R(FC) 2/98

(Meyers v. Adjudication Officer (C-116/94))

ECJ (P. J. G. Kapteyn, acting as President of the Fourth Chamber, C. N. Kakouris and H. Ragnemalm, judges; Advocate General: C. O. Lenz)
13.7.95

Mr. A. W. E. Wheeler CBE **CFC/19/1990**
23.9.96

Income - calculation of earnings - absence from family credit scheme in 1989 of a provision for deduction of child minding costs from earnings - whether family credit within the scope of Council Directive 76/207/EEC and whether discriminatory on grounds of sex

The claimant was a lone parent who claimed family credit on 26 April 1989, declaring earnings of £487 per calendar month and £60 per week childminding expenses The adjudication officer disallowed the claim on the grounds that her income exceeded the appropriate limit. She appealed to a social security appeal tribunal, arguing that the child minding costs should be deducted in calculating the earnings to be taken account in the assessment The tribunal allowed the appeal on the grounds that the child minding costs constituted a payment of expenses wholly exclusively and necessarily incurred in the performance of her duties.

The adjudication officer appealed to the Commissioner, who gave an interim decision ruling that the tribunal had erred in law and that there was no provision in the family credit scheme allowing for the deduction of the childminding costs. However the claimant contended that the absence of such a provision had the effect that the family credit scheme indirectly discriminated against women contrary to Council Directive 76/207/EEC because it was more difficult for lone parents than couples to avoid having to pay for child care whilst working and the great majority of lone parents were women On 11th February 1994 the Commissioner referred to the European Court of Justice the question of whether a benefit having the characteristics and purpose of family credit fell within the scope of the Directive On receipt of their reply, the Commissioner gave a final decision.

Held, by the European Court of Justice, that

1. although social security matters are excluded from Council Directive 76/207/EEC by Article 1(2), a particular benefit comes within the scope of the Directive if it is concerned with any of the subject areas mentioned in Article 1(1) i.e. access to employment, including vocational training and promotion, or working conditions (*Jackson and Cresswell v CAO*, appendix 2 to R(IS) 10/91, followed) (para 13),

2. the concept of access to employment is not limited to matters that obtain before a person finds work. As the family credit scheme is intended to encourage both (a) workers to remain in low paid employment and (b) unemployed persons to take up such employment, for the purpose of the Directive it is concerned with access to employment (paras. 20 to 22),

3. the concept of working conditions within the meaning of Article 5 of the Directive is not limited to those conditions laid down by or agreed with the employer and can include a benefit necessarily linked to an employment relationship (para 24),

4 there was a link between family credit and an employment relationship in that the benefit could only be awarded if there was such a relationship, albeit that the recipient might not be a party to the relationship and that the award, being for a fixed period, might continue after the relationship had ended (para. 23);

5 a benefit having the characteristics and purpose of family credit therefore comes within the scope of Council Directive 76/207/EEC.

Held, by the Commissioner in his final decision, that:

1 in order to determine whether a measure that falls within the scope of Council Directive 76/207/EEC is indirectly discriminatory on grounds of sex.

(a) the test to apply is to consider whether there is a considerable difference in the number or percentage of one sex as against the other in either the "advantaged group" (i e those who can comply with the requirement or condition imposed by the measure) or the "disadvantaged group" (i c. those who cannot comply with that requirement or condition);

(b) the facts to be considered are those which applied at the time the measure actually affected the claimant (*R v. Secretary of State for Employment ex parte Seymour-Smith* [1995] ICR 889, CA followed) (para. 20);

2 on consideration of the statistical evidence, the family credit scheme, at the time it actually affected the claimant (i e in 1989), was indirectly discriminatory on grounds of sex in that the absence of a provision allowing childminding costs to be deducted in the calculation of earnings worked to the disadvantage of far more women than men (para 22),

3 the design of the family credit scheme was justified by reasons that were objective and unrelated to discrimination on grounds of sex. This was because:

(a) the test to be applied was whether the scheme reflected a legitimate social policy aim of the UK government and was appropriate and necessary to achieve that aim (*Nolte v Landesversicherungsanstalt Hannover* [1996] IRLR 225 followed) (para. 24),

(b) the aim of the scheme as stated by the government was to ensure that families do not find themselves worse off in work than they would if they were not working (para. 26);

