

ANTI-DISCRIMINATION {PAY} ACT, 1974

EQUALITY OFFICER'S RECOMMENDATION NO.EP 01/1999

PARTIES

26 Named Female Employees

{Represented by IMPACT.}

and

Irish Aviation Authority

File No. EP 06/98

1. Dispute

1.1 This dispute concerns a claim by IMPACT on behalf of

26 named female claimants that they are entitled under the terms of the Anti-Discrimination (Pay) Act, 1974 to the same rate of remuneration as that paid to seven named comparators.

2 Background

- 2.1** The claimants and the comparators involved in this claim are employed by the Irish Aviation Authority. The Authority was established in January, 1994 to take over the role and functions of the Air Navigation Services Office of the Department of Transport, Energy and Communications. The Authority's responsibilities include the provision of safe, orderly and expeditious civil aviation services in Ireland.
- 2.2** The claimants and the comparators are either employed at Dublin Airport or at Shannon Airport and they are graded as Data Assistants. They are assigned to work either in operations or in training. The comparators, at the time of the claim, were all Air Traffic Control Assistants, which grade was being phased out, and was being replaced with the claimants' grade of Data Assistant and Student Controllers.
- 2.3** The first Data Assistants were recruited by open competition in January, 1997 and the first intake of Student Controllers took place in October, 1997. The operational requirements to phase in the Data Assistant grade whilst phasing out the Air Traffic Control Assistant grade required a transition period of approximately 15 months. After the completion of the transition period one person, a named comparator, who the Authority describes as unique, remains in the grade.

2.4 In February, 1998 the Union served a claim in respect of the 26 named female employees and nominated seven comparators. A list of the names of the claimants and the comparators, together with their work locations are at Appendix 1. The Equality Officer held a preliminary joint hearing with the parties. Subsequent to that hearing he received written submissions from both parties to the case. As like work was not conceded by the Authority, the Equality Officer carried out, on various dates in August and September, 1998, inspections of the work of the claimants and the comparators at both Dublin and Shannon airports. He held a final joint hearing with the parties on the 4th November, 1998.

3 Summary of the Claimants' Case

3.1 The Union contends that the 26 claimants, at the time of the claim, did "like work" within the meaning of section 3(a), (b), and (c) of the Act with the seven named comparators and are therefore entitled to receive the same rate of remuneration. The Union rejects the respondent's case that there are grounds other sex to justify the pay differential between the claimants and the comparators.

3.2 In support of its case of "like work" the Union points to its job descriptions of the claimants and the comparators work as at Appendix 2. The Union's commentary on the duties of the claimants and the comparators is at Appendix 3.

3.3 The Union contends that the proportion of females in the Data Assistant grade compared with their proportion

in the Air Traffic Control Assistant and Air Traffic Control Service grades establishes a sufficient statistical pattern to prove unequal treatment. On 5 February 1998 the figures and proportions were as follows:-

Grade	Female	Male	Female Proportion
D.A.	26	12	68%
ATCA	4	7	36%
All ATC	26	245	10%
1998 Cadets	4	20	17%

The Union contends that in a male dominated service the only predominantly female grade is the Data Assistant. The Union points out that the proportion of females in the grade is 32 percentage points higher than in the grade of the comparators, the Air Traffic Control Assistant. It is 58 percentage points higher than in the overall Air Traffic Control Service and even 51 percentage points higher than the 1998 Cadet intake.

3.4 In relation to the respondent's arguments, that all the claimants and all the comparators are not employed at the "same place" for the purposes of the Act, the Union points out that the pay and conditions of the respondent's employees here are determined on a national basis through a Central Joint Conciliation Council. As a result the Union contends that the two relevant centres in the State viz. Dublin and Shannon constitute the "same place". In support of this case the Union refer to a number of findings under the Anti-Discrimination Act, including MIPMPA Insurance Company v Three Women Insurance Officials EP12/85

3.5 The respondent, the Union maintains, misinterprets the

relevant legislation that because the arrangements are transitional this constitutes a defence to the claim. It points out that case law allows a claimant to be compared with a former comparator and there is clearly no restriction on a comparison with a current one - even if it is transitional.

