

EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number: 4 of 1999

**CAROLINE MILLER**

**Complainant**

- against -

**MINISTER FOR EDUCATION**

**Respondent**

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**REASONS FOR DECISION**

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BEFORE:            Mr N Hasluck QC            President  
                      Ms R Kean                    Member  
                      Ms M Fadjar                Deputy Member

HEARD:             7 & 8 February, 2000

DELIVERED:        Tuesday, 18 April, 2000

For the Complainant:            Mr Macdonald  
Counsel for the Respondent:    Mr Matthews

## **REASONS FOR DECISION**

The Complainant, Caroline Miller, claims that the Respondent, the Minister for Education, discriminated against her on the ground of sex. The complaint arises out of her employment with the Education Department and her applications for promotional positions (level 4) at the Bunbury, Ashfield and Tranby Primary Schools in the latter half of 1997. The complaint raises significant issues concerning indirect discrimination as defined by the Equal Opportunity Act 1984 and it will therefore be useful to begin by looking at materials relevant to the Education Department's policy and practices in regard to employment and promotion.

### **Education Department**

By section 5 of the Education Act 1928 the Minister is a body corporate charged with the responsibility for carrying out the purposes of the Act. Section 28 allows to the Minister a power to make regulations relating to the general management of schools and the appointment, promotion, transfer and supervision of teachers. The Education Act and Regulations recognise the existence of an Education Department and, for present purposes, it will henceforth be convenient to refer simply to the Education Department as the body principally involved in the daily administration of the Act. Section 7(3) provides that the Minister or Chief Executive Officer of the Department will transfer or promote any teacher or employee of the Department.

The Tribunal received evidence from two senior officers employed by the Education Department, namely, Mr Home and Mr Ayling, and their evidence, together with the various documents adduced by the parties, provided the Tribunal with details relevant to the present dispute. It became apparent at an early stage that the dispute between the parties is affected by a long-standing policy of the Education Department whereby vacancies are to be filled by transfers before promotion, known generally as the transfer policy, and it will therefore be useful to look more closely at this aspect of the matter. The Tribunal notes in passing that the transfer policy finds formal expression in regulation 70A which was gazetted on 30 October 1987 pursuant to provisions of the Education Act. This regulation was subsequently repealed on 5 February 1999. At the time the present dispute arose regulation 70A was in these terms:

"Without derogating from section 7(3) of the Act, vacant positions on the teaching staff shall be filled by the transfer of teachers who are eligible to be transferred to those positions before those positions are filled by promotion except where the Director General is of the opinion that in relation to a particular case there are special circumstances that apply."

### The Transfer Policy

Mr Home confirmed that the credo of the Education Department is to ensure that school children throughout the state receive the same standard of education, and this has been the credo of the Department for many years. In a vast state such as the State of Western Australia this credo has always required that special measures be implemented with a view to servicing the educational needs of rural areas and remote communities. Various policies and practices were devised with a view to encouraging teachers to spend periods of service in country areas so that the talents of those associated with the teaching profession would be distributed evenly throughout the state. It

was understood by members of the teaching profession that in order to obtain promotion it would be necessary to point to a period of country service. There was also a general understanding that after a period of service outside the metropolitan area of Perth opportunities would be afforded to those who wished to return to the metropolitan area to do so. One facet of this tradition was the transfer policy reflected in regulation 70A whereby persons holding promotional positions in country areas were to have priority for promotional positions in the metropolitan area with transfers to such positions being effected on a seniority basis. Inevitably, there was bound to be a degree of resistance to change, for many teachers, in good faith, had undertaken service in country areas in the expectation that this would advance their career prospects. They put up with a degree of disruption to their domestic circumstances accordingly.

With the passage of time, and as a result of changes in community attitudes concerning the role of women in society - these changes being reflected to some extent in the anti-discrimination provisions of the Equal Opportunity Act 1984 which came into effect in 1985 - various policies and practices of the Education Department were subjected to scrutiny, especially in regard to the prospects of promotion. Commentators noted that it was to the benefit of students to have women in senior administrative positions otherwise narrow views of the position of women in society would be reinforced. For present purposes, it is not necessary for the Tribunal to review all aspects of what proved to be an ongoing debate. For the sake of an orderly narrative, however, it is useful to note that as part of the changing climate of opinion provision was made for certain classes of schools to have two deputy principals, and for those deputy principal positions to be gender linked, that is to say, one deputy principal of each sex was required.