(c) in judging the appropriateness of the scheme, the following principles should be applied

(i) the government had a wide discretion to choose the measures capable of achieving its social policy aim (para. 25);

(ii) the appropriateness of the choices made by the government had to be judged on the basis of the information available to it when they were made (para. 37),

(iii) it was not necessary to enquire how or to what extent the policy aim had in fact been achieved (para. 35);

(d) after appraising the scheme, and taking into account, amongst other things, research evidence showing that in 1989 a lone parent with average childcare costs was better off in work and receiving family credit than unemployed, the Commissioner concluded that the scheme met the test of appropriateness (para. 39);

4. the absence from the family credit scheme of a provision for the deduction of childcare costs in the calculation of earnings was therefore not precluded by Council Directive 76/207/EEC

DECISION OF THE EUROPEAN COURT OF JUSTICE

R. Drabble, Barrister, instructed by D. Thomas, Solicitor, for Ms. Keyers.

C. Vajda, Barrister and S. Braviner of the Treasury Solicitor's Department, agent, for the United Kingdom.

M. Wolfcarius and C. Docksey, of its Legal Service, agents, for the Commission of the European Communities.

The Opinion of the Advocate General was delivered on 11 May 1995 and is reported at [1995] ECR I-2133.

Judgment

1. By decision of 11 February 1994, received at the Court on 19 April 1994, the social security Commissioner, London, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2. That question was raised in proceedings between Jennifer Meyers and the adjudication officer concerning her right to deduct child-care costs from her gross income in order to obtain family credit.

3. Family credit is an income-related benefit which is awarded in order to supplement the income of low-paid workers who are responsible for a child.

4. According to Article 20 of the 1986 Social Security Act, a person in Great Britain is entitled to family credit if, when the claim for it is made or treated as made:

- his income does not exceed the applicable amount;
- he, or if he is a member of a married or unmarried couple, he or the other member of the couple, is normally engaged in remunerative work; and
- he, or if he is a member of a married or unmarried couple, he or the other member, is responsible for a member of the same household who is a child or for a person of a prescribed description.

5. Article 20(6) provides that "family credit shall be payable for a period of 26 weeks or such other period as may be prescribed and, subject to regulations, an award of family credit and the rate at which it is payable shall not be affected by any change of circumstances during that period (...)".

6. Ms. Meyers, who is a single parent, made an application for family credit in respect of herself and her daughter, then aged three. The application was rejected by the adjudication officer on the ground that her income, as calculated for the purposes of that benefit, was greater than the level conferring entitlement.

7. In her appeal against that decision to the social security appeal tribunal, Ms. Meyers submitted that the non-deduction of child-care costs for the purposes of calculating her net income discriminated against single parents, since it is much easier for couples to arrange their working hours so that any children can be looked after by one of them. As most single parents are women, it also constitutes indirect discrimination against women.

8. The social security appeal tribunal accepted Ms. Meyers' argument.

9. In the appeal proceedings before the social security Commissioner, however, the parties do not contend that the first tribunal incorrectly applied a provision of national law. The social security Commissioner observes that Ms. Meyers will be able to rely on the direct effect of Article 2(1) of the directive if family credit falls within its scope.

10. Accordingly, the question referred, which concerns only the last point, is worded as follows:

> "Does a benefit having the characteristics and purpose of family credit fall within the scope of Council Directive 76/207/EEC?"

11. The purpose of the directive, according to Article 1(1) thereof, is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. Article 1(2) states that with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, is to adopt provisions defining its substance, its scope and the arrangements for its application.

12. The Court has consistently held that, in view of the fundamental importance of the principle of equal treatment, the exclusion of social security matters from the scope of the directive provided for in Article 1(2) must be interpreted strictly (see the judgments in Case 15/84 *Roberts v. Tate & Lyle* [1986] ECR 703, para. 35, and in Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, para. 36).

13. Thus, the Court has held that a scheme of benefits cannot be excluded from the scope of the directive solely because, formally, it is part of a national social security system. Such a scheme may come within the scope of the directive if its subject-matter is access to employment, including vocational training and promotion, or working conditions. However, the directive is not rendered applicable simply because the conditions of entitlement for receipt of benefits may be such as to affect the ability of a single parent to take up employment (see the judgment in Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell v. Chief Adjudication Officer* [1992] ECR I-4737, paras. 27, 28 and 31).

