EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number: 3 of 1999

BEVERLEY LEONORA BOGLE — Complainant

– against –

METROPOLITAN HEALTH SERVICE BOARD — Respondent

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REASONS FOR DECISION

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BEFORE: L W Roberts-Smith QC (Deputy President)
T Ackland (Deputy Member)
S Rowe (Deputy Member)

HEARD: 30 Nov, 1, 2, 3 & 6 Dec 1999

DELIVERED: 7 Jan 2000

FOR COMPLAINANT: Ms P Giles
Ms J Quinliven

FOR RESPONDENT: Ms C Thatcher

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Overview

- Mrs Beverley Bogle is a registered dental nurse and has been employed by the respondent (or its predecessor) in that capacity at the Fremantle Dental Clinic ("the Fremantle Clinic") since 1979, that is for some 20 years. The respondent is a statutory authority created by the *Hospitals and Health Services Act 1927* to provide public health services including dental services to residents of the Perth metropolitan area and throughout Western Australia. That is done through its Dental Services Division ("Dental Services").

- In broad terms, clinic staff generally comprise a Head of Unit who is a dentist, a Charge Nurse or Charge Dental Clinical Assistant ("Charge DCA") and Dental Nurses or Dental Clinic Assistants ("DCA"). In addition there may be Dental Therapists, who are qualified to perform certain dental procedures including fillings and extractions of children's teeth. The chairside assistance to the dentists and dental therapists was originally provided by dental nurses whose training was essentially clinical or dental-hospital based. In more recent times it has been the policy of the respondent to phase out dental nurses as a category and replace them by dental clinical assistants. DCA training is TAFE based and the role is seen as involving more non-clinical tasks such as reception and administration. We understand dental nurses (and particularly Charge Nurses) take great pride in their status as such and are loathe to relinquish it even though incremental and promotional advancement is deliberately structured to favour the DCA "stream" — the intention being that the category of dental nurses will eventually be phased out altogether.

- On 13 June 1983 Mrs Bogle was appointed to the position of Charge Nurse at the Fremantle Clinic. Mrs Bogle suffers from a medical condition which

adds greatly to the risks of pregnancy and child bearing. In fact, she became pregnant and took maternity leave twice; once in 1985 and once in 1990. She went 30 weeks on both occasions but both babies were stillborn.

- She and her husband decided to adopt a child.
- In late 1995 they adopted a then 4-month-old girl called Jade.
- Mrs Bogle took a combination of adoption and other leave from November 1995 to 26 March 1997.
- Prior to taking leave Mrs Bogle had a discussion with her immediate supervisor, Mr Peter Neesham, who was the Regional Dental Officer ("RDO"). The conversation was brief and in general terms. There is some conflict in the evidence about exactly what was said and what was understood. Mrs Bogle's evidence was that she told Mr Neesham that she and her husband had just been approved to be Jade's adoptive parents and that she wanted to take maternity/adoption leave. It has not been suggested there was any difficulty about her doing that; however, she testified that when she said she intended to come back to work afterwards he said:

  *"Don't worry, we'll fit you in."*

8. And when she then went on to say that she would not want to come back to her Charge Nurse position full time but only part time, he again assured her:

   *"Don't worry, we'll fit you in."*

9. According to Mrs Bogle she made it clear she was talking about her Charge Nurse position; according to Mr Neesham she was not specific about that and he understood them to simply be talking about her coming back to

work in some part-time position. He said the thought of her working part time in the Charge Nurse position never even occurred to him and was not raised with him until he received a letter from the Australian Nursing Federation ("the ANF") in July 1997.

10. In any event when the time came for Mrs Bogle to return to work she sought to return to her substantive position of Charge Nurse at the Fremantle Clinic, but to work part time – that is, to work on a "job share" basis. Dental Services senior management was not prepared to have that. Management took the view that Charge Nurse positions had never been job-shared, and would not be. It was made clear to Mrs Bogle that if she wanted to return to work it would have to be either to work full time in the Charge Nurse position or if she wished to work part time she would have to regress to a lower classification level. Various options were put to her within those conditions.

11. She continued to press for a return to her substantive position on a job-share basis, but in the meantime (and without prejudice to that claim) she accepted one option put to her that she work part time as a dental nurse from 27 March until 22 July 1997, at which date she would return to the Fremantle Charge Nurse position full time. She did that.

12. After 22 July 1997 when the complainant reverted to full time work as a Charge Nurse her husband took extended leave from his employment to care for Jade. However, that leave ran out on 20 August 1997 when he returned to his full time employment. That involved frequent travel in Western Australia and interstate and he could be called away at relatively short notice.

13. Mrs Bogle found full time work extremely difficult combined as it was with maintaining the household and caring adequately for Jade.

14. On 1 September 1997 Mrs Bogle made a formal complaint (dated 27 August 1997) to the Commissioner for Equal Opportunity ("the Commissioner") alleging discrimination on the grounds of sex and family responsibility. The ANF also lodged a complaint on her behalf (but when the matter eventually came before the Tribunal that was withdrawn).

15. In October 1997 she took a combination of annual leave, leave without pay and sick leave until 6 February 1998. She found herself unable to cope with her full time work as well as her child rearing, domestic and family responsibilities. So she accepted a part time position as a level 1.6 dental nurse at the Perth Dental Clinic from 9 February 1998. That was 8 increments below her Charge Nurse position and was available only for 33 weeks per year – the other 19 weeks having to be taken off as 4 weeks annual leave and 15 weeks leave without pay.

16. In October 1997 Mrs Bogle applied to the Tribunal for an interim order under section 126 of the *Equal Opportunity Act 1984* ("the *EO Act*") to preserve the status quo or rights of the parties pending determination of the complaint then before the Commissioner. Various interim orders were sought in the alternative by Mrs Bogle. The principal order sought was that the Board provide her with a part-time position as a Charge Nurse at the Fremantle Dental Clinic for 2 or 3 days a week; the alternatives were variations on this, incorporating leave without pay but each predicated on her retention of the Charge Nurse position.

17. The application was heard by the President on 3 November 1997. His reasons for decision refusing the application were delivered on 6 November 1997. It is unnecessary to refer further to those here.

18. In the meantime the investigation and attempts at conciliation by the Commissioner had been ongoing. They proved unsuccessful, with the consequence that by letter dated 12 January 1999 the Commissioner referred the complaint to the Tribunal under section 93(1)(b) of the *EO Act*.

19. On 1 March 1999 Mrs Bogle was given a short-term acting position in the Radiography Department of the Perth Dental Clinic which required her to work 2 days per week and every alternate Wednesday. This position is a level 1.9 and was due to conclude in December 1999 after which it was her expectation that she would revert to the position at level 1.6.

20. Mrs Bogle's evidence was that she found it difficult to comply with the requirement that she work each alternate Wednesday because of the difficulties finding full time day care for that day combined with the additional travel required for working in Perth rather than in Fremantle closer to her home.

21. Mrs Bogle's employment at all material times has been subject to the Dental Nurses (ANF WA Public Sector) Award 1994 ("the Award") and the Dental Nurses Perth Dental Hospital Enterprise Agreement 1996 ("the Agreement"), both of which are registered with the Australian Industrial Relations Commission.

22. The Award contains provisions concerning part time work for nurses. The Agreement contains a provision in which the parties

"agree to the continued utilisation of a flexible approach to part time employment consistent with the commitment to customer service organisation and efficiency and productivity."

23. Mrs Bogle's complaint before the Tribunal is that she has been indirectly discriminated against by the respondent on three alternative grounds: namely, sex (contrary to s.8(2) of the *EO Act);* family responsibilities and family status (contrary to s.35A(2)); and marital status (contrary to s.9(2)).

## Onus and Burden of Proof

24. Proceedings upon complaint before the Tribunal are in the nature of an inquiry.[1] For the purposes of any inquiry the Tribunal is not bound by the rules of evidence and may inform itself on any matter as it thinks fit and must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.[2]

25. Despite the inquisitional nature of proceedings before the Tribunal it has been recognised that in accordance with the principle that he or she who asserts something must prove it, the onus is on the complainant to establish the unlawful discrimination alleged.

26. The relevant standard is proof on the balance of probabilities.[3]

## The Grounds of Complaint

27. Section 35A (2) of the *EO Act* is representative of the provisions relating to indirect discrimination. It provides as follows:

"(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 family responsibility or family status if the discriminator requires the aggrieved person to comply with a requirement or condition –

(a) with which a substantially higher proportion of persons not of the same family responsibility or family status as 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."

28. Clearly it is necessary for there to be a causal connection or nexus between the alleged ground of discrimination in the particular case and the requirement or condition which is said to be discriminatory.

29. It must also be noted that by virtue of s.5 of the *EO Act* the discriminatory ground does not have to be the only ground upon which the act in question was done – it will be sufficient if it is shown to be one of the reasons or grounds, whether or not it is the dominant or substantial reason.

30. Nor is it necessary for a complainant to prove an intent to discriminate. The relevant act must be shown to be conscious or deliberate, but beyond that it will be sufficient to show it had a discriminatory effect on the complainant. Proof of a discriminatory motive is not necessary.[4]

31. Ms Thatcher, counsel for the respondent, submitted that apart from there being no proof of unlawful discrimination on any ground, in this case there is no factual basis upon which the allegations of indirect discrimination on the grounds of sex or marital status could be sustained. She submits that is so because Mrs Bogle was obviously a woman and married for a substantial part of the time during which she worked as a Charge Nurse at the Fremantle Clinic on a full time basis and there is no evidence that the requirement or condition that she work full time (nor her inability to

comply with it) had any connection whatsoever with her sex or marital status.

32. It is convenient at this point to return to consider the evidence in more detail.

The Complainant's Evidence

33. The respondent obviously regards Mrs Bogle as a valued staff member and one to be retained if at all possible. There is no contest whatsoever about that, nor her qualifications, nor her capacity to fulfil the position of Charge Nurse. Indeed, Dental Services would have been quite happy (if not keen) to retain her in that capacity full time. The only difficulty from the Service's point of view was her request that she work in her substantive position part-time on a job-sharing basis.

34. The Tribunal had the sense that the Dental Service officers themselves felt a degree of frustration about the whole situation – the desire to keep a valued senior staff member on the one hand as against a strongly held perception that job-sharing the Charge Nurse position was simply not practicable, on the other.

35. Why was that? Was there anything in practical experience or considered rational policy which made that the reasonable impossibility they seemed to consider it to be? In expressing it that way, the Tribunal is nonetheless mindful that it is for the complainant to demonstrate that the requirement or condition that she work full time was unreasonable in all the circumstances. We shall return to this.

36. It is useful first to turn to Mrs Bogle's evidence as to the course of events in detail and then consider that against the other evidence before the Tribunal. According to Mrs Bogle the events occurred as follows.

37. In November 1995 she and her husband were advised their application to adopt had been approved and the child would be available in about a week.

38. At that time the Fremantle Clinic was operating out of the Mt Henry Dental Therapy Clinic because its own Clinic premises at Fremantle were being demolished and new premises constructed.

39. The Fremantle Clinic Head of Unit ("Clinic Head") was Mr Kee Yu Chou. The acting RDO was Mr Peter Neesham and the Regional Dental Therapist at the time was Ms Linda Chilli. The Director of Dental Services ("the Director" or "DDS") was Mr David Neesham, Peter Neesham's older brother.