Affirmative action of this kind could arguably be regarded as a form of discriminatory conduct, and this led to a series of applications being made by the Education Department to the Equal Opportunity Tribunal for exemption from the provisions of the Equal Opportunity Act in the manner allowed for by section 135 of the Act. The Tribunal made various rulings allowing the applications for exemption (subject to various conditions) on 6 July 1987 ("the 1987 exemption"), on 29 April 1993 ("the 1993 exemption") and on 25 September 1997 ("the 1997 exemption"). The Tribunal will return to these rulings, and the consequences of such rulings, in due course. For the time being, however, it is sufficient to note that the rulings resulted in various internal reviews of existing policies and practices being undertaken by the Department and to two important reports being brought into existence by the Director of Equal Opportunity in Public Employment. These reports concern "women in promotion" and the question of gender-linked positions and are dated respectively September 1994 ("the 1994 DEOPE report") and April 1997 ("the 1997 DEOPE report"). These reports form part of the evidence in the present proceedings and are a useful point of reference in tracing the progress of the debate concerning promotional prospects mentioned earlier and as a source of statistical data.

The tradition of service in country areas became a subject of debate also. It is apparent from the two DEOPE reports just mentioned, and from the evidence given by Mr Home and Mr Ayling, that the operation of the transfer system tended to disadvantage women seeking promotion because, owing to family and domestic commitments, women were less able than men to move to country areas to take up promotional positions. The consequence was that not only were women under-represented in promotional positions in country areas due to their lack of mobility but they could not, in turn, take advantage of the transfer system to win promotional positions in the metropolitan area. Inevitably, they were under-represented in those positions also.

The 1994 DEOPE report contains a section numbered 4 and headed "Progress of Women Seeking Promotion" which places this issue in a wider context. In reviewing the effect of departmental policies the report notes that women continue to occupy a relatively small percentage of promotional positions in schools despite comprising two-thirds of the teaching workforce. The report identifies various "barriers" which were continuing to prevent access to promotion. Thus the requirement for permanency as a prerequisite for promotion was said to weigh against female teachers, many of whom were characterised as temporary staff. The requirement for four year teaching qualifications and the practice of not allowing part-time work in promotional positions was said to weigh against women, as many female teachers choose to work part-time following maternity leave while their children are young.

The 1994 DEOPE report also contains this passage at page 12:

"There are very few metropolitan promotional vacancies available for appointment through merit selection due to the practice of transfer taking precedence over a promotion. In most cases to gain promotion it is necessary to move to a country location and then at a later date seek to transfer back to a metropolitan school. Subsequent promotions are likely to again require moving to a country location. Due to family responsibilities, many women are unable to be mobile and therefore cannot apply to positions at country schools. This requirement to be mobile is an enormous barrier to promotion for women. Women who could otherwise win a promotion on merit are thus precluded from doing so. Although the requirement for WA teachers to declare statewide availability in order to gain permanency no longer exists, the influence of mobility and promotion still exists. To allow transfers to take precedence over promotion means that mobility is in fact a major requirement for promotion."

The same report goes on to suggest that job descriptions and selection processes can sometimes equate preferred leadership styles with entrenched and mostly male patterns of behaviour. One

example given was devaluing a woman candidate's experience because it was in the so-called "women's area" of looking after the pastoral care needs of students. The report suggests that this could lead to selection panels continuing to assess merit in a discriminatory way. The report also drew attention to the alleged continuing effects of past discrimination. Prior to 1985, promotions were based on seniority, ie, years of continuous service. Many women had reduced seniority due to breaks in service for family reasons. As a consequence, the report suggests, many of those currently in school leadership positions were there due to their seniority. The effects of past policies were therefore likely to be felt for a considerable period of time. The report said at page 14:

"Many of the Department's past personnel policies and practices have had a significant and continuing impact on women's careers. These include:

- the requirement to resign from permanent appointment on marriage (until 1968) - permanency was offered to those subsequently unable to regain it in 1991;
- the requirement to resign to take up part-time employment (until 1981);
- statewide availability as a requirement for promotion (until 1985);
- the need to work full-time on probation and be available statewide to qualify for permanency (until 1992)."

The 1994 DEOPE report also drew attention to some of the difficulties involved in changing attitudes. There was a perception in the Education Department that with such a complex and large system, change of any one aspect would result in a myriad of other changes, some unintended and possibly undesirable. It follows from earlier discussion in these reasons for decision that many conscientious and committed teachers had an understandable interest in maintaining the existing practices. They had made career choices on the assumption not only that the existing system would

continue but also that it was underpinned by an appropriate and equitable rationale, namely, the need to service country areas. Accordingly, the outcome of the ongoing debate was by no means a foregone conclusion, although doubtless many people within the education system recognised in general terms that for the reasons reflected in the two DEOPE reports there were various facets of the system that disadvantaged female teachers.

Put shortly, it seems that there were many teachers who thought that any sudden revision of the transfer system would have an adverse effect upon teachers and administrators who had uprooted families and taken up positions in country locations under the existing process with the knowledge that there would be an opportunity for them to apply for a transfer either to a more favourable location or to return to the metropolitan area. In some cases partners had ceased jobs and sought whatever employment could be found at a country location. In some instances partners had committed themselves, at a high personal cost, to a mode of commuting. The rapid introduction of a merit-based system was also thought to be inequitable to many country administrators who did not have the same opportunities for professional development as those in the metropolitan area. It was thought that these consequences could have a detrimental effect on morale if changes were made. It seems that views to this effect were reflected in the negotiating stance adopted by the State School Teachers' Union of WA (Inc), the WA Secondary Deputy Principals' Association and the Western Australian Principals' Federation.