14. The question whether the characteristics of a benefit such as family credit are such as to bring it within the scope of the directive must therefore be resolved in the light of those considerations.

15. According to the United Kingdom, family credit is excluded from the scope of the directive by Article 1(2) thereof. Family credit is intended to supplement the income of persons with insufficient means to meet their needs. Classifying it as income support is justified on the ground that, where a couple applies for it, family credit is paid to the woman, whether or not she is working. Moreover, the United Kingdom points out that the benefit continues to be paid for a period of 26 weeks even where the circumstances change, and that appeals against decisions concerning that benefit are brought before a tribunal with jurisdiction in social security matters. Finally, it claims that family credit has nothing to do either with access to employment, since it is awarded to persons who are already employed, or with working conditions, because those are merely conditions in the contract of employment or measures applied by an employer to a worker in respect of the latter's employment.

16 Those arguments cannot be accepted.

17. According to the *Jackson and Cresswell* judgment, cited above, the fact that a scheme of benefits is part of a national social security system, which makes national

remedies in the field of social security applicable in the main proceedings, cannot exclude it from the scope of the directive.

18. In its judgment in Case C-78/91 *Hughes v. Chief Adjudication Officer* [1992] ECR I-4839, para. 19, the Court noted that family credit in Northern Ireland performed the dual function of keeping poorly paid workers in employment and of meeting family expenses. It considered that by virtue of that second function (para. 20), a benefit such as family credit fell within the scope of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No. 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

19. However, that classification cannot prevent a benefit of the same kind, where its function is to keep poorly paid workers in employment, from coming within the scope of the directive, in so far as it concerns access to employment and working conditions.

20. It is not disputed in the main proceedings that one of the conditions for the award of family credit is that the claimant should be engaged in remunerative work. According to the legislation referred to by the United Kingdom in its written observations, the aim of the benefit is to ensure that families do not find themselves worse off in work than they would be if they were not working. It is therefore intended to keep poorly paid workers in employment.

21. That being so, family credit is concerned with access to employment, as referred to in Article 3 of the directive.

22. Furthermore, it is not only the conditions obtaining before an employment relationship comes into being which are involved in the concept of access to employment. As the Advocate General has pointed out in paragraph 47 of his Opinion, the prospect of receiving family credit if he accepts low-paid work encourages an unemployed worker to accept such work, with the result that the benefit is related to considerations governing access to employment.

23. That finding is not invalidated by the United Kingdom's other arguments which seek to show that there is no link with an employment relationship. It is precisely the existence of an employment relationship which confers entitlement to the benefit, even though the worker is not the direct recipient of that benefit, as in the case of a woman who is married or cohabiting and is unemployed, but who receives the benefit by virtue of her husband's or partner's work. The fact that entitlement to family credit is not affected by loss of employment or an increase in salary during the 26 weeks following the award cannot detract from the finding that the benefit is awarded only when the claimant is engaged in remunerative work and is not in receipt of income exceeding a specified amount.

24. Furthermore, compliance with the fundamental principle of equal treatment presupposes that a benefit such as family credit, which is necessarily linked to an employment relationship, constitutes a working condition within the meaning of Article 5 of the directive. To confine the latter concept solely to those working conditions which are set out in the contract of employment or applied by the employer in respect of a worker's employment would remove situations directly covered by an employment relationship from the scope of the directive.

25. Consequently, the answer to the question referred to the Court must be that a benefit with the characteristics and purpose of family credit is concerned with both access to employment and working conditions and falls, therefore, within the scope of the directive.

Costs

26. The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the social security Commissioner, London, by decision of 11 February 1994, hereby rules:

A benefit with the characteristics and purpose of family credit is concerned with both access to employment and working conditions and falls, therefore, within the scope of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. By an interim decision dated 11 February 1994 I held that the decision of the Walthamstow social security appeal tribunal, given on 1 August 1990, was erroneous in point of law and, accordingly, I set it aside. At the same time I referred a question of Community law to the European Court of Justice for a preliminary ruling, the question being: Does a benefit having the characteristics and purposes of family credit fall within the scope of Council Directive 76/207? In the event, the European Court ruled that family credit does fall within the directive. I am now placed to give my final decision, the decision the tribunal should have given, which is that the claimant is not entitled to family credit from 20 April 1989, the date on which she claimed, because her income was higher than the level at which family credit is payable. My reasons follow.