40. Having received her news, Mrs Bogle called a meeting in Mr Kee's office when Mr Peter Neesham came to visit. In addition to the two of them Mr Kee and Ms Chilli were also present. She told them the news and said she would be taking leave until she decided what she wanted to do. As she explained it to the Tribunal (t.19):

> *"... there was no mention made of what leave I was taking. I was taking maternity adoption leave till I decided what I wanted to do, and Peter Neesham said to me he would definitely fit me in, and I said there was no way I would be coming back full time after waiting so long for this child, and he said he would definitely fit me in, to come and talk with him when I'm ready to come back.*
>
> *Now let me just take you back over that evidence again. What did you say you wished to do when you returned to work? In what status or capacity did you wish to return? – I just said I would like to come back to my job when I have – at some time, when I have decided when I'm ready to come back, and he said then – there was no mention about what status or salary, or anything. He just said he would definitely fit me in.*

*And when you say "my job", what did you mean? – Well, I meant my original Charge Nurse position.*

*Yes. Now you say that his words were, "We'll definitely fit you in". Was there any discussion between about hours of work or any other arrangements? – No, there wasn't. There wasn't."*

41. Mrs Bogle then took long-service leave from 20 November to 18 December 1995, annual leave from 19 December 1995 to 24 January 1996, maternity (adoption) leave from 25 January to 20 November 1996 and long-service leave at half pay from 21 November 1996 to 26 March 1997.

42. About November 1996 when her adoption leave was coming to an end, Mrs Bogle went to Dental Services' Head Office at Mt Henry to complete leave forms and to discuss her part-time options with Mr Peter Neesham. She saw the Supervising Nurse, completed the forms and then went to Mr Neesham's office. She asked him about her returning to work part time in her position as Charge Nurse -

*"like we originally discussed" (t.20)*

but he said the Branch would never allow part time in that role. She reminded him that he had previously told her he would definitely fit her in, and he said in a jocular way –

*"oh, you know I'm a liar".*

43. He told her she could come back to some other job, but not that. She was dumbfounded, shocked and upset. He had to go to another meeting then so that was how it was left. She went home.

44. In the meantime she had been keeping contact with Mr Kee and discussing her intentions with him. So a couple of days after the meeting with Mr Peter Neesham, Mrs Bogle telephoned Mr Kee and told him Mr Neesham would not allow her to job-share the Charge Nurse position. Mr Kee

advised her to put her request in writing to him and he would pursue it with Mr Neesham.

45. She accordingly wrote to Mr Kee by letter dated 24 February 1997 (ex C.2):

> "My Maternity/Adoption leave and Long Service leave finishes on the 26th March 1997.
>
> I am due to return to Fremantle Dental Clinic in my position as Charge Nurse, Level 2, on that date.
>
> I would like to reduce my working days to 2 days (ie 15.34 hours) per week, as discussed previously with Mr Peter Neesham and yourself.
>
> As you know, I have a 19 months old baby girl, and at present I feel I need to spend as much time with her as possible.
>
> It would be greatly appreciated if you would look favourably at this request, and advise me of your decision as soon as possible.
>
> Yours sincerely
>
> Beverley Bogle."

46. Jade was by then about 18 months old. Mrs Bogle had previously placed her for a time in a large child-care centre in January, but Jade was getting a lot of colds and infections and her doctor advised Mrs Bogle that Jade would probably be better off in a family day care centre where there would be only 3 or 4 children in a person's home.

47. That in fact proved to be a much better arrangement for the child and her health improved considerably. It was also more convenient for Mrs Bogle. The other child-care centre was a greater distance from her home and work.

48. Mr Kee told Mrs Bogle he had passed on her letter to Mr Neesham and was waiting for a response, but she should keep pursuing it, which she did.

49. Having still not received a response to her letter she contacted Ms Helen Attrill, then State Secretary of the ANF. It was agreed the ANF would make representations on her behalf and she would also continue to press her own cause.

50. Subsequently Mrs Bogle spoke to Lyn Santich, Assistant Coordinator of Nursing, who told her that she had received a letter from Mr Peter Neesham confirming the outcome of discussions the two of them had had with the DDS, Mr David Neesham. That letter set out the conditions on which they had decided Mrs Bogle could return. Ms Santich faxed a copy of that letter to Mrs Bogle. For some reason it was not available to be put before the Tribunal. However there appears to be no dispute about it.

51. Three options were offered. The first was that the complainant could apply for regression to dental nurse and work part time to 22 July 1997 after which she would have to revert to her Charge Nurse position full time. The second was that she could work part time by relinquishing her Charge Nurse position altogether and regressing to a DCA (level 1.6). The third was that she could apply for leave without pay until part-time work could be found, but not later than 30 January 1998 after which she would have to return to her Charge Nurse position full time or resign.

52. The first option was possible because there was a part-time dentist who would be working to 22 July 1997, so she would be accommodating the dentist. That option was 8 salary increments below her Charge Nurse salary level.

53. None of the options were satisfactory to her, but Mrs Bogle was aware the ANF was still negotiating on her behalf and was hopeful the outcome

would eventually be at least a trial of her Charge Nurse job-sharing proposal.

54. With that hope in mind, she wrote to Mr David Neesham on 24 March 1997 nominating the first option (ex.C3).

55. She then returned to work on 27 March 1997 as a part-time dental nurse working Mondays and Tuesdays to coincide with the dentist who could work only those days. The job was basically chair-assisting and involved no supervisory or other advanced skills.

56. During this period Jade was placed for those days in the family day-care centre close to Mrs Bogle's home and employment. That arrangement worked well.

57. She was still trying to negotiate her part-time job share proposal but felt some awkwardness about that because by then the Director's wife, Mrs Pam Neesham, was acting in her Charge Nurse position. She felt Mr Kee was supportive. He kept asking her how she was going with the negotiations and encouraging her.

58. On 23 July 1997 Mrs Bogle had to revert to her Charge Nurse position full time, working 7.6 hours per days 5 days a week.

59. On 18 July 1997 Ms Attrill wrote to Mr Peter Neesham (ex C4) reciting the history of the matter and pointing out that Mrs Bogle had not applied for temporary regression from full-time Charge Nurse to part-time dental nurse, but had elected that simply because it was the only acceptable option given her by Dental Services following her request for reduced hours in the Charge Nurse position. The letter went on:

"Mrs Bogle is due to return to her substantive position of Charge Nurse at the Fremantle Clinic on 26 July 1997. Her request to reduce hours remains current, ie that she wishes to reduce from full time to part time because of her family responsibilities, and she again asks that the dental service considers this request.

Mrs Bogle indicates that it is her view that the Charge Nurse position is one which could operate effectively as a job-share position, and that there are suitably qualified dental nurses who would be interested in such an opportunity.

I would also refer you to the undertaking given by dental health services in the Dental Nurses Perth Dental Hospital Enterprise Bargaining Agreement 1996, and in particular clause 9.5 – Part-time Employment.

As Mrs Bogle's request has been before you since February 1997, we would like an early response from you as to the dental health service's position in this matter, and ask for a reply by close of business Monday 21 July."

60. That letter prompted the following response from Mr David Neesham dated 23 July 1997:

"Further to your letter (faxed) dated 18 July 1997 I wish to advise that Mrs Bogle did make an application for regression from her full time Charge Nurse position to a part time Dental Nurse position at Fremantle Dental Clinic, in her letter of 24 March 1997. In the same letter she acknowledged her return to her substantive Charge Nurse position, which is full time, at Fremantle Dental Clinic from 23 July 1997. This situation evolved from ongoing discussions with Mrs Bogle, as a result of a general request to reduce the working days by Mrs Bogle in a letter to the Head of Unit, Mr Y Kee at Fremantle Dental Clinic, dated 24 February 1997.

In a letter dated 25 June 1997, Mrs Bogle was further advised of the requirement to resume in her substantive full time position as Charge Nurse on 22 July 1997.

Your request of 18 July 1997 has been further considered, however, Dental Services' position remains that the Charge Nurse position cannot be effectively job shared.

Should Mrs Bogle wish to explore other part time opportunities we would be prepared to further investigate this option.

In the interim Mrs Bogle is required to resume in her substantive full time position."

61. That penultimate paragraph was subsequently queried but it was made clear that the Director was referring only to level 1 positions, not Charge Nurse or Charge DCA.

62. On 26 September 1997 there was a meeting between Mrs Bogle, Ms Attrill and Ms Susan Bell, the Dental Services Human Resources Officer.

63. According to Ms Bell's notes of the meeting (ex:C6) it had been requested by Dental Services:

> "to clarify (Mrs Bogle's) preferences in relation to her application for PT employment".

64. There is no reference in the note to job sharing. The note states Mrs Bogle's preferences as being –

- Immediate part-time work 2-3 days per week in her substantive position (Charge Nurse, L.2) at Fremantle Clinic;
- Leave without pay until part-time availability at Fremantle is resolved;
- Part-time dental nurse position in another location.

65. The note also records that she did not want to relinquish her Charge Nurse L.2 position at Fremantle and that she was unable to work full time past 10 October 1997.

66. Mrs Bogle told the Tribunal that her preference was the first of those set out; the second was an option put to her and the third was not something she would accept and was not discussed.

67. Nonetheless, the outcome of that meeting was a letter from Mr David Neesham to Mrs Bogle dated 2 October 1997 (ex:C7):

> "During discussions with yourself, Ms Helen Attrill (ANF) and Ms Susan Bell on 26 September 1997 you indicated that you are interested in part-

time work within the School Dental Service or Perth Dental Hospital on the basis of two or three days per week.

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.

Part-time positions do become available from time to time as a Dental Clinic Assistant Level 1, although at present there are no immediate vacancies. You can be considered for the next appropriate vacancy that is suitable to you on the following basis:

- Your confirmation that you do not intend to work full time in your position of Charge Nurse (Level 2) beyond 20 October 1997.
- Your confirmation that you are prepared to regress to a Dental Clinic Assistant Level 1 (Year 9).
- Leave without pay as a Dental Clinic Assistant will be granted from 20 October 1997 to 30 January 1998 to allow Dental Services to explore every opportunity for permanent or temporary periods of part-time work suitable to yourself.
- Should a suitable permanent or temporary part-time Dental Clinic Assistant position become available during the period of leave without pay you would resume work.

Leave without pay beyond 30 January 1998 would not be granted."

68. Mrs Bogle was dissatisfied with this and felt it did not reflect what had been discussed on 26 September. She raised it with Ms Attrill, who wrote on her behalf to the DDS on 9 October 1997. That letter (ex:C8) emphasised Mrs Bogle wished to retain her Charge Nurse position pending finalisation of her complaint to the Equal Opportunity Commission. Ms Attrill pointed out that at the meeting Mrs Bogle had indicated on "an interim, without prejudice basis" that she wished to:

- work part time (two to three days);
- retain dental nurse status;

- regress to Level 1 – preference was for payment at increment 9 in view of extensive experience as a dental nurse and Charge Nurse;
- to work, in order of preference, at (1) Fremantle Clinic, (2) School Dental Services, or (3) Perth Dental Hospital and/or dental clinics;
- be granted leave without pay effective from the end of her booked annual leave until a suitable vacancy becomes available or resolution of the complaint before the Equal Opportunity Commission; and
- to retain her substantive position as Charge Nurse, Fremantle Clinic.

69. In response to the undertaking sought by Dental Services, Ms Attrill advised that Mrs Bogle confirmed that:

- because of her family responsibilities she could not work full time beyond 20 October 1997;
- on an interim, without prejudice basis, she would be prepared to regress to Dental Nurse L.1 at the appropriate increment (her preference being L.1.9);
- she would accept leave without pay from 20 October 1997 to 30 January 1998; and
- would take up a part-time temporary or permanent position as a dental nurse should one become available during the period of leave without pay.

70. On 9 October 1997 Mrs Bogle received a faxed handwritten note from Ms Bell stating that although Dental Services had received the letter from Ms Attrill, they required a written response from Mrs Bogle. The note concluded (ex.C9):

"It is reiterated that the only consideration for part time positions is as Dental Clinic Assistant, Level 1, and not as Dental Nurse, Level 1.

You will receive consideration for part time DCA positions in the location preferences that you have indicated ie Fremantle GDC, School Dental Service, PDH.

Appointment to part time position will be at Level 1.9(DCA)."

71. Mrs Bogle was unhappy with that. It was not what had been discussed at the meeting on 26 September. Her principal concern was the reference to loss of her Dental Nurse status by regression to DCA. She telephoned Ms Bell and told her so.

72. By this time Mrs Bogle could see no course than to resign, but she spoke to Ms Attrill who persuaded her to await further negotiations and to apply to the Tribunal for an interim order.

