pool of potential applicants for charge nurse positions, the vacant position could not be filled. Similar problems would arise where one of the person's job sharing the position wished to resume full time employment. Transforming the charge nurse position to a part time position is also likely to limit the promotional opportunities for other staff in that the progression of a dental clinic assistant to charge nurse at a clinic where the charge nurse position is job shared would require the dental clinic assistants to work part time.

He concludes by saying in his affidavit at paragraph 19:

"As Ms Bogle has not accepted the offer to take leave without pay until 31 January 1998 to enable the Perth Dental Hospital to locate a suitable part time dental clinic assistant position, the hospital requires Ms Bogle to return to her full time substantive position as charge nurse at the Fremantle Dental Clinic."

Particulars of the complaint lodged with the Commissioner of Equal Opportunity on 28 August 1997 are set out in a letter from Dwyer Durack as solicitors for the complainant to the Commissioner which is exhibited to the affidavit of Penelope Giles of which mention has already been made. In essence, this letter reflects the various facts and matters touched on in the complainant's affidavit. The letter, however, does contain the following additional matter:

"Our client is faced with the very difficult situation in accommodating her job and family responsibility. She is of the view that a charge nurse in dental nursing is a position which very much lends itself to part time work and job sharing and that if the employer was prepared to be more flexible all the necessary arrangements could be made to make it an effective arrangement. Ms Bogle sees no reason why she should take a drop in salary, status and other opportunities in order to work part time. We would be grateful if you would accept this as a complaint by Ms Bogle by the Australian Nursing Federation on behalf of its affected members alleging indirect

discrimination on the grounds of family responsibilities, sex and marital status."

The Tribunal pauses to note that it seems from this letter that the present complaint is viewed by the parties as in the nature of a test case, and this was a line of argument advanced by counsel for the respondent, namely, that a ruling on the central issue, even if only an interim ruling, could have wider implications. The Tribunal also notes in passing that investigation of the complaint by the Commissioner has not yet been completed, although the structure of the Equal Opportunity Act presumes as evidenced by sections 90 and 93 that the jurisdiction of this Tribunal to conduct an inquiry into the complaints referred to it will not generally be activated until the Commissioner has completed her investigation and attempted to resolve the dispute.

This brings me to section 126 of the Act and the power of the Tribunal to make interim orders at any time after the lodging of a complaint. The section reads as follows:

"The Tribunal, or where the President of the Tribunal, is of the opinion that it is expedient that the President alone should exercise the functions of the Tribunal under this section, the President, may, on application of the Commissioner under section 85, or on the application of a party to an investigation at any time after lodging of

the complaint into which that investigation is held, make an interim order to preserve,

(a) the status quo between the parties to the complaint; or

(b) the rights of the parties to the complaint,

pending determination of the matter that is the subject of the complaint."

I pause to note that in the urgent circumstances of the present case as described in the affidavits I am of the opinion that the President should sit alone and have proceeded accordingly. A more difficult question is whether the limitations on the power exclude the proposed relief, for the respondent's counsel argued forcefully that the proposed orders are beyond power. I shall return to this line of argument in a moment but for the time being it will be useful to set out more exactly what the complainant seeks.

According to the complainant's application (as amended by the written submissions filed on her behalf in accordance with directions given prior to the hearing of the application for interim relief) the complainant seeks the following interim orders. (A), the respondent provide the complainant with a part time position as a charge staff nurse at the Fremantle Dental Clinic, the part time position to be 2 or 3 days a

week. (B) the respondent provide the complainant with leave without pay until 30th January 1998 after which time the complainant be provided with a part time position as a charge staff nurse at the Fremantle Dental Clinic. (C) the respondent provide the complainant with part time work as a charge staff nurse at the Fremantle Dental Clinic until such time as her family responsibilities allow her to resume full time work and at that time the complainant be reinstated into her former position of full time charge staff nurse at Fremantle Dental Clinic; or (D) the respondent provide the complainant with leave without pay and her position and status as a charge nurse be preserved pending determination of the matter that is the subject of this complaint.