2. This is an appeal by the Chief Adjudication Officer and the Secretary of State against the tribunal decision of 1 August 1990 which decided that the claimant was entitled to have her childminding costs offset as an expense against her earning in the calculation of her entitlement to family credit. Following the ruling of the European Court, the oral hearing of the appeal was resumed at which Mr. David Pannick QC with Mr. Christopher Vadja of Counsel appeared for the Chief Adjudication Officer and the Secretary of State and Mr. Richard Drabble QC with Mrs. George of Counsel for the claimant. I am grateful to all of them for their penetrating submissions, both written and oral, which have been extremely helpful.

3. Although I set out the background to the appeal in some detail in my interim decision, I think it would assist to outline it here. Family credit, replacing family income supplement was introduced in April 1988 by the Social Security Act 1986. Essentially, it is an income related benefit which supplements the income of low paid workers who are responsible for a child or children. On 26 April 1989, the claimant lodged a claim for family credit in respect of herself and her daughter who was then aged three. She declared that her net earnings amounted to £487 per calendar month, out of which she had to pay nursery fees of £60 per week for her daughter. On 10 June 1989, the adjudication officer decided that the claimant was not entitled to family credit because her income was higher than the level at which family credit would become payable. In the event the tribunal accepted the evidence given by the claimant and found as a fact that she paid £60 weekly to send her child to a private nursery school and that without incurring such expense she would not be able to work. They also accepted evidence presented that 90% of single parents are women. The tribunal decided that the claimant was entitled to have her childminding costs offset as an expense against her earnings in the calculation of her entitlement to family credit and they remitted the matter to the adjudication officer for a recalculation. They reached that decision on the basis of regulation 19(2)(b) of the Family Credit (General) Regulations 1987, SI 1987 No. 1973, which they held entitled the claimant to have her childminding costs offset as an expense against her earnings. For the reason set out in my interim decision, that was manifestly wrong in law and I set aside their decision.

4. At the heart of this appeal is Mr. Drabble's contention that the absence of a provision enabling child care costs to be deducted in calculating a claimant's net income was indirectly discriminatory against women in terms of access to

employment and contrary to Council Directive 76/207, as most lone parents are women and it is easier for couples to arrange child care between themselves and, if required, to pay for it. In advancing that case, the first hurdle Mr. Drabble had to overcome was the issue whether family credit falls within the scope of that directive. As mentioned earlier, Mr. Drabble cleared that hurdle, the European Court answering the question which I posed in the following terms:

> "A benefit with the characteristics and purpose of family credit is concerned with both access to employment and working conditions and falls, therefore, within the scope of Council Directive 70/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions".

5. By reason of their importance, I set out the key passages in the Court's ruling:

> "20. It is not disputed in the main proceedings that one of the conditions for the award of family credit is that the claimant should be engaged in remunerative work. According to the legislation referred to by the United Kingdom in its written observations, the aim of the benefit is to ensure that families do not find themselves worse off in work than they would be if they were not working. It is therefore intended to keep poorly paid workers in employment.
>
> 21. That being so, family credit is concerned with access to employment, as referred to in Article 3 of the directive.
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> 22. Furthermore, it is not only the conditions prevailing before an employment relationship comes into being which are involved in the concept of access to employment. As the Advocate General has pointed out in paragraph 47 of his Opinion, the prospect of receiving family credit if he accepts low-paid work encourages an unemployed worker to accept such work, with the result that the benefit is related to considerations governing access to employment."

6. Now two fundamental matters are not in dispute before me. The first is that indirect discrimination on the ground of sex contrary to Council Directive 76/207 occurs where a measure has disparate impact on one sex and is not objectively justified. The second is that the burden of proving indirect discrimination on the ground of sex lies on the claimant, and if that is made out, the burden then shifts to the Secretary of State to prove that the disproportionate impact is objectively justified. It is also common ground and well settled that the test of indirect discrimination on grounds of gender is whether there is a considerable difference in the number of one gender in the advantaged or disadvantaged group compared with the other gender. Lord Justice Neill put it thus in *R v. Secretary of State for Employment, ex parte Seymour-Smith and another* [1995] ICR 889 at page 950:

> "... we would accept a submission made on behalf of the Secretary of State that before a presumption of indirect discrimination on the: ground of sex arises there must be a considerable difference in the number or percentage of one sex in the advantaged or disadvantaged group as against the other sex and not simply a difference which is more than *de minimis*".