73. She continued to work full time although finding it difficult to do that as well as care for her family, and very distressing leaving Jade every day at child care. By the end of October she was very stressed and suffering severe headaches. She had to take a week's sick leave and had to have daily injections in her head for the headaches.

74. The first month of her return to full-time work Mrs Bogle's husband took a month's leave so he could look after Jade. He had tried to get 3 months long-service leave but could get only one month. For the following 2 months Jade was in full-time child care, which Mrs Bogle found unsatisfactory and very difficult. She explained it thus (t.39):

*"...I just found that very difficult. I felt torn between my child and my job. I was putting in long hours at work, and I was very stressed, and when I went to pick her up she wasn't happy going to child care every day for five days. I was – I just got very torn between them both.*

*Now, why did you resume in July 1997 when this was the situation? --- I felt that – I was hoping all along that the branch policy would change, and*

*that they would allow me to work part time in my supervisory role. And I knew that negotiations were being made all along with the ANF.... (indistinct)... had to constantly meet the ANF with Mr Neesham, so she told me to hang out. She felt that there was going to be something good at the end of the line. But I could only take it for three months. It was just too difficult."*

75. And later (t.40-41):

> *"... I was exhausted. She was an 18-month-old child. She had a lot of needs. I wanted to be with her. I wanted to nurture her, but I was rushing home from work, rushing all the duties, putting her to bed, not spending enough time with her. I just felt torn.*
>
> *What about your husband? What role does he play in the family? – Well, my husband has got a very – what's the word – highly skilled job which involves him travelling a lot too, so I cannot involve him a lot with the home duties, apart from the gardening. That's basically all he does.*
>
> *... the rest is all left up to me so when I'm working full time I have to care for the home, my family, my child – everything."*

76. These difficulties were exacerbated by Mrs Bogle's particular concerns because of Jade being an adopted child. She had read a lot of literature about adoption and was very conscious of the importance of not being separated particularly during the first 5 years or so of growing and parental bonding.

77. Following her unsuccessful application to the Tribunal in November 1997 Mrs Bogle wrote to the Manager, Dental Administrative Services, Mr Peter Pittendrigh, applying for leave without pay to 30 January 1998 which would

> "... allow Dental Services to explore every opportunity for permanent or temporary periods of part-time work suitable to myself as a Dental Nurse."

78. Shortly after she sent that letter Mrs Bogle received a telephone call at home from Mr Pittendrigh. He told her leave without pay would be granted only if she regressed to level 1.6 and gave up her Charge Nurse

position. She told him she could not understand why leave without pay could not be given at her substantive level and at that point Mr David Neesham spoke. She had not realized he was listening. He said words to the effect that she had lost that decision at the interim hearing in the Tribunal and this was the only option Dental Services were going to offer her to continue to work there (t.51). She kept asking why leave could not be granted at her substantive level but he told her they were being more than accommodating, and refused. The telephone call left her very upset.

79. She then received a reply dated 13 November 1997 from Mr David Neesham. He referred to the telephone conversation and pointed out her approved period of leave without pay ceased on Friday 7 November and she had been expected to return to full time work in her Charge Nurse position the following Monday. Her request for further leave without pay was not approved. Dental Services did not have any part-time Charge Nurse nor other level two vacancies, but "as a special case" she could make a further application for leave without pay to 30 January 1998 but only on the basis of her immediate voluntary regression to level 1 Dental Nurse and relinquishing her Charge Nurse position. Were she to do that a part-time dental nurse position would be sought at Perth Dental Hospital or the Metropolitan Clinics and if available offered to her. This was said to be a "special case" because it would be outside the respondent's agreement with the ANF that whenever a dental nurse position became vacant it was to be reclassified as a DCA position. Her rate of pay would be at level 1.6. Should a part-time position not become available by 30 January 1998 she would be expected to resume full time duty as a dental nurse L 1.6.

80. She recognized she no longer had any choice and so told them that was what she would do. Even though it was said to be voluntary, so far as she

was concerned she was forced to regress. She did so, and was granted leave without pay to 30 January 1998.

81. By early January 1998 she had heard nothing about the availability of a part time position and was concerned. She made some enquiries and learned that positions would be available at Perth Dental Hospital. She telephoned Mr Pittendrigh and told him that.

82. Eventually she received a letter from Ms Bell for the DDS dated 27 January 1998 offering her two days a week at Perth Dental Hospital. She accepted it. That was not a satisfactory situation either – work was only available during term time, so leave had to be taken during semester breaks. The faculty works only 33 weeks a year. The other 19 weeks had to be taken using annual and unpaid leave. Nonetheless, having no alternative, Mrs Bogle commenced in that position in February 1998. The work was essentially nurse chairside duties and involved no training nor supervisory responsibilities. The rate of pay at level 1.6 was appreciably less than that at her Charge Nurse level – and of course she was also losing the other 15 unpaid faculty vacation weeks a year. Even when not working during the faculty breaks she had to pay to retain Jade's child-care place on a "holding" basis. In these circumstances Mrs Bogle was experiencing financial difficulties. So on 15 September 1998 she wrote to her Charge DCA at the faculty asking for other part-time work during the faculty breaks. She was subsequently offered (and accepted) 2 days a week in the Dental School Patients Clinic from 2 November to 18 December 1998 after which she would have to take leave until 5 February 1999 and then resume as a part time DCA in the faculty.

83. In fact another opportunity arose in early February 1999. The Radiography Department at Perth Dental Hospital had two radiographers who were job-

sharing one Advanced Dental Nurse Practitioner Position. That was at level 1.9, three increments higher than that to which Mrs Bogle had regressed. One radiographer worked 3 and the other worked 2 days a week. The former had been given 12 months leave without pay to go with her husband to New Zealand. There are not many qualified radiographers in Dental Services but Mrs Bogle is one of them. She was asked to take that job-share position from 1 March to 17 December 1999. At that stage Jade was booked into child care Mondays and Tuesdays. The Centre was not able to take her Wednesdays, but Mr Bogle was able to arrange a rostered day off every second Wednesday, so Mrs Bogle agreed to work in the position on the basis that she would work 2 days every week plus each alternate Wednesday.

84. By mid-July 1999 that arrangement had become impracticable because of the travel commitments of Mrs Bogle's husband's work and because having to travel from her home at Bull Creek to Perth rather than Fremantle took her an extra 2 hours each day and she was still unable to get Jade the extra day in child care. Consequently, from 9 August 1999 her hours were reduced to 2 days a week at her own request.

85. From 17 December 1999 until commencement of the next faculty term in February 2000 Mrs Bogle has been required to take leave without pay after which the arrangement is that she will return to the level 1.6 part time DCA position at the faculty.

86. Much of the foregoing narrative is not relevantly in dispute but some aspects of it are and it is convenient to deal with them at this point.

The November 1995 Conversation

87. Mrs Bogle was adamant Mr Kee was present when she first broke the news she had been approved to adopt Jade. Mr Peter Neesham thought the discussion would have occurred in the staff area between the Clinic and the Administration building at Mt Henry and that Linda Chilli was the only other person present (t.379). He said the issue of the adoption was a great surprise to him and apart from that they just had a general discussion about what Mrs Bogle would do. She told them she was not sure she would come back full time and his advice to her was that there would not be any difficulty finding her part-time work as long as he had some notice. There was no discussion about any particular position (t.380).

88. In cross-examination Mr Neesham agreed November 1995 was a particularly busy time for him but maintained he had a very good recall of that conversation, although the reasons he then advanced for saying that (t.417-8) really seemed to have no bearing on the issue at all. Nonetheless, he insisted he certainly would not have forgotten the basis of the conversation, and added that the three of them had been over to the Clinic and were walking back. The main point of the conversation was the adoption; what Mrs Bogle was going to do about her employment was a peripheral issue. He denied that he had said

*"We'd definitely fit you in"*

although he definitely would have said

*"I'd like to have you back"* (t.419).

89. Ms Chilli's evidence was that she, Mrs Bogle and Mr Neesham were the only ones present. The conversation began towards the back of the reception area and continued as they walked out of the clinic and headed towards the administration building. They were walking that way because

Mrs Bogle was going to see the Coordinator of Dental Assisting Services whose office was in the administration as was hers and Mr Neesham's.

90. Mrs Bogle told them about the adoption and how delighted she was about that. She needed to proceed on adoption leave quite quickly. She was unsure about whether she would return to work because it was her first child, but did talk about the possibility of returning part time (t.456). Peter Neesham said he would endeavour to find a part time position for her and felt there would be part time positions available. According to Ms Chilli there was no specific discussion about returning to work part time as a Charge Nurse (t.457).

91. Mr Kee told the Tribunal he heard from Mrs Bogle that she was going to adopt a child and take maternity leave, just before it happened. She did mention to him that she was trying to come back to work part time as Charge Nurse job sharing with the senior DCA (t.551-2) and within the week he told Peter Neesham that was the proposal. He was not involved in any meeting with Mrs Bogle, Mr Neesham and Ms Chilli in which what Mrs Bogle would do when she returned to work was discussed. The first discussion he had with her about the adoption took place in the Charge Nurse's office at Mt Henry.

92. Cross examined by Ms Giles for the complainant, Mr Kee agreed Mrs Bogle had made it clear to him from the very start that she wanted to return part time to the Charge Nurse position. Although he could remember someone (he thought it was Peter Neesham) saying to her words to the effect "we'll fit you in" or "we'll find you a place somehow" or "we'd love to have you back", it was not in that first conversation. He thought they spoke about the job sharing after she had been on her first 12 months maternity leave and was seeking an extension (t.572-3).

93. Mr Kee was at something of a disadvantage before the Tribunal. Neither of the parties had intended to call him. That was apparently for tactical reasons – counsel on both sides wanted to cross-examine him. There may have been other reasons. In any event, towards the end of the respondent's case it was apparent that Mr Kee was said to have been a relevant participant in the events with which we were concerned, and having heard from both counsel on the matter the Tribunal decided to call him itself. A summons was accordingly issued requiring his attendance on 8 December. It was apparently served on him the day before that. He was taken completely by surprise and so when called to give evidence had not turned his mind to these matters for some years. He said he had difficulty recalling the events and conversations and that was obviously so. Although in some other respects his evidence was of assistance to the Tribunal it was only marginally so on this aspect.

94. This particular conversation assumed in retrospect an importance to those involved which it did not have in their minds at the time. Further, we are satisfied there was a degree of misunderstanding in the course of it. Whilst we consider each of the witnesses to be giving what they believed to be an honest account of the circumstances and what was said, we accept that given by Ms Chilli as being the most reliable. It is unlikely that Mrs Bogle would have called a meeting of the Head of Unit, the Regional Dental Officer and the Regional Dental Therapist to inform them of her adoption. It is much more likely that she went in that day to tell Mr Kee and having done so, and on her way to see the Coordinator of Dental Assistance, encountered Mr Neesham and Ms Chilli and took the opportunity to tell them the good news of her adoption. We accept (and we find) that there was a discussion essentially as Ms Chilli described it, but whilst Mrs Bogle may well have had her Charge Nurse position in mind when speaking of

returning to work part time, she did not expressly say so, and Ms Chilli and Mr Neesham thought she was talking of part time work only in general terms. We accept that he did respond encouragingly to that and did say "we'll fit you in" or words to that effect.

Mr Peter Neesham's understanding of the request

95. Mr Neesham had no further discussions with Mrs Bogle about her return to work until after the middle of 1997. He testified he was aware there had been contact from her seeking part-time work (he mentioned her letter to Mr Kee), but the proposition that she wanted to job-share the Charge Nurse position was not something he became aware of until August 1997 (t.382).

96. He was emphatic that he never said to her in a jocular vein nor any other way:

*"You know I'm a liar"*

or words to that effect. He said he would never say anything like that and found the suggestion offensive. His evidence on this issue was confusing and less than satisfactory. He appeared unsettled and his manner became strained. The effect of his evidence was that the conversation alleged by Mrs Bogle to have been about November 1996, had never occurred at all.