3.6 The Union does not accept that the male in the ATCA grade is unique nor is there an agreement to "red circle" him. The Union points out :-

A. "An ATCA's promotion entitlement or expectation is determined by the number of Controller vacancies and ATCAs have served for periods of 12 years in the grade.

B. An ATCA who passes their primary course and subsequently fails the "Controller" medical will not be promoted and continues to serve as an ATCA.

C. An ATCA who succeeds in being promoted to Controller and fails to secure an ICAO rating reverts to the ATCA grade and continues to serve as an ATCA.

D. Therefore the concept of a lifetime career ATCA is not unique and the person here cannot be considered be "red circled".

4 Summary of Respondent's Case

4.1 The Authority rejects that "like work" as defined by Section 3(a), (b) and (c) of the Anti-Discrimination (Pay) Act, 1974 exists between the work of the claimants and the named comparators. The Authority's

descriptions of the work of the claimants and the named comparators are at Appendix 4. The respondent's views on the differences between the contracts, terms and conditions of employment of the two grades are at Appendix 5.

- 4.2** The respondent, "without prejudice" to its case that "like work" does not exist between the claimants and the comparators, contends for various reasons, that there are "grounds other than sex" to justify the pay differential.

The Authority points out that the Union has been selective in its choice of claimants and comparators in that the reality is that the claimants grade of Data Assistant and the comparators grade of Air Traffic Control Assistant are both made up of males and females.

- 4.3** The Authority draws attention to the requirement in the Act for a claimant and comparator to be employed in the "same place". The Authority asserts that the only reasonable interpretation of the "same place" is the Authority's Training and Air Traffic Control Centres at Shannon Airport. The respondent holds that that under no circumstances could Dublin Airport and Shannon Airport be construed as the "same place".

- 4.4** One of the main arguments of the Authority is the grade of Air Traffic Control Assistant was being phased out and that there was a transitional time period for this phasing out. The Authority states that the period of transition arose, following negotiations and agreement with the Union, in order to facilitate the replacement

of the Air Traffic Control Assistant grade with two new grades i.e. Student Air Traffic Controllers and Data Assistants. The transition period lasted for some fifteen months.

- 4.5 The respondent states that since February, 1998 only a male, who was recruited in November, 1965 and is one of the named comparators, remains in the ATCA grade. The Authority contends that he is unique in that despite his failure to pass end of probation technical examinations, which should have lead to his dismissal after his second examination failure, he was confirmed in his appointment as an Air Traffic Control Assistant in 1967. The circumstances in relation to his employment as an Air Traffic Control Assistant is at Appendix 6.

5. The Conclusions of the Equality Officer

- 5.1 The Act under Section 2(1) provides that a women is entitled to the same rate of remuneration as a man where both are employed, by the same employer in the same place, on "like work" unless the employer can show under Section 2(3) that the differences in the rates of pay is justifiable on grounds other than sex. The company in this case disputes that the claimants meet the requirements of section 2(1) in that all the claimants are not employed at the same place as all the comparators and while it maintains that there is no "like work" between any of the claimants and any of the comparators, it argues that there are legitimate "ground other than sex" to justify the higher rate of remuneration paid to the named comparators.
- 5.2 In making my recommendation in this case I have taken

into account all of the submissions, written and oral, made to me by the parties to this case and also the work inspections which I carried out on the work of claimants and the comparators. I am satisfied from my inspections of the work of the comparators and the work of the claimants, that the descriptions submitted by the parties fairly reflect the jobs of the employees involved in this claim. The detailed job descriptions of the claimants and the comparators, as submitted by the Union are at Appendix 2. The job descriptions submitted by the Company are at Appendix 4.

- 5.3** I note that the Authority accepts that all the claimants, regardless of their work location, do like work with each other. I am satisfied with the benefit of my work inspections that they perform like work with each other in terms of section 3(b) of the Act.

In relation to the seven comparators nominated by the Union I note that, at the time of the claim, they were all employed as Air Traffic Control Assistants. I further note the Authority accepts, regardless of their work location, that they perform like work with each other. I am satisfied with the benefit of my work inspections that they performed the same work and that they are employed on like work with each other in terms of section 3(a) of the Act.