Having regard to the terms of section 126, the Tribunal considers that it is at liberty to make orders of this kind, notwithstanding that the Commissioner's investigation has yet to be completed, although this is a matter which may bear upon the exercise of the Tribunal's discretion. Of greater concern is the respondent's argument which I have touched on earlier, namely, that the Tribunal's power in section 126 of the Act is limited as the terms of that section arguably go to the preservation of an existing state of affairs, being the status quo, or the preservation of the parties' present rights.

Essentially, the respondent argues, the purpose of the power is to maintain matters until the complaint in question is determined by the Commissioner. The power does not extend to

permit the Tribunal to grant or vest fresh rights or obligations on the parties.

In this case the respondent further argues that the status quo between the parties is that the complainant is employed as a full time charge nurse. This position is currently open for her to take up. The complainant's existing rights are to a position as a full time charge nurse. Each of the alternative arguments advanced by the complainant require this Tribunal to grant a fresh right to the complainant, namely that the respondent permit the complainant to work part time as a charge nurse at the Fremantle clinic.

The respondent's counsel submits further that it is clear from the affidavit of the complainant sworn on 17 October 1997 that A) the complainant is not presently employed by the respondent as a part time charge nurse at the Fremantle Dental Clinic; B) the complainant is not presently entitled to work part time as a charge nurse at the Fremantle Dental Clinic, and C) the respondent is not presently obliged to permit the complainant to work part time as a charge nurse at the Fremantle Dental Clinic.

Counsel for the complainant goes on to argue that the present position of the complainant is that she is employed by the respondent as a full time charge nurse at the Fremantle Dental Clinic. That being so the Tribunal's power pursuant to section 126 of the Act is limited to the making of interim

orders for the maintenance by the respondent of the complainant's position of employment. The orders sought by the complainant go beyond this power.

Counsel for the respondent also notes that the proposed orders, in effect, are mandatory in nature. Mandatory orders or injunction, it is said, usually go further than the preservation of the status quo by requiring a party to take some new positive step or undo what is done in the past. In this case, the orders principally contended for, and especially the first four orders I have mentioned, if made would compel the respondent:

> "To provide the complainant with a part time position as a charge staff nurse at the Fremantle Dental Clinic for 2 or 3 days."

This is a form of employment, counsel for the respondent argues, that the complainant has not previously had and she, herself, recognises that she is not entitled to insist upon as a contractual right and can only insist upon such an entitlement by order the Tribunal. Thus it cannot be said she is seeking orders to preserve the status quo or existing rights with the result that the powers allowed to the Tribunal in section 126 are not available.

The Tribunal is persuaded by the first part of this argument. A reference in the statutory provision to preserving the status quo denotes a power to preserve an existing state of affairs. The present case to make an order which both parties recognise, would significantly transform the nature of the employment, goes beyond the scope of the power.

At a first glance, a similar approach might seem to fit the notion of preserving rights allowed for by section 126(b), especially if the concept is limited to contractual rights. The existing contractual right is to be employed as a charge staff nurse in return for attendance at the place of employment on a full time basis. To allow the complainant to vary the entitlement to suit her domestic circumstances might seem to go beyond preservation of existing rights and amount to the conferring of additional rights. Nonetheless, the Tribunal is conscious that legislation of this kind must be interpreted in a beneficial manner as the High Court noted in Waters v Public Transport Corporation (1992) 103 ALR 513.

Although there is little case law bearing on this provision, the Tribunal considers that the rights referred to in section 126(b) include not only contractual rights, or rights arising under an industrial award, but rights under the Equal Opportunity Act itself. Thus to employ an example which emerged during the course of argument, if it became apparent that an employer was about to embark upon a new and obviously discriminatory course of conduct at the place of employment

which might affect employees of a particular race or sex adversely, then those likely to be affected could approach the Tribunal for interim relief so that their right to be treated in a manner which didn't infringe the legislation could be preserved until the dispute had been resolved.