97. On this issue the objective course of events bears out her account.

98. Mr Kee confirmed Mrs Bogle had spoken to him about a discussion she had with Mr Peter Neesham regarding her coming back to work part time as a Charge Nurse. She said Mr Neesham had promised her she could do that but had changed his mind and that he had said (t.556):

*"... something like he was joking or he was lying or something like that."*

99. When shown Mrs Bogle's letter to him dated 24 February 1997 Mr Kee agreed he had advised her to write that. He suggested she put it in terms of reducing her hours rather than wanting to go part time because that was likely to be viewed more favourably by Dental Services. He understood (as indeed the letter says) this was in relation to the Charge Nurse position, and he testified he told that to Peter Neesham.

100. We found Mrs Bogle generally to be an impressive witness. She gave careful, considered and responsive answers. She was not evasive. She was precise and to the point.

101. Whilst we regarded Mr Peter Neesham as generally an honest witness, he was sometimes over anxious to present himself and Dental Services in the best possible light, his answers were sometimes not responsive to the questions and he had a tendency to loquacity, particularly when pressed.

102. In relation to the conflict between them as to the conversation in late 1996, we are persuaded that Mrs Bogle's account was essentially accurate. We are satisfied that by late 1996 and early 1997 Mr Peter Neesham was aware that Mrs Bogle wanted to work part time in her Charge Nurse position. We are also satisfied he made some throwaway remark in a jocular vein to the effect that "you know I'm a liar," which may not even have registered with him at the time but which nonetheless upset Mrs Bogle.

103. Whether he understood at that stage specifically that she was proposing the position be job-shared probably does not matter much in the overall context of this case because there can be no doubt whatsoever that he (and hence the respondent Board, vicariously) knew it by mid-July 1997. Her proposal was explicitly stated in those terms in the ANF letter to him dated 18 July 1997 (ex:C4). And as we have already noted Dental Services' response then

was – and has consistently been since – that the Charge Nurse position cannot be effectively job-shared and would not be.

Mr Kee's role

104. Mrs Bogle had always been under the impression that Mr Kee supported her application to job-share the Charge Nurse position and that he was encouraging her. She obviously saw him as someone she could talk to and rely upon. For that reason she kept him informed of developments. So it was she testified that when she told him of her conversation with Peter Neesham in which the latter had said words to the effect:

*"You know I'm a liar"*

Mr Kee was shocked and said he could not believe it.

105. Mr Kee's evidence was that he was against the idea initially, but when she explained what she was proposing was to share the job with the senior DCA, he agreed with that (t.579-581) and may have said she had his full support (t.583)

106. He told the Tribunal he discussed it with his supervisor, Mr Peter Neesham and told Mr Neesham it could probably work because of the two people involved (t.552). However they had a lengthy discussion about it and in the end he found the RDO was right – it would create more problems than having a full-time Charge Nurse (t.552). In cross-examination by Ms Giles, Mr Kee adamantly denied that he came to oppose the proposal because he knew Mr Neesham opposed it (eg t.588).

107. Even so, despite having changed his mind, Mr Kee did not tell Mrs Bogle that. He continued to deal with her in a way which conveyed to her the impression that he was supporting her proposal and encouraging her. When

cross-examined about this he explained that he was sympathetic to Mrs Bogle and when speaking to her was speaking with his heart, whereas in his head he knew what she was proposing would not work. He never told Mrs Bogle he had changed his mind. He testified that he tried to convey the message indirectly by suggesting to her later that rather than press to work part time in the Charge Nurse position she should take extended leave without pay, work part time in private practice and in due course return to her Charge Nurse position full time. Whatever he may in fact have said to Mrs Bogle along those lines was (not surprisingly) too subtle for her to grasp the message he testified he was really trying to give her. His explanation for not being more direct about it was that he did not want to hurt her feelings.

108. He did agree that he had been present at a meeting in the office he shared with Mrs Bogle later in 1997 after she had returned to her Charge Nurse position. Apart from he and Mrs Bogle, Mr Peter Neesham and Ms Chilli were there. Mr Neesham reiterated the management view that Mrs Bogle could not job-share the Charge Nurse position. In cross-examination Mr Kee agreed he had asked Mr Neesham why they would not allow that. When queried why he asked that question if he had by them himself come to the view the position could not be job-shared and he was not supporting Mrs Bogle, Mr Kee said (t.590):

> *"I just wanted to know really what is (sic) their reasons, whether their reason is the same as mine."*

109. In the end, Mr Kee's own position in these events and his reasons for it, probably does not matter to the eventual outcome. It is clear, and he accepted, that he initially gave his support to Mrs Bogle's application to job-share the Charge Nurse position and that (whatever his actual view may

later have been) he acted towards her in such a way as to lead her to believe right up to the date of hearing that he continued to support it.

Dental Services' Response to the Request

110. Despite numerous requests from Mrs Bogle (and the ANF) for Dental Services to explain their reasons for saying the Charge Nurse position could not be job-shared, no reasons (other than that it had always been a full-time position) was given until it became necessary for the Board to respond to her complaint to the Equal Opportunity Commission in late 1997. However some consideration had been given to the matter internally before that.

111. Mr Peter Jarman was the Manager, Hospital Dental Services and a member of the Executive. He had not been directly involved in dealing with Mrs Bogle's application and was unaware until the end of 1997 that part time work as a Charge Nurse had become an issue.

112. The issue of job-sharing Charge Nurse positions had been raised in the past and it had been "historically agreed" that was not a position that could be shared (t.274-5).

113. Mr Jarman recalled Mrs Bogle's proposal was discussed at a general Dental Services Management Committee or Executive Committee meeting in late 1997.

114. According to him those present were asked to go away and prepare notes on why they thought supervisory positions could not be job-shared. Although he later ineffectually sought to resile from that position and to suggest they were actually asked to reconsider the issue without seeking to reaffirm an already established position, that is exactly what he did. The notes he made at the time were produced after he referred to them when

giving his evidence. The notes (ex:C39) were prepared for a meeting on 7 November 1997 and were headed:

> "Why Supervisory Positions should not be job-shared."

115. It is clear from the evidence overall that those notes were the genesis and became the essential content of Dental Services (and ultimately the Board's) expressed reasons for imposing on Mrs Bogle the requirement to work full time if she wished to retain her Charge Nurse position. We shall return to their content later, but for the moment proceed to concentrate on the process of their articulation.

116. Mr Peter Neesham said he became aware of the proposal when he received the letter from the ANF dated 18 July 1997. His immediate reaction was "it can't be done".

117. Mr Neesham told the Tribunal that once he became aware that what Mrs Bogle was really seeking was to job-share her Charge Nurse position, although he had some input, the matter was actually dealt with by the Director and Peter Pittendrigh. He said (t.385):

> *"I was asked to provide ... provide reasons basically; reasons for and against job share. In other words, I was really asked to formalise what otherwise you would probably call intuition..."*

118. This was in August 1997.

119. He said that after that he had a discussion with Mrs Bogle at the Fremantle Clinic (at which Linda Chilli was present) and told her the proposal that she work 3 days and the senior DCA work the other 2, sharing the Charge Nurse position, was totally unsatisfactory. He said (t.386):

> *"---and it was a strange sort of arrangement, and I just felt that having two people in the clinic, one a supervisor 2 days and then being*

*supervised for 3 days was just not an arrangement that would work, certainly from our point of view."*

But that, of course, was not what was being proposed.

120. The request from the Director was not in writing. Again, Mr Peter Neesham was at obvious pains in the hearing to claim the exercise was to be a fair and considered evaluation of the proposal. He and Peter Jarman were asked to prepare a position paper. He discussed it with Mr Jarman who did most of the work on it and actually prepared the paper (t.421).

121. In putting it together they did not see any advantages for the organisation in the job-share proposal (t.422). The only advantage Mr Neesham could see was the retention of an experienced staff member – although even that was not something he discussed in the context of this case (t.422).

122. In his position Mr Pittendrigh was directly responsible to the DDS for all matters to do with human resources management in Dental Services. The Human Resources Officer reported to Mr Pittendrigh. Until May 1998 the organisation was part of the Health Department and a lot of the information and policy direction in respect of human resources issues came from that Department, some of it from the Coordinator of Equal Opportunity. Apart from those sources, Mr Pittendrigh also had personal dealings with the Director of Equal Opportunity in Public Employment ("DEOPE"). Part 1X of the *EO Act* contains provisions specifically covering equal opportunity in public employment. Those provisions apply to the respondent. [5] The objects of Part 1X are [6]:

"(a) to eliminate and ensure the absence of discrimination in employment on the ground of sex, marital status, pregnancy, family responsibility or family status, race, religious or political conviction, impairment or age; and

(b) to promote equal employment opportunity for all persons,

in the authorities to which this Part applies."

123. Section 142 of the *EO Act* creates the Director of Equal Opportunity in Public Employment whose functions include [7] advising and assisting authorities in relation to equal opportunity management plans. Each authority subject to Part IX is required [8] to prepare and implement an equal opportunity management plan in order to achieve the objects set out in section 140, and such plan must include provisions in respect of certain specified matters detailed in section 145(2).

124. Mr Pittendrigh was aware of a State Government policy document which encouraged part-time employment and he had seen a DEOPE Equity Resources Kit publication of November 1995 entitled "Implementing Flexible Working arrangements – a Resource Kit" (ex.C34) and acknowledged there should be a copy of that in the Human resource Manager's office of Dental Services. He agreed that what was set out at page 15 of that document under the heading "Part-time Work":

> "Permanent part-time work was introduced formally to the WA Public Service in November 1989. A series of updates followed, with official policy introduced in the Public Service and widely adapted throughout the Public Sector.
>
> The policy encourages consideration of opportunities for part-time employment applicable to a range of situations including:
>
> - combining work with family responsibilities;
> - inability or difficulty in working full time as a result of impairment or for medical reasons (including rehabilitees);
> - preparation for retirement;
> - readjustment to the workplace after extended absences, such as sick leave or maternity leave; and
> - undertaking study.

Part-time work opportunities can be created in a variety of ways. These include:

- designing jobs to be performed on a part-time basis;
- the employment of current full-time employees who wish to work part time on the same, or different work; and
- advertising for work to be performed on a part-time or full-time basis, and designing the work arrangements to suit the availability of the best applicant."

accurately reflected what had been his understanding of State Government policy since 1989. He had also seen a DEOPE publication "issues Paper No 3: Flexible Working Arrangements in the WA Public Sector – Outside the Square" of November 1994 (ex:C33). Notwithstanding this background and despite his responsibility for human resources management, Mr Pittendrigh was never asked to provide any evaluation, recommendation nor comment on Mrs Bogle's job-share proposal. When she applied to return from maternity leave he was asked for advice about the conditions of the Award and an agreement Dental Services had with the ANF but that was all (t.478-9). He became aware she was seeking to job-share the Charge Nurse position and he would have had some discussions with the DDS about it. He quickly came to realise Dental Services management was against the proposal. He did attend one meeting that the DDS called with the Regional Dental Officers and Regional Dental therapists to discuss it in late 1997 but it was never raised at a Dental Services Executive meeting. At the one meeting he did attend the view expressed was that job-sharing the Charge Nurse position could not work effectively. He never saw the document produced by Mr Jarman (ex:C39) until he had to coordinate the preparation of material for the Tribunal hearing in November 1998.

125. As it happened, having heard the management discussions about the feasibility of job-sharing supervisory positions Mr Pittendrigh personally

did not disagree with the view that it could not work effectively. However it was apparent from his evidence that this again was essentially an "intuitive" reaction and not based upon any empirical survey, cost analysis nor indeed any detailed examination or consideration of the issue at all.

126. The DDS, Mr David Neesham, told the Tribunal his recollection was that the issue was first raised with him about March 1997. He understood then that Mrs Bogle wanted to work part time in the Charge Nurse position. He considered that was not appropriate and so she was offered alternative options. He said it was his clear understanding at that time that she had undertaken to eventually return to full-time work.

