

Editorial

Part-Time Workers' Rights

The Employment Protection (Consolidation) Act 1978 provides for a five year threshold for part-time workers employed between 8 and 16 hours per week, to qualify for redundancy pay and compensation for unfair dismissal. For full-time workers the qualifying period is two years. Given that some 83 per cent of part-timers are women, does this not amount to indirect sex discrimination, in contravention of EC law? In correspondence with the Equal Opportunities Commission (EOC), the Secretary of State for Employment denied any breach of Community law. In a test case, involving a part-time local government employee, Mrs Day, who had been made redundant before completing five years' employment, the EOC sought declarations, by way of judicial review, that the Minister's interpretation was wrong; it also challenged the method used to calculate statutory redundancy pay.

The Divisional Court held that the EOC and Mrs Day were entitled to bring judicial review proceedings, but

ruled against them on the substantive issues. The Court of Appeal (*Independent*, 10 November 1992) was divided. Lord Justice Kennedy held that the EOC's role was that of an adviser to the Minister and that it did not have the capacity to initiate judicial review proceedings; that the Minister's letter was not a decision subject to challenge by judicial review; and that judicial review was not available as a "fast track" in lieu of the procedures laid down in Articles 169 and 170 of the Treaty of Rome for ensuring government compliance with EC obligations. Lord Justice Hirst agreed that the Employment Secretary's letter was not reviewable, though he thought that the EOC's duty was sufficient to embrace applications for judicial review in appropriate circumstances.

Lord Justice Dillon held that Mrs Day's claim was in the domain of private law, and not amenable to judicial review. However, he dissented from the majority in upholding the EOC's right to challenge the Minister's decision. He held that the Employment Secretary had not discharged the onus of establishing objective justification for

the statutory thresholds and that the applicants were entitled to a declaration in relation to the thresholds, though not in relation to the calculation of redundancy payments. He accepted the Commission's contention that there was no evidence that abolishing the five-year threshold would result in a reduction in part-time work, and noted that no other European country has comparable rules.

On the substantive merits of the case, Lord Dillon's dissenting judgment is to be applauded as empathetic with the realities of a job market in which many women combine, through a combination of choice and force of circumstance, family responsibilities with productive employment. We are very sceptical of the majority's narrow characterisation of the EOC as an advisory body with a limited role in enforcing the laws against discrimination. This decision has created a worrying gap in the scope of judicial review which should be remedied by the House Of Lords at the earliest opportunity.