The Tribunal therefore concludes that in the circumstances of the present case it has power to grant interim relief pursuant to section 126(b) notwithstanding that the complainant is superficially seeking to obtain a more beneficial form of employment. I say "superficially" because, on the complainant's case, it is her changed circumstances, not any alteration in her rights, which would bring about a different kind of employment if her case is made out.

It follows from this analysis, however, that the Tribunal will only exercise the power to grant interim relief if it can be persuaded to the degree required by the principles governing the grant of interim relief that the refusal of part time employment in the circumstances of the present case might amount to discriminatory conduct according to one or more of the categories of discrimination relied on, namely sex, status or family responsibilities.

It was not in issue that the principles applicable when considering an application for orders under section 126 resemble those which apply in common law courts to the

granting of interlocutory injunctions. Previous cases have indicated that the principles to be considered governing the grant of interim relief pursuant to section 126 include whether there is a serious issue to be tried, the balance of convenience and hardship, and whether it would be just to confine the complainants if eventually successful to common law damages, see Davies v University of New England (1994) EOC 92-103, Michael v State Housing Commission (1996) EOC 92-829 and recent decisions in this Tribunal, namely Martin v State Housing Commission, delivered 21 May 1997, Penny v State Housing Commission, delivered 11 November 1996, and McGuire v Minister of Education, delivered 11 July 1997.

It was an issue, however, as to whether different principles should be applied to orders resembling the grant of a mandatory injunction, that is to say orders which would have the effect of reconstituting the employment in a way which was arguably more beneficial to the employee but not acceptable to the employer.

There are certainly decided cases which suggest that in the case of a mandatory injunction, the court should be satisfied not simply that there is a serious issue to be tried, but that the applicant has a high assurance of success. On the other hand as counsel for the complainant in the present case pointed out, the reasoning of Gummow J in Business World Computers Pty Ltd v Australian Telecommunications Commission (1988) 82 ALR and Carr J in Michael v State Housing Commission

(supra) suggests that in this jurisdiction it is permissible to grant a mandatory injunction if it appears to the court that the case is one in which withholding such injunction would carry a greater risk of injustice than granting it, even though the court does not feel a higher degree of assurance about the plaintiff's chances of establishing his or her right. Accordingly in the present case the Tribunal will approach the matter in that light.

I note, however, that in the Michael case one factor influencing the court's approach in that case was the possibility that the hearing of the matter could be expedited. That factor is absence in the present case because this Tribunal does not have power to conduct and complete an inquiry until the Commissioner has completed her investigation and the jurisdiction of the Tribunal has been enlivened by a reference of the complaint to the Tribunal by the Commissioner in the manner allowed for by the pact.

This brings the Tribunal to the complainant's prospects of making out her case. In each of the categories of discrimination relied on, the complainant relies upon a plea of indirect discrimination. It became apparent as argument proceeded that the claim based on family responsibilities or family status was more consonant with the circumstances of the case than the other categories so it will be useful to begin by looking at that issue first.

By section 4 of the Act, family responsibility or family status means having responsibility for the care of another person, a definition which fits the relationship between the complainant and her daughter Jade.

By section 35B(2) it is unlawful for an employer to discriminate against an employee on the grounds of the employee's family responsibility or family status in the terms or conditions of employment, or by denying the employee accessed benefits or by subjecting the employee to a detriment.

By section 35A(2) concerning indirect discrimination, a person discriminates against another on that ground, namely a family responsibility or a family status, if the discriminator requires the aggrieved person to comply with a requirement or a condition with which a substantially higher proportion of persons not of the same family responsibility or family status comply or are able to comply, which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

It was common ground at the hearing, as appears from the affidavits, that the complainant was indeed being required to comply with a requirement or a condition within the meaning of the Act, namely, that to work as a charge nurse she would have to work full time. Even if it were not common ground, the

Tribunal is satisfied that the requirement in the present case that the complainant work full time is a requirement or condition of the kind contemplated by section 35A(2) of the Act. See Home Office v Holmes (1984) ICR 679 also see Waters v Public Transport Corporation (supra).