127. He said that following receipt of the letter from the ANF in July 1997 he required senior management to review the issue (t.493):

> *"...I know that I required all the senior management to review that – and I think it was following a request to the ANF just before Bev returned to full-time employment to review and give their reasons to me as to why it couldn't be part time. I had a fairly definite view it couldn't be but I also – I wouldn't say a definite view. My feeling was that it couldn't be part time because of the nature of the employment and they certainly confirmed that. There was no documentation but I certainly had all the managers – the regional dental offices, the managers – the regional dental officers, the managers and the regional therapists and the acting HR officer present their views on it."*

128. In cross examination Mr David Neesham explained the proposal was dealt with within Dental Services. It never reached the Board until, he thought, just prior to the matter going to the Tribunal. In fact his recollection was clearly not quite accurate about that. Following Mrs Bogle's complaint to the Equal Opportunity Commission on 1 September 1997 the Commissioner made some preliminary enquiries and then on 16 October 1997 wrote to the Hon Ian McCall, Executive Chairman of the Board. He wrote back to her by letter dated 25 November 1997 (ex C.24 tab 7). That

letter contains a detailed response to the complaint and essentially reflects (albeit with much more elaboration) the reasons against job-sharing expressed in Mr Jarman's notes for the meeting on 7 November 1997. However we accept the essential point of Mr David Neesham's evidence on this, which was that the decision that Mrs Bogle could only return to the Charge Nurse position if she worked full time, was not made by the Board. In fact, as we find, it was made by Mr David Neesham.

129. Further cross-examined about what he had actually asked the management group to do he said he did not believe that he would have told them to come back with reasons why the position could not be job-shared; rather, he requested them to review it. The cross-examination continued (t.517-8):

> *"Yes? – we have had a long view or there has been a long – a view held over a long period that this position is a full-time position, yes. If I presented it in that term it certainly was presented for them to justify that position.*
>
> *For them to justify that decision? – To them to justify and reconsider that position, yes.*
>
> *Did any of them come back to you and say, "Well, look, here are some of the benefits of the proposals"? --- No, they didn't.*
>
> *Because you didn't actually ask them for that, did you? – I could have equally not asked for anything. I actually asked for it because I believe there is a value in forcing these people to review their position on that matter.*
>
> *MS GILES: But you didn't really do that, did you? You simply asked them to come back with justifications for the decision which had already been made? – As I said, I can't recall exactly what I asked but I certainly asked them to review that request."*

130. When further pressed he stated he would have expected the staff to consider and "have the option" to put forward reasons in favour or opposed to it.

131. He acknowledged that in fact no-one did suggest any possible benefit or advantage in the proposal – all he did get back were reasons why the

position could not be job-shared. There was no comparison or weighing of benefit against detriments; there was no attempt to do any cost nor other analysis; no consideration was given to seeking any external assistance or advice and indeed, as we have observed, nor even was Mr Pittendrigh asked to provide any kind of evaluation and report.

132. The Tribunal is satisfied there was an historical view within Dental Services that supervisory positions could be neither worked part time nor job shared. That view was based on no more than the historical fact that they never had been, and the entirely personal "intuitive" (to use Mr Peter Neesham's word) feeling of senior management that it would not work. We are satisfied that the Neesham brothers and Mr Jarman were the only real players in this, and that when they came to reconsider the matter following receipt of the ANF letter of 18 July 1997, they had already committed themselves against the proposal and their efforts were all directed to justification of that position. We do not say they necessarily saw it in that light themselves, but we have no doubt that was the situation. This conclusion is reinforced by a consideration of the reasons they eventually advanced, to which we now turn.

The reasons advanced

133. The starting point must be an understanding of what the Charge Nurse job entails. The requirements of the Fremantle Dental Clinic Charge Nurse position are set out in the Position Data Form ("PDF") effective from 7 April 1993. The key responsibilities are stated as being to assist the Head of Unit in the administration of the Clinic, supervise staff under control and provide chairside assistance within the Clinic. Staff under control are up to 7 FTE Dental Clinical Assistants and up to 3 FTE Reception Staff (there

could also be contract cleaners to supervise). The summary of duties, listed in descending area of importance, is:

| | |
|---|---|
| 1. | CLINIC MANAGEMENT |
| | 1.1 Assists the Head of Unit in the administration of the clinic. |
| | 1.2 ensures adequate stocks of equipment and materials, maintenance of inventories and completes requisitions as necessary. |
| | 1.3 Liaises with Physical Resources section to ensure maintenance of clinic, equipment and instruments. |
| | 1.4 Co-ordinates patient reception activities. |
| | 1.5 Liaises with private dental practitioners, other dental services' units in relation to patient records. |
| | 1.6 Arranges issue, receipt and distribution of laboratory work. |
| 2 | SUPERVISION AND STAFFING |
| | 2.1 Arranges deployment of Dental Assisting staff in consultation with Head of Unit. |
| | 2.2 Provides assistance and direction to Dental Assisting and reception staff. |
| | 2.3 Assists the Head of Unit with the Performance Management Program for nursing, reception and orderly staff. |
| | 2.4 Conducts orientation programs for new staff and implement training programs for dental assistant trainees and other staff as required. |
| | 2.5 Assists the Head of Unit by coordinating the completion of necessary documentation for staff/statistical records and forward to the appropriate section. |
| 3. | CLINICAL |
| | 3.1 Provides chairside assistance to dental offices as required. |
| | 3.2 Assists with the provision of radiographic and dental health education services. |
| | 3.3 Ensures infection control, emergency and occupational health and safety procedures are implemented in accordance with Dental Services policies. |
| 4. | OTHER |
| | 4.1 Other duties as directed. |

134. It was Mrs Bogle's assessment that Clinic management takes approximately 30-35% of the time, supervision and staffing takes about 35% and most of the balance would be clinical work.

135. We have already noted that it was the list of reasons produced by Mr Jarman with some assistance from Mr Peter Neesham for the meeting on 7 November 1997 which became the substance of the justification thereafter relied upon by Dental Services.

136. Mr Jarman's qualification is in dentistry. He has never worked in private practice (other than on a casual basis).

137. Despite his position in the organization he has had no formal management training, although he has attended public sector courses as part of middle management development training. He has done 4 units of a part-time MBA with the University of Western Australia but has not pursued that and does not expect to complete it. When cross-examined about his understanding of indirect discrimination he frankly conceded that he had a lot of difficulty grasping the concept (t.270) and proffered the explanation that indirect discrimination occurs where there is an act of discrimination against one person which has a discriminatory effect on another (t.271). He said he could not give a practical example of it because he tries to avoid such situations in practice.

138. In passing, we observe the distinction between them as it was explained by Dawson and Toohey JJ in *Waters v Public Transport Corporation*[9] :

> *"Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such "equal" treatment is that the former is in fact treated less favourably than the latter. The concept of indirect discrimination was first developed in the United States in relation to practices which had a disproportionate impact upon black workers as opposed to white workers. Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable."* (footnotes omitted)

139. In *Secretary of the Dept of Foreign Affairs & Trade v Styles and Anor*[10] Bowen CJ and Gummow J described indirect discrimination as

*"... practices which are fair in form and intention, but discriminatory in impact and outcome."*

140. Like Mr Jarman, Mr Peter Neesham's qualification is in dentistry, in which he graduated in 1974.

141. Given the importance of ex: C39 to these events we set it out in full below:

" Why Supervisory Positions should not be Shared
REF: CHARGE NURSE POSITIONS
Continuity –
The Charge Nurse interfaces with the Head of Unit; assisting staff; supply; maintenance; reception cleaners; Information Technology. It is a liaison role. Any interaction which extends over to a day where a second Charge Nurse was in place could create problems.
eg. A problem with a product or number of supply items. Detailed written instructions would need to be left for the 2nd person to meaningfully interface with Supply. This is inefficient.
eg. Providing information to IT on a problem that was not addressed fully by the initial contact. Especially if not easily recognised, or if an intermittent fault. Again detailed written advice would need to be left.
eg a cleaning problem will need to be verified the following day and remedial changes instituted. Different Charge Nurses may see things differently, causing confusion.
Training –
Inservice training, staff development, will need to be done twice. This is a cost to the organisation. There will be double course fees (if needed) and the "off duty" person will work extra time.
Convenience –
The Head of Unit will need to provide direction/advice/instruction on separate days. This is inefficient.
Accountability –
Where it is difficult to specify the exact day on which something was done/should have been done, or an incident occurred, the investigation process becomes protracted and could lead to conflict.
Performance Management –
It is very difficult to have assessments made with the same outcome by different individuals ie, one Charge Nurse may be considered by staff to be more rigorous than the other. Those assessed by a more precise person may feel hard done by. To have one person do all the PMS assessments would not be an equal distribution of work.
Leadership –
The Charge Nurse position is one which should provide leadership. With a single occupant this role is easily recognised. Due to individual differences there is potential for problems. Staff tending to follow the style of one and not the other.

Charge Nurses are not clones. The possibility of "playing one off against the other" is real, and damaging to the team spirit needed in a clinic or department.

Standards –

Standards in patient handling, stock control, customer relations, dress monitoring, chairside functions etc. require consistent application. There is potential for conflict/problems.

Load Sharing –

To ensure the job is done effectively, there is an added burden on the Head of Unit as closer overview is needed.

Recruitment –

Recruitment of 2 individuals, rather than one, will have a cost/doubles the ongoing potential cost.

Personal Confidence -

Where personal issues are required to be advised to a supervisor in confidence, the duplication is a problem.

Leave –

Both parties would be required to take leave at the same time; or work full time while the other is on leave."

142. On the evidence the concern that any interaction extending over to a day when a second Charge Nurse was in charge would create problems does not withstand scrutiny. The conduct and administration of a dental practice relies heavily on comprehensive, accurate note-taking and recording of clinical and other information It also relies on adherence to detailed established procedural protocols (exemplified by the General Dental Services Procedure Manual ex: C29 and the General Dental Services Performance Management System Manual ex: C30). The suggestion made by the complainant that the use of a daily diary and planner in conjunction with goodwill and reasonable cooperation between the persons job-sharing the position would avoid problems of this nature is one we accept as a matter of common sense.

143. We are persuaded to a similar view about the issue of supply of stores. The example given by Mr Jarman was of a verbal instruction by a clinician to order a pamphlet and the wrong one was ordered. That was a mistake due to lack of clarity in the instruction and says nothing whatsoever about

problems likely to arise because a Charge Nurse position is being job-shared.

144. In this context Mr Kee's apprehension was that when people come into a new job they usually try to make changes so as to impress their superiors. His example with clinical stores was where one Charge Nurse would require items to be shelved eg alphabetically whereas another might do so by category or in some other way. He had not actually experienced this with job-sharing but thought it could happen. The Tribunal cannot accept this as a potential problem militating against job-sharing the Charge Nurse position, and nor that there would be any realistic difficulty in the two incumbents of such a position agreeing on a method of storage.

224. A further example offered by Mr Jarman about problems with interaction extending beyond one day, should the Charge Nurse position be job-shared, related to information technology. When asked to describe the problem Mr Jarman was able to speak only of an experience he personally had. He has had no computer training, describing himself as "self-taught". He does not have a computer in his office. He does use them to gain access to waiting lists etc. Apparently on some occasions the screen did not come up correctly. The procedure is to leave the screen up and telephone Dental Services IT support personnel, who can access the same screen themselves, or the user can describe it to them. Sometimes the user cannot get through to the IT personnel and so it becomes necessary to contact them the following day and describe the problem. Mr Jarman's concern was that if the second person job-sharing the Charge Nurse position was working the following day that person would not be able to describe the problem.

225. Mr Jarman acknowledged that unlike him Charge Nurses did actually receive IT training and in fact had the highest level of access in the clinics

(t.292). He did not believe however that Charge Nurses had any protocols for dealing with such problems – but his reason for saying so was that when he had raised with two Charge Nurses the difficulties he had with the computer they said they had never experienced the problem.

226. We reject the issue of potential IT problems as being shown to have any bearing on the merits or otherwise of Mrs Bogle's request to job-share. The experience upon which it was said to be based was idiosyncratic, completely unrelated to the issue of job-sharing and had no regard to the IT training or procedures of Charge Nurses.