It is against this background that the Tribunal pauses to note that although the witnesses for the Education Department played a constructive role in the course of their evidence in outlining the nature of the ongoing debate about such matters and the background to the present dispute, and in doing so acknowledged - as will be observed in due course - that the Department itself was minded



to introduce reforms reflecting changed community attitudes, the Respondent did not at any stage accept that the transfer policy was discriminatory on the ground of sex. For that reason, it did not feel obliged to apply for an exemption in respect of the transfer policy. Further, and in any event, having regard to its experience with the exemption in respect of the gender-linked deputy principals, the Department was also conscious of the risk that an exemption might impede the progress of structural changes.

### Subsequent Events

The ongoing debate and the presence of the Tribunal rulings mentioned earlier, together with some Tribunal decisions adverse to the Education Department, resulted in the gradual introduction of a system of promotions based on merit. Bearing in mind the reservations of various interested parties about the possibly adverse consequences of any sudden changes, one facet of the gradual movement was an emphasis upon local merit selection. Whereas formerly selection procedures had been handled centrally, with the result, according to some participants in the debate, that there was an undue emphasis upon the effects of past discriminatory practices such as seniority and country service, it was now thought that selection panels linked to specific schools would produce a more equitable result. It will be useful to look at how this came about.

The promotion system, which was established originally as a result of a 1990 memorandum of agreement between the then Ministry of Education and the State School Teachers' Union of WA, continued to evolve to meet system needs and the changing expectations of the teaching profession in the 1990s. The tenor of the debate at this stage was that the system should remain consistent

with merit principles, be modified to comply with the public sector standards and human resource management, be flexible enough to accommodate those schools choosing to move towards local staff selection and be based on processes and information which were accessible and well understood. This represented a move away from seniority as a basis for promotion and an inclination towards merit-based promotion, although, having regard to the practical considerations mentioned earlier, the process continued to be gradual.

The evolutionary process is reflected in the School Administrators' Collective Workplace Agreement of 13 November 1995 which was to remain in force for two years after the date of registration. School administrators agreed to participate in the development of career structures addressing issues such as transfer rights, limited merit selection, school profiles, site tenure, differential salary structure and lateral career paths. They also agreed to undertake and be subject to the selection of school-based staff in schools which choose to change provided that there was a systemically agreed process for school leadership and staffs choosing to change, a vacancy occurring through transfer, promotion, retirement or any other reason that constitutes a permanent move from the position, central involvement in assisting the local merit selection to assist in managing and resourcing the process and "the school utilising a consistent and equitable merit-based process to accommodate participation in local merit selection and transfer". Nonetheless, clauses 10 and 11 of the agreement clearly contemplate promotional positions being filled by a system called "merit transfer".

The concept of "merit transfer" was not defined precisely and the Tribunal was left with an impression that the phrase "merit transfer" simply reflected the unresolved and ongoing debate whereby increasing emphasis was being placed upon merit as a matter of rhetoric, and as an overall

objective, even though the underlying reality continued to be that persons holding promotional positions in country areas would still be given priority for promotional positions in the metropolitan area pursuant to the transfer policy, provided the candidate's application reflected sufficient merit to justify the appointment.

The process of gradual reform is also reflected in an information guide published by the Department in 1997 concerning transfers and promotions ("the 1997 Information Guide"). That publication outlines the Department's policies and procedures "related to the transfer, promotion and appointment on merit of teachers to promotional positions". It contains information on position descriptions, selection criteria, notes supporting the criteria and forms. It also notes that any changes to the transfer and promotions process will be published in the magazine called *School Matters* through 1997.

The 1997 Information Guide commences by saying in regard to conditions for transfer at levels 3, 4, 5 and 6 of primary, secondary and education support that:

"Vacancies are to be filled by transfer before promotion. Once transfers are completed any remaining vacancies will be filled by merit promotion. Transfers are subject to review according to the public sector standards and human resource management...the periods of service to satisfy the eligibility requirements for transfer within a level must be substantive...promotional positions at levels 4, 5 and 6 will be filled in 1997 for appointment in 1998 using the following transfer ranking procedures:

- (a) length of service and present promotional position - if equal, then
- (b) the length of service previous lower or equivalent lower promotional position - if equal, then
- (c) total service with the Education Department - if equal, then
- (d) length of total country service - if equal, then

(e) location of country service."