7. Returning to Mr. Drabble's case, his argument is that in calculating in 1989 under the relevant regulations a claimant's income for the purpose of entitlement to family credit, the absence of a provision allowing a deduction for child care costs incurred for the child of the family indirectly discriminates against women by preventing equal access to employment in breach of Directive 76/207. As he put it in his written submissions:

> "Because of the absence of a disregard in respect of child care costs in 1989 in the family credit scheme, it was a condition of access to employment that claimants were able to make arrangements for child care without exceeding the income gained from employment (taking into account family credit) over income support levels".

The basis of that case is that the non deduction of child care costs discriminated against lone parents such as the claimant, since couples are placed to arrange their working hours so that a child or children can be looked after by one of them and as most lone parents are women it discriminates against women. Without a child care disregard, the argument runs, the claimant in financial terms would have been worse off in work than out of work and receiving income support and that amounts to indirect discrimination against women in access to employment. The issue therefore, he argues, is whether the absence of a disregard of child care costs affected a disproportionate number of women. It will do so, he says, if a disproportionate number of women rather than men can only work by incurring a loss in income compared with the position in income support.

8. Mr. Drabble's case on the statistical issues is based on two lengthy and detailed reports of Ms. Sally Holtermann Bsc, Msc, backed up by numerous reports and other documentation. Ms. Holtermann has been an economic consultant since 1982 and is a former economic adviser in the Department of Health and Social Security and other Departments. Her opinion is that when considering the disparate impact issue, it is necessary, as a first step, to compare the proportion of men and women in the relevant population potentially affected by the condition (the pool) with the proportion or men and women who cannot meet the condition that is to say "the disadvantaged group". The pool, she says, consists of all individual parents in low income families who might expect to be beneficiaries of family credit when working. According to Ms. Holtermann citing a Policy Studies Institute study carried out in 1991 when the conditions of entitlement to family credit were the same as in 1989, it was found that nearly half the families in the pool were headed by a lone parent, of which 96% were women. Of the individual parents within this pool, 64% were women and 36% were men. They also found that 92% of all lone parents were in this pool. She also calculates (see section I, paragraph (VIII) of her second report) that approximately 79% of women in the pool do not have a resident non working, non disabled, non student partner compared to 16 per cent of men.

9. Ms. Holtermann then goes on to identify the disadvantaged group. This she does by reference to those individual parents who do not have a resident partner available for child care on the ground that a resident partner, if not incapacitated or studying, can look after the child or children and so release the individual in question to go out to work. Furthermore, her evidence is (see section I, paragraph (ix) of her second report) that this group is composed of 90% of women and 10% of men and she adds that in terms of absolute numbers this amounts approximately to 1.9 million

women and 200,000 men. On the basis of that statistical picture, she says, it is established that those who do not meet with the condition in issue are disproportionately women and that the disparate impact is substantial. Moreover, her evidence is that the result is the same on the basis of the proportions of men and women in the advantaged group, namely those with a resident partner available for child care, where the figures, she says, consist of 31% women and 69% men.

10. Turning to child care costs, she makes the broad assertion that the evidence supports the conclusion that they were acting as a barrier to employment in the late 1980s "for around a quarter or a third of non-working mothers". In that regard she refers in section I, paragraph XII of her second report, to a study undertaking in 1989 (DSS Research Report No.6), apparently published in 1991, which found that 34% of lone mothers said that difficulties with child care were the main reason why they were not in work while 27% said it created a difficulty. 2:3 of the lone mothers said that the main problem was that child care cost too much and another 21% said they could not afford it. However, she points out that 20% gave affordability and 18% gave cost as secondary problems.

11. That, I trust, is a fair summary of the main points of Mr. Drabble's case on the issue of disparate impact of a lack of child care disregard in family credit in 1989.