227. The problem Mr Jarman saw with cleaning drew on a single instance in Kalgoorlie where one supervisor required a cleaning contractor to meet a certain standard, and a second person did not, but the first person subsequently reinstated the higher requirement. The situation was resolved within a week or two by the Head of Unit setting the standard. Again, that was, it seems to the Tribunal, to have essentially been a management problem which would be prevented or overcome by proper management processes. Mr Jarman explained there can in any event be significant personal variations in standards (quite apart from any issue of job-sharing) and management is addressing them by a document-intensive quality assurance programme. There is no reason any concern about job-sharing a Charge Nurse position in this respect could not be overcome by that same process. Mr David Neesham accepted that disputes over standards should be resolved by referring to the Dental Services manuals (t.530).

228. The experience relied upon by Messrs Jarman, Peter Neesham and David Neesham as the foundation of their concern that if the Charge Nurse position were to be job-shared efficiency would be reduced due to a lack of continuity simply does not provide that support in any credible way. Nor

do we accept that continuity could be achieved only by either overlapping the days worked or requiring the Head of Unit to act as liaison (as was suggested in the letter from the Chairman of the MHSB dated 25 November 1997, ex: C24 tab 7). We prefer the evidence of Mrs Bogle, Ms Robin May and Mrs Michelle Stone that continuity can satisfactorily be achieved by the use of notes, diaries, stock-control records, daily/weekly etc planners and other means which are consistent with documentary practises which have historically been a feature of clinical dental work.

229. Messrs Jarman and Peter Neesham saw additional costs (particularly of training) as a feature standing in the way of job-sharing the Charge Nurse position.

230. Although he agreed it would be a useful thing to do (t.296) Mr Jarman conceded no attempt had been made to actually quantify such costs. Nor could he think of any reductions in costs that might flow from job-sharing, including a financial benefit from retaining qualified and experienced staff. He mentioned the additional costs of having to send two people rather than one on, for example, courses provided by external consultants, but then agreed that such courses for Charge Nurses are "pretty rare" (t.301). and he had not calculated what the additional cost of sending another person might be. He then claimed there would be a double cost on meetings which Charge Nurses are required to attend. When asked to elaborate he said he was talking about a meeting for half a day once annually. Both job-sharers would have to be paid for that half-day. He suggested that there would also be additional costs for insurance and workers' compensation for attendance at those meetings. Further pressed, he was unable to say why that would be so, stated such costs would probably be small particularly given the respondent is

*"basically, self insured"* (t.304)

and agreed he had never made any specific enquiries about what these additional costs might be in respect of Charge Nurses (t.305).

231. We accept the point made by Mr Peter Neesham in evidence that where specialist training is provided in such areas as use of the computerised Patient Management System or staff supervision, there would be some additional cost to the organisation in training two people for the same position – but the respondent has made no attempt to quantify it and on the evidence overall the additional cost is not only likely to be marginal but would have to be offset against the additional benefits to it, such as increased flexibility, retention of qualified and experienced staff, probably lower rates of absenteeism and sick leave (to mention a few).

232. Indeed, in his evidence, when asked whether some costing should have been done so as to determine whether cost was really an issue, Mr David Neesham said (at t.520):

> *"this costing would be directly impacting on the individual in terms of, you know, their qualify of working life, their quality of professional development and on patients in terms of the quality of services we provide. They aren't necessarily quantifiable.*
>
> *But some costs would be quantifiable, wouldn't they? That is, for example, the additional training that is alleged needed to be expended, the additional costs of recruitment and so on? --- I don't think those costs are that major.*
>
> *No. They are marginal really, aren't they, in the general scheme of things? --- I think those issues that you have just referred to I think are, yes. "*

We agree.

233. The perceived problem noted by Mr Jarman under the heading "Convenience" in ex C.39 again we think is a non-issue and would be

addressed by ordinary management practices and proper clinical diary or planning notes of the sort we have referred to above.

234. The "accountability" problem was based on another experience of Mr Jarman. His recollection was that a piece of equipment broke down but it was not possible to determine which of two Dental Therapists, who worked consecutive days, was responsible. He was asked if this was the only such incident of which he was aware to which he replied (t.314) that it was the one which came to mind first. When the question was put to him again he conceded it was the only incident of which he was aware.

235. An incident of that kind could obviously potentially occur in a wide variety of circumstances having nothing to do with job-sharing. The fear of it occurring has not caused Dental Services to deny part-time work. Many dentists and dental therapists are employed part time by the respondent. The view is clearly taken that the risk of an incident such as this happening is outweighed by the benefits to the organisation and individual staff of providing part-time work. There is no reason job-sharing the Charge nurse position would be any different.

236. A good deal of evidence was directed to the issue of performance management. We do not propose to canvass it in detail. It is sufficient to say that the evidence (and indeed, common sense) shows that subjectivity in performance management and appraisal will always be a potential concern in any organization. It is the responsibility of management to recognize that potential and ensure the systems in place produce consistent and fair performance monitoring. Input from more than one person in the performance appraisal of an individual is ordinarily likely to produce a fairer and more objective outcome. Within Dental Services performance appraisals already involve input from more than one person. The

apprehensions expressed on this issue by witnesses for the respondent do not in our view withstand objective scrutiny. We see no reason why job-sharing the Charge Nurse position would produce any particular problem in this regard.

237. Similar considerations apply to the issues of leadership, load-sharing and personal confidence identified in Mr Jarman's note. When articulated, those concerns were, in the Tribunal's view, speculative and lacking in any objective justification.

238. So far as the issue of leave is concerned Mr Jarman explained in evidence that he had listed that not because he saw it as a problem, but simply because it was a factor (t.352).

239. The letter to the Commissioner for Equal Opportunity from the Chairman of the Board dated 25 November 1997 was apparently drafted by Mr Pittendrigh from material and information provided to him, and passed to the chairman for signature through Mr David Neesham, as Director. Mr Neesham told the Tribunal he would have seen the letter and would have agreed with it (t.526-7). He conceded in cross-examination that the problems with job-sharing the Charge Nurse position, as set out in that letter, were problems which would have been reported by his managers rather than problems which he himself saw with the proposal (t.527). As we have found, the source of that information was essentially Mr Jarman, with some input from Mr Peter Neesham.

240. One matter which was advanced at some length in the letter was the limiting effect on promotional opportunities were job-sharing to be introduced. It was suggested that the 264 full time dental nurses/DCA

> "would have to go part time to obtain a promotion."

or it would be necessary for a full-time person to work part time in one place and part time in another and a corresponding additional part-time person to be recruited (ex.C24 p.37-38). Again, this was a bare assertion unsupported by any kind of practical experience, empirical observation or considered analysis. It has to be remembered that what was being decided was whether or not the Fremantle Clinic Charge Nurse position should be job-shared, not whether all Charge Nurse (or Charge DCA) positions should be. Looked at in that light, the concerns expressed in relation to this fall to the ground – quite apart from the prospect that job-sharing at least some of the Charge Nurse positions would actually increase promotional prospects for dental nurses/DCA.

241. Mrs Michelle Stone, a dental therapist, gave evidence that she and another therapist had recently received approval to job-share a dental therapy position on a 12-month trial basis from 1 February 2000.

242. Mr David Neesham's evidence was that it was he who approved that sometime after Mrs Bogle's application for an interim order had been made to the Tribunal (t.533) and he did so in the face of opposition from his management personnel who thought it would not work. There are differences between Charge Nurse and Dental Therapist positions, probably most importantly for present purposes in respect of supervisory responsibilities, but on the evidence the promotional prospects they offer to those in their respective streams within Dental Services are quite comparable. And as to that, in respect of dental therapists, Mr David Neesham said in his evidence in chief (at t.498):

> *"I think another aspect is that we do have a large number of part-time staff in that area. I think I explained earlier that we have something like 40 per cent of the therapists in that area are part-time dental therapists, and operationally, if something can succeed – and I think it can; as I said, we'll still wait and see – then it also opens up opportunities for these*

*people who, again, were precluded from a promotional position, or there are only a few promotional positions available to them at that level, part time.*" (our emphasis)

164. One of the most marked features of Dental Services' opposition to the idea of job-sharing the Charge Nurse position is the extent to which, upon examination, it was shown to be based not on any objective analysis, but on entrenched historical belief systems and attitudes, or "intuition". That is consistent with other experience. In the DEOPE Issues Paper No 3 "Flexible Working Arrangements in the Public Sector – Outside the Square" Helen Maddocks notes that where they do exist the introduction of flexible work practices has been an outstanding success but

> "Fundamental to their success has been a preparedness to change the corporate culture and adopt new and progressive management styles which focus not on process but on outcome. While the structural and organisational changes may be minimal, the challenge to traditional attitudes and belief systems is great.
>
> Changing the way we work demands an openness to change that takes many people away from their comfort zone. In a world of constant change, resistance to innovative methods of working is to be expected. For those who meet the challenge, the rewards are many."

- In the paper Maddocks discusses international and national trends in he introduction of flexible work practices including part-time work and job-sharing. She observes (at p.5) that the latter has been applauded as a means of maintaining and expanding the benefits of part-time work while eliminating most of its traditional negative aspects. She points out that it places employees in full-time career path positions on a part-time basis and allows them to have the non-work time they require without sacrificing the involvement in, and benefits of, full-time mainstream positions. Whilst she cautions a majority of employees could or would not choose to job-share over their entire working lives, it is nonetheless a viable arrangement for certain employees and organizations in specific circumstances.

- Maddocks gives some particular illustrations of this, one of which resonates with the present case in terms of the apprehended problems and concerns:

> "Results of job sharing arrangements in the London Borough of Lewisham's Social Services Department highlighted objections to job sharing arrangements and also positive benefits to be gained. The basic objection was that the management role and tasks could not be shared without creating confusion, inconsistency and lack of cohesion. It was feared the two managers would not be of equal status and that staff would not know who to consult, would receive inconsistent advice, and that there would be confusion over responsibilities.
>
> According to staff, the arrangements have been successful, and the potential difficulties have been successfully overcome through good communication, thorough preparation, professional compatibility and a similar level of commitment to work Staff appreciate having a wider range of skills, different perspectives and the energy of two people.
>
> Job sharing has also been acclaimed for the synergy that results from two minds exchanging ideas and working in unison. Job sharing allows each person to work his/her own area of expertise and interests, thus maximising individual strengths and minimising individual weaknesses. Tasks may be rotated to decrease feelings of stagnation or boredom. In addition, the partners tend to supervise one another as well as enhance performance. Stress can be reduced as a result of shared responsibility. The success of the arrangement, however, is dependent upon the meshing of the personalities. The job sharers must have a strong foundation of mutual respect, be well-organized, cooperative and flexible, as well as willing to engage in extensive and open communication."
>
> (references omitted).

167. Later in the same paper Maddocks observes (at p.36) that the introduction of flexible working arrangements means breaking with tradition and challenging the existing values, beliefs and assumptions which characterise an organization. That certainly was a feature of the course of events in this case. Indeed, as the evidence unfolded, it might have been the history of attitudes and responses from decades ago.

168. *Home Office v Holmes*[11] was heard in England in 1984. There a woman was employed by the Home Office as a civil servant. She was one of 250

executive officers engaged in immigration department casework, all of whom were required to work full time – ie in her grade within that department there were no part-time workers permitted at all. That did not provide the least source of difficulty to her until 1975 when she became a mother. She took maternity leave and returned to work full time thereafter but found in practice that her duties as a mother made it difficult and almost impossible for her to fulfil the hours required. She had to take extensive periods of unpaid leave. In September 1981 her second child was born. In January 1982 she notified the Home Office that she proposed returning to work in April but asked to be allowed to work part time. That request was refused. She was advised that within her grade in that department there were no part-time posts available and she could return only if she did so full time. She did in fact return to full-time employment but only with great difficulty and under protest, and shortly thereafter she lodged a complaint of unlawful discrimination on the ground of sex with the Industrial Tribunal.