The Information Guide goes on to say in respect of the same levels that all vacancies for promotion will be filled by promotion on merit and declared to be special positions for appointment. Vacancies will be advertised in *School Matters*. The principles upon which merit selection is based are selection of the most suitable applicant for the position with adherence in selection processes to principles of natural justice, fairness, equity and comparability. It emerges from the Information Guide that an application for principal of a primary school class 4 is effectively an application to be principal of a primary school located in urban, rural, remote and mining communities where student enrolments number between 100 and 300. The selection criteria for such a position include matters such as demonstrated understanding and professional knowledge, capacity to provide educational leadership and manage change, high level of interpersonal and public relations skills, commitment to own professional growth and high level of proficiency in directing staff, capacity to plan and equitably manage resources.

The Tribunal pauses to note that, as foreshadowed by the Information Guide, various matters bearing upon applications for promotion were published in *School Matters* in the period following publication of the information guide in April 1997. An issue of *School Matters* dated 16 July 1997 indicates that after discussions between the Department and the Union about the local merit selection trial, it was agreed that a revised list of schools participating in the trial be published. The selected schools now have the option, when and as positions became vacant during the year, to fill those vacancies via a local selection process. The list of participating schools included the Ashfield Primary School, the Bunbury Primary School and the Tranby Primary School, being the three

schools to which Ms Miller subsequently directed her applications for a promotional position as principal of a level 4 school.

### The 1997 Exemption

The Tribunal will turn to the details of the Complainant's applications and the manner in which they were dealt with by the Respondent in a moment. Before doing so, in order to complete this part of the narrative, it becomes necessary to notice that on 23 June 1997 the Tribunal received an application by the Minister for a further extension of the exemption concerning gender-linked deputy principals to cover the period 6 July to 31 December 1997. The Minister was of the opinion that the exemptions previously given had served a useful purpose in providing role models of women in senior positions within the teaching service. However, it was his further opinion that the exemption was no longer a useful means of ensuring a pathway to promotion for women and that it was timely to allow it to lapse. He stated that a package of measures would be put in place in order to build on work already under way and to increase the number of women in promotional positions. The package would include accountability, monitoring and evaluation strategies. In that context, the application for a further extension to 31 December 1997 was nonetheless still thought to be necessary because of the timing of the process for staffing schools for 1998.

The departmental timetable for filling level 3 and level 4 transfers and promotional vacancies was intersected by the date on which the exemption lapsed, that is to say, 6 July 1997. That would mean, if (retrospective) approval were not granted to extend the exemption until the end of 1997, that some positions which were currently gender linked would be filled on that basis and others not. Thus, in order to maintain consistency in staffing for 1998, the Department considered it essential

that the exemption be continued until the process for filling those positions had been completed, that is, to the end of December 1997.

The application was supported by the affidavit of Mr Home who also gave evidence before the Tribunal upon the hearing of the application. Mr Home noted that primary and secondary school deputy principal positions are promotional positions (being level 3 and level 4 positions respectively). He went on to say that the level 4 secondary school deputy principal positions for 1998 were advertised for filling by way of transfer only, in the Education Department publication *School Matters* on 23 April 1997. Applications to fill those positions by way of transfer closed on 9 May 1997 and those applications were then being processed by the Department. The Department anticipated that all promotional positions for the 1998 school year would be filled by 31 December 1997.

It follows from earlier discussion that as at mid-1997 the transfer system for the filling of promotional positions, at that stage in place within the Department, provided that all promotional positions be filled, in the first instance, by way of transfer rather than merit. When a metropolitan promotional position became available, it was usually filled by the most senior appropriate person by way of transfer from a country posting. The evidence indicated that a few metropolitan positions remained vacant after the transfer process to be filled by way of merit selection.

After a careful review of the evidence adduced in support of the application for exemption, including reference to the way in which various policies and practices such as the transfer policy impacted upon the career prospects of women, particularly in regard to the issue of gender-linked deputy principals - being the issue immediately before the Tribunal at the time the application was

being dealt with - the Tribunal concluded that the abolition of the transfer policy was critical to the advancement of the objects of the Equal Opportunity Act within the department. To that end, the Tribunal determined that the extension of the exemption in respect of female gender-linked positions to 31 December 1997 should be conditional upon abolition of the transfer policy and the adoption of a wholly merit-based system by not later than that date. A condition to that effect formed part of the various orders made by the Tribunal in response to the application for exemption in respect of the gender-linked deputy principal positions.

The significance of the 1997 ruling in the context of the present proceedings is this. As a consequence of the ruling the Department was obliged to institute reforms concerning the transfer policy more rapidly than might otherwise have been the case. The evidence adduced before the Tribunal in the present proceedings suggested that, notwithstanding the many misgivings about sudden change previously mentioned, it did prove possible to reform the transfer policy along the lines implicit in the Tribunal's ruling. As appears later, this may have a bearing upon the question of whether the Department's maintenance of the transfer policy as at mid-1997, albeit in a modified form, and against a background of progressive movement towards a merit-based policy in regard to promotional positions, could be regarded as reasonable within the language of section 8(2)(b) of the Equal Opportunity Act.