12. In contending that Mr. Drabble has not made out that case, Mr. Pannick's starting point is to challenge Mr. Drabble's method of identifying the advantaged and disadvantaged groups, the former being those individual parents in low income families who might expect to be beneficiaries of family credit when working. Mr. Pannick reminds me that Mr. Drabble, basing himself on Ms. Holtermann's evidence, says that of the individual parents within this pool, 64% were women and 36% were men, yet women make up 90% of those who need child care in order to work, defined as those without a resident partner available for child care. The disadvantaged group, he says, consists of those individual parents who do not have a resident partner available to assist with child care, and this group is composed of 90% of women and 10% of men.

13. Mr. Pannick puts forward three main reasons why this argument fails. In the first place he argues that it is a fallacy to assume that all the women who lack a resident partner available for child care are adversely affected by the absence of a child care disregard. Many women in that group are not affected, for example, those who do not want to work for reasons other than the absence of a child care disregard. Indeed, he says that "excluding all unaffected categories, there is no evidence" to show that those adversely affected consists, disproportionately, of women. Thus Mr. Drabble's approach is flawed because it does not satisfactorily identify the group who need to make and pay for child care arrangements who, as a result, are worse off than they would be on income support. The focus, Mr. Pannick says, should be on those who are adversely affected by the condition of which the claimant complains because it is that condition which is said to cause the relevant detrement. The claimant has to "identify the relevant population, comprising all those who satisfy all the other criteria for selection" (*Jones v. Chief Adjudication Officer* [1990] IRLR 533 at p.537, para. 36).

14. Invoking the two affidavits of Ms. Moore, the current policy manager in the Department of Social Security, and the accompanying documentary evidence. Mr Pannick goes on to argue that ten categories of women fall to be ignored on the

footing that they are not detrimentally affected by the absence of a child care disregard. They are listed in paragraph 5 of the second affidavit of Ms. Moore:

> "(i) those who simply prefer not to work, the evidence showing that 27% of women looking after the home, and 12% of those with the youngest child under five, prefer to look after their home and family;
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> (ii) those who are not working for reasons other than the non provision of a child care disregard. Examples are, the lack of suitable and available employment, the lack of suitable child care provision, the desirability of caring for the children themselves or only entrusting them to members of the family and the fact that women and especially those who are lone parents, tend to be less well qualified for employment than men. Ms. Moore's evidence is that 54% of male lone parents work, compared with 39% of female lone parents, although they are subject to the same benefit rules. Further, Ms. Moore's evidence (para. 10 of her first affidavit) is that 22% of lone mothers in work pay cash for child care, again suggesting that there are many women in Mr. Drabble's pool who are not working for reasons other than the absence of a child care disregard;
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> (iii) those working who did not wish to claim family credit. Ms. Moore's evidence being that in 1989 only 57% of those working who would have been entitled to family credit actually claimed it;
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> (iv) those not working but who would in any event not claim family credit if they did go out to work;
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> (v) those who are working and drawing family credit and who are better off in work than they would be on income support. This would include all those who had no child care costs and many women paying child care costs. According to Ms. Moore in paragraph 10 of her first affidavit, research conducted on behalf of the Department of Social Security in 1991 showed that, only 22% of working lone mothers in fact paid for child care and of those only 7% paid £91 or more a week. Indeed, Ms. Moore goes onto say that survey evidence in 1989, the year when the claim was made, indicates that for lone parents who were not on income support, the average cost of child care was less than £20 per week, with 62% paying £20 or less;
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> (vi) partners in couples who are out of work and if they returned to work would lift family income to too high a level to feature in the pool;
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> (vii) those who were working less than 24 hours (reduced to 16 hours a week in 1992) and had no intention of working longer, would not, in any event, be eligible for family credit;
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> (viii) those who are not working but are looking for work, Ms. Moore's evidence being that over half of the lone parents who say that they are looking for work are looking only for part-time work;
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> (ix) those not working, say they want to work, but are not actively seeking to obtain it for reasons other than the absence of a child care disregard; and
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> (x) those many women who would always choose informal child care regardless of help with purchasing professional care."

For all of those reasons, Mr. Pannick says that the pool suggested by Mr. Drabble on the basis of Ms. Holtermann's evidence is far too widely drawn because it includes a large number of women who are not affected by the absence of a child disregard.