- The Tribunal upheld her complaint and that decision was in turn upheld by the Employment Appeal Tribunal.

- On the question whether the requirement or condition that she work full time was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, the Industrial Tribunal[12]

> "...reached the answer to that one unhesitatingly. It was yes; and the reason was that despite the changes in the role of women in modern society, it is still a fact that the raising of children tends to place a greater burden upon them than it does upon men."

171. So far as the employee herself was concerned the Tribunal commented[13] that her parental responsibilities prevented her carrying out a normal full-

time week's work, and that in trying to fulfil all of these at the same time she had had to suffer excessive demands on her time and energy.

172. Counsel for the Home Office argued (amongst other things) that the Industrial Tribunal's conclusion that the requirement of full-time service had not been shown to be justifiable[14] was perverse. As to that the Employment Appeal Tribunal said[15]:

> "His ground for urging that is the following: the bulk of industry in this country and, in very large measure, the national and local government service is still organised upon the basis of full-time employment. The requirement in a particular case that a woman employee should serve her master full time is therefore, he contends, self-evidently a justified requirement which needs no assistance from evidence to support it.
>
> We applaud the courage of that submission, but cannot accept its correctness. It seems to us that the issue whether in a particular case a requirement as to length of service was justified or not is precisely the line on inquiry that Parliament intended to entrust to the industrial tribunals by the scheme and language of the Act of 1975." (our emphasis)

173. So it is also, in our view, that the issue whether the requirement in this particular case that Mrs Bogle work full time if she wished to retain her Charge Nurse position has been shown to be not reasonable, is precisely the question that the legislature directs to this Tribunal.

Unlawful discrimination or not?

174. The respondent concedes the stipulation that Mrs Bogle could only work in her Charge Nurse position if she did so full time, is a "condition or requirement" within the meaning of the relevant provisions of the *EO Act*.

175. With regard to the claim of unlawful indirect discrimination on each of the grounds of sex, family responsibilities and marital status, the complainant must satisfy the Tribunal on the balance of probabilities, that in respect of each relevant ground:

(i) a requirement or condition has been imposed upon her

- with which a substantially higher proportion of persons not in that category comply or are able to comply;
- which is unreasonable having regard to all the circumstances of the case; and
- with which the complainant cannot or does not comply.

176. The question of compliance arises in two ways. The first is that the complainant must show that a substantially higher proportion of persons of the other group (ie men, people without family responsibilities and unmarried people) comply or are able to comply with the requirement or condition; the second is that the complainant must show that she cannot or does not comply with the requirement or condition.

177. In some cases the ability to comply or not may be objectively readily demonstrable (as eg where the requirement is that a person be of a particular height or weight); in other cases it may be more subjective. Where the latter, questions of degree will invariably arise and it is necessary then to have regard to all the circumstances including the subjective circumstances, beliefs and expectations operating on the complainant and those persons in the relevant group.[16]

178. In *Finance Sector Union v Commonwealth Bank* the Bank imposed a requirement or condition on women that they return early from maternity leave in order to participate in a restructure of positions. The Bank argued that the women could comply, in the sense that there was no physical barrier to them returning to work. The Human Rights and Equal Opportunity Commission (HREOC) held that the Complainants could not comply in the relevant sense, even though some did return during the time required by the employer.

179. Thus although some of the complainant group had the physical ability to return to work, the shortness of notice made childcare arrangements difficult or impossible, making compliance difficult or impossible, within the context of the natural feelings of the complainants towards their children, and society's expectation that they would not abandon them.

180. This decision was subject to a review in the Federal Court in *Commonwealth Bank v HREOC* (150 ALR 1) but the Commission's decision in the area of compliance was not challenged.

181. That physical ability to comply is not the test was recognized by the English Court of Appeal in *Mandla v Dowell Lee.* A requirement that students cut their hair was held to be unlawfully discriminatory against a Sikh. Although physically he could comply with that requirement he was relevantly unable to do so because of the cultural and religious constraints upon Sikhs.

182. We accept the submission made on behalf of the complainant that in determining compliance or ability to comply the law imports a notion of reasonableness which is to be assessed having regard to all relevant circumstances in the particular case. They include the difficulty of compliance so far as the complainant and the relevant group are concerned.

183. In *Hickie v Hunt and Hunt*[17] HREOC held that a requirement or condition imposed upon Ms Hunt that in order to retain her legal practice she work full time constituted indirect discrimination on the grounds of sex and family responsibilities. Commissioner Evatt relied on evidence of the respondent about the numbers of women who had periods of maternity leave and part-time work "as well as my general knowledge and experience

of employment in the legal profession. It is a requirement with which the complainant could not comply due to her family responsibilities."

"Substantially higher proportion"

184. In applying the "substantially higher proportion" test it is first necessary to identify the appropriate base group for the purposes of comparison. That will usually be the group upon whom the requirement or condition is imposed.[18] In this case the evidence is that the requirement of full-time work applied to all supervisory positions. Certainly it applied to all Charge Nurse positions. As that was a promotional level for Dental Nurses or DCA the group upon which the requirement was imposed was therefore that comprising all Charge Dental Nurses and Charge DCA and all Dental Nurses and DCA.

Comparison by Sex

185. The statistical table of Dental Nurse and DCA categories (by age group) employed by Dental Services tendered by the respondent (ex: R6) shows there are 33 women and 3 men within this group. (That includes one under-18 full-time single female DCA).

186. Of the 335 women, the total part-time female workforce is 78 (23%). The remainder work full time, being 257. Of the 3 men, all work full time.

187. Assuming for the moment that all those persons working part time cannot comply, and all those working full time can comply with the requirement or condition (the latter must ex hypothesi be true) the relevant comparisons are:

> Number of women who can comply (257) as a proportion of the total number of women (335) in the base group; = 76.7%.

That is to be compared with the number of men who can comply (3) divided by the total number of men in the base group (3) = 100%.

100% obviously constitutes a substantially higher proportion than 76.7%.

188. The proportions of men and women working part time in the workforce generally support the proposition that women make up a majority of part-time employees. Seventy five percent of all part-time jobs are held by women. Of all women in the workforce, 43.1% of them work part time, whereas only 11% of men work part time.[19]

189. These statistics bear out what would in any event have been the broad view accepted by the Tribunal based on its own general knowledge of the contemporary structure of the Australian workforce.[20]

190. The 78 part-time female employees clearly do not comply with the requirement to work full time. But the assumption that they are not able to work full time is one which requires greater scrutiny. There must be a reasonable likelihood that at least some of them choose to work part time for reasons which would not relevantly preclude them working full time.

191. Counsel for Mrs Bogle pointed out that of the 78 employees who work part time, 65 (or 83%) are aged between 26 and 45. She submitted that this strongly suggests their reason for part-time work is related to their child-raising responsibilities. She then argued that the ABS data (contained in exhibits C.35 and C.36) illustrates what is generally known, namely that it is women who principally have responsibility for the day to day care of young children in Australian society, which makes it more difficult for them to work full time and that is reflected in their workforce participation.

192. We accept that submission. In the *Finance Sector Union* case (supra) HREOC accepted that it was "common knowledge" that the overwhelming

majority of women on extended leave in order to care for young children or prepare for the birth of a child, were not able to comply with the requirement to take up a new position within four weeks of appointment, noting that courts and tribunals have taken judicial notice of the continuing trend for women to be the primary caregivers in a society structured like ours.[21] Thus, although the statistical material here does not enable any firm numerical nor percentage comparison to be made, we are satisfied the complainant has demonstrated that a substantially higher proportion of men than women in the base group are able to comply with the requirement to work full time.

Family Responsibilities

193. "Family responsibility or status" is defined as meaning:

(a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment;

(b) the status of being a particular relative; or

(c) the status of being a relative of a particular person.[22]

194. No statistics are available as to the numbers of employees in the base group who have family responsibilities. The evidence was that information is rarely kept by employers, and certainly not by the respondent.

195. However, the ages of the employees within the base group who work part time provide some indication of the likely family responsibilities of the individuals in the base group. Of the 78 part-time employees, 65 of these employees are under the age of 45, representing the usual span of child bearing and raising years. This represents 83%. The unchallenged

evidence of the complainant was that the two male DCA's employed by the respondent in her 20 years of employment with the Dental Services, worked full time and had no children.

196. ABS data shows a strong link between having family responsibilities and working part time, among both men and women.[23]

197. There is also a clear link between the age of dependant children and the workforce status of the mother. Almost 38% of married part-time working mothers with children under the age of 15 cited family reasons as their reason for working part time, whereas only 2% of part-time working mothers with children over the age of 15 cited this as their reason for working part time. A similarly large group (33.4%) of single mother parents who work part time with children under the age of 15, cite family reasons as their reason to work part time, with the figure dropping to a statistically insignificant figure for part-time working mothers who are sole parents with children over the age of 15. The comparable figures for part-time working fathers, both married and sole parents, show that insignificant numbers of them cite family reasons as their reason for working part time.[24]

198. There is nothing to suggest the base group we have taken here possesses in these respects different characteristics to those in the general population as indicated in the ABS figures.

199. On this basis we conclude that a substantially higher proportion of persons in the base group who do not have the family responsibilities of the complainant are able to comply with the requirement or condition to work full time.

Marital Status

200. Section 4(1) of the *EO Act* defines marital status as the status or condition of being single, married, divorced, widowed or the defacto spouse of another person. The complainant is married.

Within the base group, there are 201 persons recorded as being married, and 133 single persons, giving a total of 334. Of the married persons, 64 work part time, and 137 work full time. Of the unmarried persons, 14 work part time and 119 work full time.

201. The relevant comparison is:

The number of married persons who work full time (64) as a proportion of the number of married persons in the base group (137+64=201) = 31.8%.

That has to be compared to the number of single persons who work full time (119) as a proportion of the total number of single persons in the base group (119 + 3 + 14 = 136) = 87.5%

Eighty seven point five percent is a substantially higher proportion than 31.8%. Accordingly, a substantially higher proportion of persons in the base group who are not married are able to comply with the requirement to work full time.

Was the Requirement Reasonable?

202. We have already discussed this to some extent above.

203. When considering whether a complainant has demonstrated a requirement or condition is not reasonable it is necessary to consider [25]:

- the nature and extent of the discriminatory effect;

- the activity or transaction being performed by the respondent;
- whether the activity or transaction be performed or completed without imposing the discriminatory requirement;
- effectiveness, efficiency and convenience.

204. In all the circumstances evident here we are satisfied the requirement was not reasonable in that:

- the initial response that the Charge Nurse position could not be job-shared was a "knee jerk" reaction based on no more than an awareness that it had always been a full-time position and an intuitive feeling that it would not work;
- by the time the ANF wrote in July 1997, David Neesham, Peter Neesham and Peter Jarman had already taken the stance that the position could not be worked part time and were committed to that. The purpose of their subsequent consideration of the proposal was not to objectively review its advantages and disadvantages but simply to justify the stance they had already taken;
- the reasons in fact advanced by them for rejecting the proposal that the position be job-shared were vague, ill-considered, superficial and had no objective basis;
- in fact, a genuine and fair consideration of the proposal would have led to the conclusion that the particular job-sharing proposal being advanced had considerable advantages which may well (and in our view probably would) have outweighed any disadvantages. In the circumstances there was no reason going to the effective functioning of the organisation why the Charge Nurse position could not be job-shared

– at the very least on the trial basis which Mrs Bogle had asked for. We are satisfied that, as in the *Finance Sector Union* case, the failure to conduct any proper analysis or evaluation led to error.

Was the complainant unable to comply?

205. The use of the expression "cannot or does not comply" is quite deliberate in the *EO Act*, and reflects the legislative intent, which is that even where a person does as a matter of fact comply, she or he may not be able to comply in a meaningful sense. Hence, while for a period, like the complainant in *Home Office v Holmes*, Mrs Bogle did in fact comply with the requirement to work full time after she adopted her child, the evidence establishes and we find, that proved difficult, stressful and unsustainable. Thus, although at one level in a practical sense Mrs Bogle was able to comply with the requirement to work full time if she wished to retain her Charge Nurse position, on any reasonable realistic view, having regard to her situation and circumstances, she was not able to comply with it.