Before leaving this overview and turning to the particular circumstances of the present dispute, the Tribunal notes in passing that in 1995, with a view to carrying into effect its credo of providing uniform teaching standards throughout the state, in an endeavour to counter any adverse consequences flowing from the movement towards merit-based selection, the Department established a remote teaching service with a view to encouraging talented teachers to country areas

and remote communities. The Department continues to harbour reservations as to whether initiatives of this kind and special financial incentives will be sufficient to maintain the standards it is hoping to achieve. The evidence before the Tribunal did not explore this aspect of the matter in detail.

### The Complainant

Ms Miller obtained a teacher's certificate from the Mt Lawley Teachers' College (as it then was) in 1973. She obtained a Bachelor of Education and a Teacher's Higher Certificate from Claremont Teachers' College in 1983. She has been a teacher since 1974 and has worked as deputy principal in a range of schools since 1992 including periods of service in that capacity at Gwynne Park Primary School and Pinjarra Primary School. As at mid-1997 she was serving as deputy principal at the Pinjarra Primary School and had some experience in developing special programmes to cater for the Aboriginal student population both at Gwynne Park and Pinjarra Primary School. The Tribunal will not attempt to draw out of the materials adduced in evidence a complete summary of her qualifications and experience. It is sufficient to note that these materials indicate that she was able to meet the selection criteria for a level 4 principal. It is significant that, in 1999, after the dispute had arisen she applied for and was able to obtain a level 5 position as acting principal of the Mandurah Primary School.

Ms Miller said in the course of her evidence that during the early stages of her career the fact that she had two children of primary school age prevented her from taking up positions in the country and her family responsibilities limited her to taking up positions with a reasonable travelling distance



from her home in Mandurah. She adduced in evidence a letter from the Acting Manager of the Human Resources Services Branch of the Ministry of Education dated 15 March 1991 which not only has a bearing upon her own status but also tends to reflect some of the matters referred to earlier in these Reasons for Decision. The letter reads in part as follows:

"The criteria for eligibility to promote from a principal class III (level 3) to principal class II (level 4) or equivalent positions has not changed. That is, a teacher must have completed two years of service at level 3 to promote to level 4. While you have completed many years of acting/relieving service at level 3 (including as acting/relieving principal of a class III school), this service was not substantive. Your work was highly valued and appreciated, however, because it was not substantive you are not eligible to promote to level 4 positions. The situation regarding the regulations will not be changed as the status quo will continue. However, I have noted your concern regarding the advertisements which call for applications for promotion and these will state that service must be substantive."

The Tribunal has already noted that as a consequence of various negotiations in the period preceding publication of the April 1997 Information Guide, the Education Department introduced a policy of "local merit selection" on a trial basis in relation to applications for promotional positions (level 4) at Bunbury, Ashfield and Tranby Primary Schools being three school on an agreed list. Nonetheless, as appears from the Information Guide, and notwithstanding widespread use of the euphemism "merit transfer", the transfer policy remained in force at mid-1997. Under the policy, promotional positions were filled using a two-stage procedure. Stage one was open only to those applicants eligible to transfer to the advertised position, that is, applicants who already held a substantive level 4 position. These applicants were then assessed on merit. If the position could not be filled this way, then under stage 2 the vacancy would be advertised as being open to all other applicants and selection was to be based on merit. The case for Ms Miller was that as at mid-1997 the proportion of males comprising level 4 compared to males in levels 1 to 3 was substantially

greater than the corresponding proportion of females in level 4. The Tribunal will return to this aspect of the matter in due course.

In August and September of 1997, Ms Miller applied for positions at Bunbury and Ashfield Primary Schools respectively as principal, level 4. Before submitting an application in respect of the latter position she obtained from the Beechboro Education Centre a document containing information for applicants in respect of the position in question which was described as "a local merit selection position". The selection criteria was said to include the five generic criteria for principal level 4 mentioned earlier. Applicants were invited to address those criteria. The information document contained a footnote in these terms:

"As per local selection guidelines, the above position will be filled by merit transfer in the first instance. That is, a merit selection process will be used with those applicants eligible to transfer to the position of principal level 4 being considered first, followed by promotional applications if no suitable applicant is determined from the initial group."

Ms Miller was unsuccessful in both cases. In regard to the Ashfield application she received a letter dated 2 October 1997 from the Director of the Swan Education District which reads (omitting the inessential parts) as follows:

"Selection process for the position of principal, Ashfield Primary School has been completed. The recommended applicant is Mr (L) who is presently principal-primary, Kojonup District High School.

"According to the policy for local merit selection outlined on page 8 and 9 of the 16 July 1997 edition of *School Matters*, the applicants for the position were treated in two pools. The first pool included those applicants who already held a substantive level 4 position and the second pool included those not presently at level 4. As the successful applicant came from the first pool applicants in the second pool were not considered (emphasis added).

"Thank you for your interest in this position and I wish you well in your future promotional endeavours."