Accordingly for the purposes of my comparisons it is sufficient to compare the work of one of the comparators with the work of one of the claimants.

- 5.4** In order to decide the question of whether or not the work of the claimants and that of the comparators is

like work within the meaning of Section 3 of the Act, I have selected Mr Paul Kennedy and Ms Clionagh Mimmagh, both of whom are employed at Dublin Airport, for comparison purposes.

I considered, in the first instance, whether the work performed by the claimants is the same work to that of the comparators in terms of Section 3(a) of the Act. Section 3(a) states that two persons shall be regarded as employed on like work:-

"where both perform the same work under the same or similar conditions, or where each is in every respect interchangeable with the other in relation to the work,"

5.5 I interpret Section 3(a) to mean that like work is performed where two persons do exactly the same work (under the same or similar conditions) or there is full interchangeability between them. In the course of work inspections at Dublin Airport I went through the Authority's job description {Appendix 4(3)} of the comparator, for the purpose of comparison with the work performed by the claimant. The respondent pointed out that "Maintain traffic records" applies only to Shannon and that "Perform Simulator Pilot duties in Training Centre as required" did not apply to the comparator Paul Kennedy. The Authority further pointed out that all the other "duties and responsibilities" were common to both grades here, except that the first three issues mentioned refer only to the Air Traffic Control Assistant grade.

5.6 I propose now to examine the three issues highlighted

by the Company as giving rise to work differences in the two grades.

The first issue raised here is the Primary Course and I note that the Authority in its submission states that "That this exam in essence is the licence standard exam for the Air Traffic Controller Grade 111."

In relation to the Medical assessments, the second issue, the Authority in its submission states that "...an officer will be eligible to undergo a technical examination and a medical examination of the same standard as the examinations which are obligatory for Air Traffic Control Officers Grade 111."

On the third matter, the performance of Air Traffic Control Officer 111 duties, I note that an Air Traffic Control Assistant would not be permitted to perform these duties until s/he has passed the Primary Course and medical examinations.

I have given careful consideration to these three issues and it seems to me, on the evidence available to me, that none of these matters were required or were necessary to carry out the duties of an Air Traffic Control Assistant but rather they go to the eligibility and/or requirements of the promotional grade of Air Traffic Control Officer class 111.

- 5.7** In the course of my work inspections I asked the comparator, Mr Kennedy (Dublin), about the differences in his work compared to that of the Data Assistants, he stated that there were no differences. Having regard to my work inspections and the views expressed in the

final paragraph of 5.6, together with the views of the aforementioned comparator I find that Ms. Mimmagh and Mr Kennedy for the purposes of section 3(a) performed the same work as each other. As I have so found it follows that each of the claimants at Dublin Airport performed the same work with each of the comparators at Dublin Airport.

5.8 I am re-enforced in my view that they performed the same work having regard to fact that the claimant and the comparator were, for the purposes of section 3(a), "in every respect interchangeable with each other in relation to the work". In this regard I should point out that it was not unusual that a claimant would relieve a comparator on duty and both grades worked at the exact same work site depending on whether they were involved in operational or training work.

5.9 I note that the claimants and the comparators either work at Dublin Airport or at Shannon Airport. As already stated I carried out work inspections at both locations. I am satisfied from a comparison of the work of Mr Peter Lynch and Ms Ailish McGrath, both of whom are employed at Shannon Airport, for the same reasons as outlined at 5.5 to 5.8, that they performed like work with each other under the terms of section 3(a). As I have so found it follows that each of the claimants at Shannon performed the same work with each of the comparators at Shannon.

5.10 As I have found that the claimants performed the same work as the comparators there is no requirement to consider whether or not the work performed by the

claimants is like work with that performed by any of the comparators in terms of Section 3(b) or (c) of the Act.

5.11 I will now consider whether, as maintained by the Authority, there are grounds other than sex justifying the difference in pay rates between the claimants and the comparators. Section 2(3), of the Anti-Discrimination (Pay) Act, 1974, provides:

"nothing in this Act shall prevent an employer from paying to his employees who are employed on like work in the same place different rates of remuneration on grounds other than sex".