Liability of the Board

206. The decision to impose the requirement was made by Mr David Neesham in his capacity as Director of Dental Services. The requirement is accordingly to be treated in law as a requirement imposed by the respondent Board.[26]

Detriment

207. The complainant must show that she has suffered detriment in the relevant sense as a consequence of the respondent's conduct. In this case, it has been demonstrated that Mrs Bogle has suffered:

- loss of opportunity to earn an income as a Charge Nurse;

- loss of opportunity to exercise her skills in a senior supervisory position; and

- loss of opportunity to be considered for promotion.

208. We find that in respect of each alleged ground, Mrs Bogle suffered discrimination in the terms or conditions of employment afforded her by the respondent, by limitation of access to opportunities for promotion beyond Charge Nurse (and indeed, to that level), by denial of the benefit of earning income at the level of Charge Nurse and by subjection to the detriment associated with her loss in personal and professional status in having to regress to a non-supervisory level.[27]

Conclusion on Liability

209. For the reasons set out above we are satisfied Mrs Bogle has made out her complaint of unlawful indirect discrimination on each of the grounds of sex, family responsibilities and marital status.

Relief

210. Mrs Bogle seeks an order requiring the Board to provide her with part-time employment as a Charge Nurse and compensation. For the former she relies on section 127(b)(iii) of the *EO Act*, which empowers the Tribunal to:

> "...order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;"

211. In *Holdaway v Qantas Airways Limited* [28] the New South Wales Anti-discrimination Board held that a similarly worded provision in its legislation empowered it to order that a flight attendant be reinstated at a more senior level than he had previously occupied, and being the level to

which he would have been promoted had it not been for the unlawful discrimination.

212. The *EO Act* is beneficial legislation and is to be given the widest construction its wording will properly allow so as to achieve its legislative objects.[29]

213. Taking that approach, section 127(b)(iii) does enable the Tribunal to make the order sought.

214. The next question then is whether such an order should be made. That question raises considerations not dissimilar to those which arise in respect of orders for reinstatement in employment, some of which were referred to in *Holdaway v Qantas Airways Limited*[30]. They included the policy of the law against forcing the continuation of a personal relationship against the will of one of the parties, loss of confidence between the parties, the need for continuing supervision and a reluctance to interfere with "managerial prerogative".

215. In this case the evidence encourages the view that the first three considerations do not militate against making the order sought.

216. The working relationship between Mr Kee and the complainant has always been good and we see no reason why that would not continue to be so, despite these proceedings.

217. Mr Peter Neesham said he has never believed a job-share arrangement could not be made, nor that it could not be managed – in his view one can manage virtually anything. His objection to the proposal was that he thought it would be a cost to the organization (t.397-8; 426). Later he explained (t.420) it was his intuition telling him it was not in the best

interests of the organization to do it, not that it could not be done, because anything can be done.

218. He testified that if the Tribunal were to make the order sought by the complainant, as Senior Manager for that area he would cooperate to maximize the prospect of a job-sharing arrangement actually working in practice and he could see no reason why he would have any trouble getting along with Mrs Bogle personally in future.

219. There is no lack of confidence between the parties and no suggestion there would be any need for continuing supervision of Mrs Bogle beyond the norm. As we observed at the outset, her professional competence and ability are not only unquestioned, but are obviously held in high regard by her superiors.

220. We are conscious that it is not for this Tribunal to usurp the prerogative of management in this or any other case. We do not consider the making of an order such as that sought would be doing so. The *EO Act* specifically contemplates the making of orders to redress loss or damage suffered by a complainant as the result of unlawful discrimination in the terms or conditions of employment, access to opportunities for promotion, transfer, training or any other benefits associated with employment. Further, the order sought here goes only to a decision in respect of job-sharing one particular position. We are also mindful that following the refusal of the Tribunal to make an interim order in November 1998 the respondent appointed another employee substantively to the Fremantle Clinic Charge Nurse position. That fact would not inhibit the respondent from making any necessary financial adjustments in respect of Mrs Bogle. Nor do we consider it should of itself preclude the making of an order for reinstatement. We recognize doing so would create a management problem

for the respondent in respect of the present incumbent, but that arises only because of the respondent's unlawful discrimination against Mrs Bogle – and there are other ways to resolve it, whether by transferring the present incumbent to another Charge Nurse position, holding her supernumerary to establishment or (should she be willing) allowing her to job-share with Mrs Bogle, to mention but a few possibilities. The point is, Dental Services Management would have to manage the problem created by its own unlawful discrimination against Mrs Bogle.

221. Under the circumstances we consider it appropriate in this case to make the order sought.

222. Thus, to (insofar as it can) redress the loss suffered by the complainant, the respondent is to:

- Reinstate her substantively to the Fremantle Dental Clinic Charge Nurse position with retrospective effect from 17 November 1997 (that being the date from which she was compelled to "voluntarily regress" – see ex: C15).

- By arrangement with the complainant (and in consultation with the ANF and the DEOPE) approve, either on a trial basis of not less than 12 months, or permanently, and implement, the proposal that the Fremantle Dental Clinic Charge Nurse position be job-shared.

- In any event, by not later than 31 March 2001, undertake an evaluation of the job-sharing arrangement with respect to the Fremantle Dental Clinic Charge Nurse position and provide a report thereon to the DOEPE and the ANF.

223. As to the question of compensation, pursuant to section 127(b)(i) of the *EO Act* the Tribunal may order the respondent to pay to the complainant damages not exceeding $40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct.

243. Compensation may be awarded under various heads of loss or damage. Loss of earnings is to be assessed according to ordinary tortious principles[31]. In this case the parties have agreed on a Schedule of Loss showing rates of pay, work and break periods, hours worked by the complainant and rates for superannuation. That was provided by consent under cover of a letter from the respondent's counsel dated 20 December 1999. The Schedule and letter are received as exhibit C.42. We accept the figures shown thereon, and pursuant to section 127(b)(i) of the *EO Act* order that the respondent pay to the complainant the sum of $10,104.52 by way of compensation for past economic loss suffered by the complainant by reason of the respondent's unlawful discrimination against her. That amount has been calculated as follows:

- Loss of wages (being the difference in wages payable at Charge Nurse (level 2) and the rates at which the complainant was in fact paid for hours worked): $ 9,447.67.

- Superannuation (again based on the difference in wage rates, at the applicable superannuation levy rate) 656.85

Total past economic loss $10,104.52

225. The final area of compensation is that of humiliation, emotional stress, loss of dignity and mental distress. The present case is in a sense the reverse of *Squires v Qantas Airways Ltd*[32] in which compensation was awarded for loss of promotional opportunity with consequent loss of enjoyment of the

working environment. Here, Mrs Bogle was compelled to relinquish the Charge Nurse position which she so much valued and regress to a lower category, with the humiliation and distress that occasioned.

226. As this Tribunal pointed out in *Horne & McIntosh v Press Clough Joint Venture v The MEWU*[33], comparison with other cases, while useful to some extent, at best affords only some guide to an appropriate award here. Each case necessarily depends very much on its own facts. The wide range of compensation awarded for embarrassment, stress, humiliation and the like, is apparent from the table of comparative cases at pages 72,273 to 72,304 CCA "Australian and New Zealand Equal Opportunity Law and Practice", Vol 1.

227. It is also important that awards aimed at compensating for injured feelings should not be inappropriately low, because that would tend to trivialise or diminish the respect for public policy manifested by the legislation.[34]

228. Dental Services' refusal to allow Mrs Bogle to work in her Charge Nurse position unless she were to do so full time was made clear from March 1997. She has been suffering the stress, humiliation, frustration and emotional upset of that decision since then. On occasion the physical manifestations of that have been marked – as for example, in October 1997 when she was suffering severe headaches. Overall, we consider an award of $2500 to be appropriate under this head, bringing the total amount of compensation to be paid to the complainant by the respondent to $12,604.52.

[1] Section 107 *EO Act* and see also section 113.

[2] Section 120 *EO Act.*

[3] See *O'Callaghan v Loder & Anor* (1984) EOC 92-024.

[4] The test is an objective one: *Reddrop v Boehringer Ingelheim Pty Ltd* (1984) EOC 92-031; proof of a discriminatory motive is not necessary: *R v Birmingham City Council ex parte Equal Opportunities Commission* (1989) 2 WLR 520; 525-6; *Australian Iron & Steel Pty Ltd v Banovic & Anor* (1989) 168 CLR 165; *Waters & Ors v Public Transport Corporation of Victoria* (1991) 173 CLR 349, per Mason CJ and Gaudron J (with whom Deane J agreed) at 359.

[5] By virtue of section 139 *EO Act.*

[6] Section 140 *EO Act.*

[7] Section 143 *EO Act.*

[8] Section 145 *EO Act*

[9] *Waters v Public Transport* Corporation, supra, per Dawson and Toohey JJ at 392.

[10] *Secretary of the Dept of Foreign Affairs & Trade v Styles & Anor* (1989) 23 FCR 251; (1989) EOC 92-265, at 77, 636.

[11] *Home Office v Holmes* [1984] ICR 678.

[12] Ibid, at p.681.

[13] Ibid, at p.682.

[14] Under section 1(1)(b)(ii) of the *Sex Discrimination Act 1975 (UK)* the onus was on the employer to prove the particular requirement or condition was justifiable; the position is different under the WA legislation, which places the onus upon a complainant of proving (on the balance of probabilities) that the alleged discriminatory requirement or condition was not reasonable: see s.8(2)(b), s.35A(2)(b) and s.9(2)(b) *EO Act.*

[15] *Home Office v Holmes, supra, at p.684.*

[16] *Mandla (Serva Singh) v Dowell Lee* (1983) 2 AC 548; *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889.

[17] *Hickie v Hunt & Hunt* (1998) HREOC 8 (9/3/98) esp at p.24.

[18] *Hickie v Hunt & Hunt,* ibid; *Australian Iron & Steel Pty Ltd v Banovic,* supra.

[19] "Working Arrangements" Australian Bureau of Statistics, August 1997, No. 6342.0, Table 4 (ex: C35).

[20] As to which see *Kemp v Minister for Education* (1991) EOC 92-340 and *Hickie v Hunt & Hunt,* supra.

[21] *Perera v Civil Service Commission & Anor* [1982] IRC 350; *Price v Civil Service Commissioner & Ors* [1978] 1 All ER 1228; *Briggs v North Eastern Educational & Library Board* [1990] IRLR 181.

[22] Section 4(1) *EO Act.*

[23] Labour Force Status and Other Characteristics of Families, ABS, June 1999, 6224.0, p.5 (ex: C36).

[24] "Working Arrangements", ABS, Supra, Table 10.

[25] *Waters v Public Transport Corporation of Victoria*, Supra; *Commonwealth Bank of Australia v HREOC* 150 ALR 1 at 8 per Davies J.

[26] Section 161 *EO Act* (Vicarious liability) – and see section 163(1)..

[27] See sections 11(2) and 35B(2) *EO Act.*

[28] *Holdaway v Qantas Airways Limited (1992) EOC 92-430.*

[29] *Interpretation Act* 1984 (WA), section 18; *EO Act*, section 3.

[30] *Holdaway v Qantas Airways Limited*, supra, at p.79047.

[31] Although otherwise the approach to the assessment of compensation in unlawful discrimination cases is not to be confined to tortious principles: see Lockhart and French JJ in *Hall & Ors v Shieban Pty Ltd & Ors* (1989) EOC 92-250 and *McCarthy v Transperth* (1993) EOC 92-478.

[32] *Squires v Qantas Airways Ltd* (1985) EOC 92-135.

[33] *Horne & McIntosh v Press Clough Joint Venture v The MEWU* (1994) EOC 92-556; and see p46 of the full text of the reasons delivered 21 April 1994.

[34] *Hall & Ors v Shieban Pty Ltd & Ors*, supra; and *Alexander v Home Office* (1988) 1 WLR 968.