In October 1997, Ms Miller applied for the promotional position of principal, level 4, at Tranby Primary School but was again unsuccessful. On this occasion she received a letter from the Director of the Cannington District dated 31 October 1997 (omitting inessential parts) in these terms:

"Thank you for your application for the position of principal (level 4) Tranby Primary School. As this position will be filled in the first instance by merit transfer you are not eligible to be included in this initial process. If a suitable applicant is not determined from the eligible pool of transfer applicants, other applications, including yours, will then be considered. If you have any queries about these processes please contact my principal consultant, Mr Rob Stewart, who is convening this local merit selection on my behalf."

It was against this background that Ms Miller lodged a complaint with the Equal Opportunity Commission alleging unlawful discrimination against her on the ground of her sex in the area of employment by denying her access, or limiting her access, to opportunities for promotion, contrary to sections 8 and 11 of the Equal Opportunity Act. When the matter was eventually referred to this Tribunal the details of her complaint were fleshed out in Points of Claim which included reference to her status as a primary school teacher and the circumstances in which her applications for the three positions in question were unsuccessful. Particulars of the alleged discrimination included an assertion that in order to be considered in the first instance for a promotional position under the local merit selection policy, it was a requirement that the applicant be eligible for transfer from a substantive level 4 position. The requirement was one with which a substantially higher proportion of males than females complied or could comply. The requirement or condition was said to be not reasonable in the circumstances and, further, the complainant pleaded that she did not or was not able to comply with the requirement or condition.

In her Points of Claim, in setting out the loss and damage she had allegedly suffered, Ms Miller included reference to hurt and humiliation and loss of opportunity to be considered as an applicant for level 4 promotional position with the respondent. She sought an award of compensation accordingly.

The Tribunal pauses to note in passing that although the Points of Claim seemed to limit the contested issue to the effect of the local merit selection policy it became apparent as the hearing proceeded that the policy specifically referred to in the Points of Claim could not be properly comprehended without an understanding of the related transfer policy and it is for this reason that the Tribunal has felt obliged to provide a lengthy exposition in order to portray the context of the dispute. There was some discussion at the hearing as to the range of issues encompassed by the pleadings but it soon became apparent that the applications in question were clearly affected by the Department's earlier policies and practices. It is significant that in relying strongly upon the plea of reasonableness allowed for by section 8(3) of the Equal Opportunity Act, the Respondent intended to argue the case upon the basis that the circumstances of the case included the difficulty of effecting any sudden change to long-established policies and practices and it was therefore obvious that the Tribunal had to understand the entire context of the dispute going beyond the particular procedure of "local merit selection".

The Respondent by its Points of Defence denied liability, conceding that at all material times Ms Miller did not hold a substantive level 4 position. On both sides, the case was argued on the basis that the Complainant was advancing a claim of indirect discrimination having regard to the provisions of section 8(2) of the Equal Opportunity Act.

### **Legal Principles**

Section 8(2) provides that a person discriminates against another person on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply, which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. By section 11 it is unlawful for an employer to discriminate against a person on the ground of a person's sex in the terms or conditions of employment that the employer affords the employee or by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training or to any other benefits associated with the employment or by subjecting the employee to any other detriment. By section 6 of the Act these provisions bind the Crown.

The Tribunal has noted in previous rulings that there are four recognised "elements" of indirect discrimination and it will therefore be useful to deal with the separately.

First, the discriminator must require the aggrieved person to comply with a condition or requirement. In the context of the present case, there appears to be little dispute about this aspect of the matter. It is apparent from the letters received by Ms Miller subsequent to her unsuccessful applications that the requirement or condition which stood in her way was that she be an applicant who already held a substantive level 4 position.

In other words, against the background described by the Tribunal, the requirement or condition in the present case was that in order for applicants to be considered in the first instance for the promotional position of principal level 4, they had to be in the first pool of applicants under consideration, that is to say, those applicants who already held a substantive level 4 position. This requirement arose out of the application of regulation 70A of the Education Regulations, whereby vacancies for promotional positions were to be filled by transfer before promotion. This was established by the 1997 Information Guide which in turn reflected long-established practices. It is apparent from the letters received by Ms Miller that the transfer policy, albeit modified to some extent by the local merit selection process, led to her applications being unsuccessful. Put shortly, the requirement was applied in relation to the advertised vacancies for principal level 4 at Bunbury, Ashfield and Tranby Primary Schools. Under the local merit selection process in 1997 reflected in the 1997 Information Guide as supplemented by the details appearing in the issue of *School Matters* dated 16 July 1997, because Ms Miller did not hold a substantive level 4 position at the time of making her applications, she was not included in the first pool of applicants and was not further considered. All three vacancies were filled by applicants included in the first pool.

Second, a substantially higher proportion of persons of a different sex than the aggrieved person must be able to comply with the requirement or condition and persons of the same sex as the aggrieved person.