Further, it was taken to be self-evident that substantially higher proportions of dental nurses not having a young child of Jade's age would be able to comply with the condition if the concept of inability to comply is given the broad meaning contended for by the complainant.

This brings me to what seems to be the two central issues bearing upon the complainant's prospects of success and whether there is a serious issue to be tried. Is the requirement or condition in question reasonable having regard to the circumstances of the case?

In a well known case, The Secretary of the Department of Foreign Affairs v Styles (1989) EOC 92-265, two members of the court, Bowen CJ and Gummow J, had this to say:

> "The test of reasonableness is less demanding than one of necessity but more demanding than a test of convenience.

> The criteria is an objective one which requires the court to weigh the nature and extent of the discriminatory effect on the one hand against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account."

This suggests that in considering whether a requirement or condition is unreasonable the Tribunal must decide this in the context of all the circumstances of the case. This is borne out by the reasoning of the High Court, in Waters v Public Transport Commission (supra) where Brennan J had this to say:

> "Even where the imposition of the particular requirement or condition is appropriate and adapted to the performance of the relevant activity or the completion of the relevant transaction, it is necessary to consider whether performance or completion might reasonably have been achieved without imposing so discriminatory a requirement or condition. To determine the latter question, reference to the general circumstances of the cases is required. It follows that reasonable cannot be narrowly confined. The only way in which a balance can fairly be struck between a putative discriminator's legal freedom to impose a requirement or condition in the several activities or transactions to which the Act relates and the interests of persons in the protected

category is to consider all the circumstances of the case."

It is apparent from these decisions that there is a balancing process to be undertaken in order to determine reasonableness.

Counsel for the complainant also placed a good deal of reliance on the decision of Home Office v Holmes (supra) in which an Employment Appeal Tribunal in England held that the Home Office discriminated against a young mother who wished to work part time after the birth of her second child. It is important to note, however, that in that case the issue was whether the requirement that she work full time was "justifiable". The facts of the case indicate that she was not in a supervisory role but performing essentially clerical duties. In that case the Tribunal said at page 684 of the report:

"We emphasise as did the Industrial Tribunal in the last sentence of their decision that this one case of the employee and her particular difficulties within her particular grade in her particular department stands very much upon its own. It is easy to imagine other instances not strikingly different from hers where the result would not be the same. There would be cases where the requirement for full time staff can be shown to be sufficiently flexible as arguably not to amount to a

> requirement or condition at all. There will be cases where a policy favouring full time staff exclusively within a particular grade or department is found to be justified. There will be cases where no actual or no sufficient detriment can be proved by the employee. All such cases will turn upon their own particular facts."

The second central issue is whether the complainant as the aggrieved person does not or is unable to comply with the condition. The Tribunal must again look at the decided cases in construing this provision. It is clear that the term "comply or able to comply" should not be interpreted narrowly. Actual rather than theoretical compliance is required, as the court noted in Foreign Affairs v Styles (supra) and as other cases have also indicated.

Further, in the subsequently decided case of Woods v Wollongong City Council (1993) EOC 92-486 it was held the compliance with the requirement should be interpreted in a practical sense. In other words, it should not be said that a person can do something merely because it is theoretically possible to do so. The theoretical possibility of being able to comply with the condition is not the test.

Thus in Mandla v Dowell Lee (1983) 2 AC 548 a Sikh schoolboy who was required to cut his hair and cease wearing a turban was able to obtain relief. He could comply with the

requirement in a physical sense but not in a practical sense having regard to the conventions and constraints of his racial group. Nonetheless it is important to note that what underlay the reasoning of the House of Lords in that case was that the notion that a narrow view of the concept would undercut the protection the Act was intended to afford to citizens of a different ethnic background.