5.12 The Authority points out on the question of grounds other sex, in the first instance, that the grades in question are made up with both males and females. As it is accepted that both grades contain members of both sexes it follows that that there is no case of direct discrimination here.

5.13 I note that the ECJ in the case of Enderby -Vs- Frenchay Health Authority and Secretary of State for Health (Case No: C-127/92), among other issues, addressed the question of the gender composition of grades under scrutiny in the context of indirect discrimination. In this regard the ECJ held that:

*"There is a prima facie case of sex discrimination where valid statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out **almost exclusively by women** and the other **predominantly by men**. It is*

*for the national court to assess whether the statistics appear to be **significant** in that they **cover enough individuals** and do not illustrate purely fortuitous or short phenomena."*

- 5.14** In my opinion, having regard to ECJ findings in Enderby, to establish a prima facie case of indirect discrimination, when comparing grades, an Equality Officer would have to be satisfied that the grades in question "cover enough individuals" and that one of the grades must be "almost exclusively" female and the other "predominantly" male.

In the present case the first question that I must consider is whether or not there are "enough individuals" in both the Data Assistant grade and the Air Traffic Control Assistant grade to make a realistic assessment as to whether or not the respective grades are "almost exclusively" female and "predominantly" male.

- 5.15** I note that the statistical information furnished in relation to the make up of the two grades on 5 February, 1998, the date of the claim, are agreed by the parties. The figures show that there were 26 females and 12 males in the Data Assistant grade and that 4 females and 7 males were in the Air Traffic Control Assistant grade.

- 5.16** I note that the percentage of males in the Air Traffic Control Assistant grade, based on the agreed figures show that seven males make up 63.36% of the total of eleven in the grade. The number of individuals here is such that an addition or a reduction of one person within the pool of eleven gives rise a percentage change

of just over 9%. It seems to me that a minimum change which gives rise to a variable of 9% in a pool is such that the pool does not "cover enough individuals" to be significant. Accordingly, it is my opinion, that the number of employees in the grade of Air Traffic Control Assistant is not sufficient to measure whether or not the grade is "predominantly" male.

- 5.17** I wish to add that if I was obliged to rely on the pool of employees in the Air Traffic Control Assistant grade to make a decision on whether or not the grade is "predominantly" male it would be my opinion that a grade made up with 63.36% of males, as applies here, is not sufficient to establish that it is a "predominantly" male grade.

It may be appropriate to state that the statistics received in the course of this investigation in respect of November, 1995, at which time agreement was reached between the parties on the new arrangements, show that the majority in the ATCA grade was male i.e. 18 males made up 56.25% of the total in that grade. The statistics here in relation to the gender make up of the ATCA grade prior to the introduction of the system show only a slight imbalance in favour of males.

- 5.18** As I am not in position to find that the comparators grade of Air Traffic Control Assistant grade is "predominantly" male there is no need for me to consider whether or not the claimants grade of Data assistant is "almost Exclusively" female.

Having regard to the views I have expressed in relation to the grades in question, in context of the ECJ finding

in "Enderby", I cannot hold that a prima facie case of indirect discrimination has been established.

- 5.19** In summary, I found that all the claimants performed like work with all the comparators, under the terms of Section 3(a) of the 1974 Act. I also found, as the grades in question were at the time of the claim made up of both sexes, that there was no direct discrimination against the claimants.

In regard to indirect discrimination I found that there was not a significant number of individuals in the grade of Air Traffic Control Assistant, at the relevant time, to determine that the grade is "predominantly" male. I also expressed the view that a grade made up with 63.36% of males, as applies in relation to the Air Traffic Control Assistant grade, is not sufficient to establish that it is a "predominantly" male grade. Accordingly I hold that a prima facie case of unlawful discrimination has not been established. I therefore found that the claimants have no entitlement, under the Act, to equal pay with the named comparators.

6 Recommendation

- 6.1** In view of my conclusions that there are grounds other than sex to justify the pay differential between the claimants and the comparators, under Section 2(3) of the Anti-Discrimination Act, 1974, I find that they have no entitlement to the same rate of remuneration as that paid to the named comparators.

Jim Clerkin,
Equality Officer,
11th February, 1999