The decided cases indicate that in the case of a complaint of indirect sex discrimination, the Tribunal should determine for itself as a matter of law the appropriate base groups which will reveal whether sex is a significant factor. The base group should be defined so as to identify the particular

group of persons to whom the requirement or condition is directed, or upon whom it is imposed. What is then required is a comparison which will reveal whether sex is significant to compliance, and that involves ascertaining the number of complying men as a proportion of other men within the base group and the number of complying women as a proportion of other women. *Kemp v. Minister for Education (1991) EOC 92-340; Australian Iron and Steel Pty Ltd v. Banovic (1989) EOC 92-271.*

With these precepts in mind, the Tribunal turns to the 1997 DEOPE report and the statistical data contained therein, especially at appendix B.

It is apparent from earlier discussion that both DEOPE reports suggest that women occupy a relatively small percentage of promotional positions in schools despite comprising two-thirds of the teaching workforce. The 1994 DEOPE report notes at paragraph 4.2 that in 1993 women comprised 67 per cent of the teaching workforce and occupied 25 per cent of school-based promotional positions. More than half (58 per cent) of the school-based promotional positions occupied by women were gender-linked positions. Women were 77 per cent of primary teaching staff, 50 per cent of secondary teaching staff and 84 per cent of education support staff. Women tended to be concentrated in the lowest levels of both the teaching and promotional levels. This was most pronounced in the primary sector where, for example, women held 90 per cent of level 1 positions and 6 per cent of level 4 and above positions. No women were employed in primary level 6 positions. It was said further that Department of Employment, Education and Training statistics of 1988 showed Western Australia had the lowest percentage of female primary principals in Australia.

The general position in both reports is reflected again in the more particular statistics appearing in the 1997 DEOPE report which is closer in time to the events the subject of the present dispute. The number of primary school employees who occupied substantive level 4 positions (eligible to be considered in the first stage of the appointment process) is given as male 182 and female 24. The number of primary employees who occupied substantive positions below level 4 (ineligible to be considered in the first stage) is male 1875 and female 8688. If one takes as the base group the total of eligible and ineligible males this amounts to 2057 males (being 182 plus 1875) as contrasted with a base group comprised of total eligible and ineligible females of 8712 (being 24 plus 8688). The eligible males as a proportion of total males in the base group can then be portrayed as 8.85 per cent as contrasted with eligible females as a proportion of total females in the base group being portrayed as 0.28 per cent. It follows that a substantially higher proportion of males than females were able to comply with the requirement or condition. The rate of compliance for males was approximately 32 times that of females. When one has regard to the general background to the dispute described by the Tribunal in earlier discussion it is not surprising that the calculations produce the result just mentioned. They confirm the general picture portrayed by both DEOPE reports that women continue to occupy a relatively small percentage of promotional positions in schools despite comprising two-thirds of the teaching workforce. The Tribunal is therefore able to conclude that a substantially higher proportion of persons of the male sex were able to comply with the condition concerning the holding of a substantive level 4 position than female teachers at the time the relevant applications were considered.

Third, the complainant must not be able to comply with the condition. Again, there is little room for controversy about this aspect of the matter. The theoretical possibility of being able to comply with the condition is not the test. *Mandla v. Dowell Lee (1983) 2AC 548 at 565*. In this case, Ms



Miller, during the course of her teaching career, may theoretically have had the opportunity to have achieved a substantive level 4 position. It appears from the narrative, however, that various matters weighed against her in that regard and the fact is that she had not actually achieved the required status at the time the applications were made and therefore, as appears from the letters subsequently received by her, was thought to be ineligible at the first stage of the process of selection. The Tribunal therefore finds that this requirement of the legislation has been satisfied.

Fourth, the requirement or condition is "not reasonable having regard to the circumstances of the case". In giving effect to that precept it will be useful to look briefly at a number of previously decided cases.

The test of reasonableness is less demanding than one of necessity but more demanding than a test of convenience. The criterion is an objective one, which requires the Tribunal to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account. *The Secretary of the Department of Foreign Affairs and Trade v. Styles (1989) EOC 92-265; Waters v. Public Transport Corporation (1991) EOC 92-390.*

In *Commonwealth Bank of Australia v. Human Rights and Equal Opportunity Commission (1997) 150 ALR 1* the Full Court of the Federal Court not only approved the principles just mentioned but also noted that the complainants bear the onus of establishing that the condition or requirement is not reasonable in the circumstances of the case. The question is not whether the decision to impose the condition or requirement was the "correct" one but whether the requirement is not reasonable having regard to the circumstances of the case, this being a question of fact which can only be

determined by weighing all relevant factors. It was essential to consider the grounds relied on by the alleged discriminator to support the reasonableness of the impugned condition or requirement.

The Tribunal notes that counsel for the Respondent also placed reliance upon certain passages in *Australian Iron and Steel Pty Ltd v. Banovic (supra)* in which it was indicated that in this context the concept of reasonableness could extend to the maintenance of a stable workforce and one not subject to industrial disputation which otherwise might result if established patterns of industrial regulation and representation were put at risk.