When these principles are applied to the circumstances of the present case, the Tribunal is not satisfied on the materials presently before it that there is a serious issue to be tried which would create a risk of injustice if the interim relief applied for is refused. The complainant has not previously worked part time as a charge nurse and therefore cannot point to a contractual right that has to be preserved. She relies upon a right not to be indirectly discriminated against under the Act but in advancing such a plea she is obliged to describe as unreasonable a mode of employment which hitherto has been regarded as reasonable or, in any event, not one that gives rise to a sense of grievance.

She herself concedes that the responsibilities of the supervisory role she performs are significant and the respondent affirms that this is so. The complainant proposes a solution in the form of work sharing and sharing of responsibilities but this has not been tested by experience. In the absence of any previous case where a charge nurse has worked part time, the Tribunal is not satisfied that the

requirement is unreasonable on the materials presently before it.

Similar considerations apply to the question of whether the complainant is not able to comply with the condition. The Tribunal accepts that the test is not physical compliance or theoretical compliance, in which respect the complainant clearly can comply, but the test is compliance in a practical sense. Nonetheless her affidavit recognises that compliance is possible, albeit with difficulty. She is in the position of many working mothers with young children in full time employment and having to draw upon a range of family and day service support.Perhaps in due course, as a matter of industrial negotiation, these difficulties will be alleviated by greater use of part time and flexible arrangements, but on the materials presently before it the Tribunal does not accept that she is unable to comply. As appears from her affidavit, she seeks to implement what is described as her "preferred option". The Tribunal is not satisfied that this fits the criteria established by the Act.

Even if the Tribunal be wrong in regard to these issues, it is also of the view that the balance of convenience weighs against what is, in effect, the grant of a mandatory injunction which would have the effect of reconstituting the contract of employment at the option of the complainant and in a way which might be acted on as a precedent by many others. The Commissioner has not yet completed her investigation. For

the time being, in the absence of a reference, the Tribunal has no ability to conduct an inquiry on an expedited basis, thus it is difficult to foretell how long the interim order would remain in place and it might come to be regarded in a practical sense as a final order. There is also a degree of ambiguity in the order sought as to how long it would last, how much of the working week it would cover and whether it would be subject to variation as circumstances changed.

The Commissioner is in a position to explore the wider implications of the complaint. In the circumstances of this complaint, her ability to effect a conciliation and resolve the dispute might be impeded by the presence of an interim order which is based on affidavits only and a comparatively narrow range of argument. Assisted by more extensive evidence, the complainant might ultimately be able to satisfy the Tribunal on the balance of probabilities that the condition is unreasonable and that she is unable to comply. On the basis of the materials presently available, however, it would seem to be premature to make what might be treated as a decisive ruling having a long term effect before the usual processes are completed, including the conduct of an inquiry by the Tribunal in which all evidentiary matters can be fully explored.

Finally and perhaps more importantly when looking at the balance of convenience, the Tribunal is conscious that this is a case where compensation is available if the complainant's

case is made out. The respondent has offered an alternative form of employment, albeit with some reduction in status and at a lesser rate of remuneration. In an assessment of damages, the presence of this offer would probably have to be brought to account. It is clear, however, that if the interim order is refused the complainant is not left without a remedy if her claim can be sustained. Further, even if she feels compelled to resign, it remains open to defer any decision in that regard about her future until the Commissioner's investigation is completed or to seek to return to full time employment in due course when circumstances allow. For these reasons the application for relief, pursuant to section 35A of the Act will be refused.

For the sake of completeness, the Tribunal must briefly consider the application for relief based on sex and marital status. Both these claims are claims of indirect discrimination also in which the same criteria of reasonableness and ability to comply must be brought into play. It follows from previous discussion that the Tribunal does not consider that interim relief of the kind sought is warranted because the decisive considerations in regard to the serious issue to be tried and the balance of convenience are substantially the same.