When one applies these principles to the circumstances of the present case the Tribunal notices that the requirement or condition that an applicant occupy a substantive level 4 position in order to be considered in the first pool of applicants arose out of the application of the transfer policy set up and used by the Respondent over many years up until its removal in 1997 as a consequence of the Tribunal's 1997 ruling. It is material to note that, although the Respondent by its representatives did not formally concede the discriminatory effect of the transfer policy, it clearly recognised that reforms were necessary in order to keep pace with changing attitudes, and it seems that, soon after lodgment of the applications the subject of the present dispute, the Department was able to dismantle the transfer policy without significant disruption, notwithstanding its apprehensions in that regard.

The facts reveal that in respect of each of the three promotional positions the subject of Ms Miller's applications, the position was eventually filled by a transferee. This confirms the picture portrayed by other evidence that filling the position by transfer from a substantive level 4 position took priority over considering those applications based on promotion by merit from a level below level 4.

In other words, the requirement or condition imposed by the Education Department had the effect of excluding a relatively large number of applicants, including Ms Miller, from the selection process for each position. The requirement was not only directed to those persons who actually occupied the positions, but to all of the Department's teaching staff occupying substantive positions at level 4 or below, with the result that the compliance rate overall amongst men was many times greater than that for women. This is because the distribution of the Department's female and male staff across levels 1 to 6 was very uneven. The Tribunal has already mentioned the factors serving to create the imbalance. The requirement for permanency was a prerequisite for promotion. The requirement for four year teaching qualifications was a prerequisite for promotion. There was a practice of not allowing part-time work in promotional positions. Mobility requirements, including application of the transfer policy, were a barrier. In most cases to gain promotion it became necessary to move to a country location and then at a later date seek to transfer back to a metropolitan school. The 1997 DEOPE report identified the transfer system as the key problem for women in promotion because of their family responsibilities and reduced mobility.

Against this background, the Tribunal finds that the requirement or condition under consideration was not reasonable in the circumstances for various reasons. Priority was given to the transfer system - a system which tended to favour male teachers because of the emphasis upon country service and mobility – such transfer system being the principal means of filling promotional positions under local merit selection, over and above applications based on merit. The long-term effect of the transfer policy as it continued to be reflected in the process of local merit selection was that mobility eventually proved to be of greater significance than merit when it came to evaluating the applications the subject of the dispute. Further, Ms Miller was denied the opportunity to compete with other applicants on merit for a position as principal level 4 in the three schools of her

choice, two of which were located in the Perth metropolitan area. In fact, merit only became a relevant consideration in the selection of the most suitable transfer applicant. The requirement was imposed to suit the Education Department in carrying out its administrative and employment relations functions, at a time when it had been aware for a considerable period beforehand of the disadvantages experienced by female teachers as a result of the transfer system and other past practices, all of which had been the subject of critical commentary in the two DEOPE reports. Counsel for the Respondent argued that it was reasonable in the circumstances of the case for the Education Department to reform the system slowly, having regard to the long-established practices in the Department concerning country service, but the Tribunal is not satisfied that this can be said to render continued application of the contentious requirement reasonable in the circumstances of the case. The Tribunal will therefore allow the complaint.

### **Relief**

Section 127 of the Act provides that after holding an inquiry the Tribunal, if it finds the complaint substantiated, may order the Respondent to pay damages by way of compensation for any loss or damage suffered by reason of the Respondent's conduct. Previously decided cases have indicated that the Tribunal must give careful consideration to the adverse consequences experienced by the Complainant, especially in circumstances where the complaint has been subjected to a degree of hurt and humiliation, because the damages are intended to be compensatory. Further, in order to underline the importance of the concepts reflected in the legislation the decided cases suggest that awards of damages should be more than nominal. *Hall v. Shieban Pty Ltd (1989) EOC 92-250*. The Tribunal should not automatically apply principles of tort to the assessment of damages in the

statutory jurisdiction, although those principles may in some cases be helpful. *Capodicasa v. Herald and Weekly Times Ltd (1989) EOC 92-969*.

Certain difficulties arise in applying these principles in the circumstance of the present case. It is difficult to accept that Ms Miller was humiliated or deeply aggrieved at a personal level as a result of her three applications being refused. A movement towards a true merit-based selection procedure was taking place but she knew from her previous experience that the transfer policy was still active and likely to weigh against her. Further, and in any event, like any applicant for an employment position at this level of seniority, where there is likely to be competition from other well qualified candidates, an applicant usually makes some allowance for the possibility of disappointment. Ms Miller gave some evidence concerning the sense of injustice she felt but she did not really contend that she was deeply distressed by the outcome. She proceeded with her complaint under the Equal Opportunity Act as a matter of principle.

In the circumstances of the present case the Tribunal will award Ms Miller the sum of \$4000 by way of general damages.

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