15. Moving on to Mr. Pannick's second main point, he contends that Mr. Drabble's approach is flawed, in any event, because the group of individual parents who do not have a resident partner available for child care does not satisfy the condition about which the claimant is complaining, that is they are not people who are "able to work by incurring a loss in income compared with the decision on income support". He says that for the majority of working women paying for child care in 1989, the cost was well below that paid by the claimant and low enough to mean that the women were better off in work than on income support. He cites the evidence that only 22% of women who worked paid child care costs, only 7% paid more than £41 per week and that, in 1989, the average cost of child care was under £20 a week, with 62% paying £20 or less.

16 On the basis of Ms. Moore's evidence (first affidavit, para. 14), his third point is that Mr. Drabble's argument is misconceived because it wrongly assumes that lone parents are financially worse off than parents who are in a couple, because that is not established by the evidence. It follows, the argument runs, that the claimant cannot prove disparate impact on women by reference to the impact of the law on lone parents as compared with parents in couples. Taking into account the living costs of only one adult plus the children, he says, lone parents are not financially worse off than parents in a couple.

17. The response of Mr. Drabble to those criticisms of his approach to the issue of disparate impact are based on Ms. Holtermann's written response (Ms. Holtermann's second report) to Ms. Moore's second affidavit. He also relies on what is described as Ms. Holtermann's supplementary note of evidence dated 11 July 1996. The thrust of his submission is that even allowing for Mr. Pannick's criticisms that various groups should be excluded from Ms. Holtermann's initial pool, namely all individual parents in low income families who might be expected to be beneficiaries of family credit when working, disparate impact is still made out. What then is Ms. Holtermann's evidence on the pool issue at the end of the day? I trust the following summary of that evidence is reasonably accurate:

> (i) the first exclusions suggested, namely people who prefer not to work or who are working for reasons other than the non provision of a child care disregard results, on Ms. Holtermann's view of Ms. Moore's figures, in the exclusion of 48% of non working women and 25% of men (originally also assessed at 48%);
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> (ii) the next exclusion suggested are concerned with people who have not claimed family credit if working, which, on a generous assumption, she says, result in the exclusion of 16% of lone parents, 15% of women and 18% of men in the remaining couples:
>
> (iii) as to excluding people working and getting family credit and who are better off in work than on income support, Ms. Holtermann says "[Ms Moore] presumably means that they would still be in the pool but would be classified as advantaged. The groups concerned are working lone parents and working parents in couples. The assumption that all are advantaged is generous

because some may work even though they are worse off than on income support";

(iv) as to excluding out of work partners who, if they commenced work, would lift the family income above entitlement to family credit, in Ms. Holtermann's view, would be unreasonable, since unemployment is much higher among people in low wage occupations. She refers to Marsh and McKay's study on "Families, Work and Benefits" at page 105, which shows that the skills profile of out of work families closely resembles families in receipt of family credit with the likely result that a very small fraction of such parents, men and women alike, would earn wages in work taking them above entitlement to family credit. However, in the case of couples with one at work, she concedes that in the vast majority of cases the second worker will take the family beyond family credit and, although a generous assumption she says it is reflected in her figures; and

(v) as to the exclusions suggested in paragraph (vi) to (x) in Ms. Moore's second affidavit, namely people working less than 24 hours (now 16 hours) with no intention of working longer for any reason, people not working but looking for work for less than 24 hours, people not working, say they want work but are not seeking it for reasons other than the absence of a child disregard and, finally, people who would always choose informal child care regardless of help with purchasing professional care, all of which taken together add up, in Ms. Holtermann's assessment, in the absence of precise figures, to a further exclusion of 30% in the exclusion's applied to non-working parents.

18. On the basis of all those exclusions, Ms. Holtermann's evidence is that the only disadvantaged people left are **non working lone parents**, while the advantaged are either working parents or parents in couples with no one in work. Recalculating the figures on that footing, Ms. Holtermann's evidence is that the population in the advantaged group is composed of 45% women and 55% men, while in the disadvantaged group, the population consists of 96% women and 4% men.

19. Finally, on the basis that Mr. Pannick's contention that people who could work without paying more for child care than the income gained from working should be counted as advantaged, is sound, as I think it is, Ms. Holtermann estimated, again in the absence of statistics, that if half the non-working men and women are reclassified accordingly, then the proportions advantaged are 39% women and 61% men but the proportions disadvantaged remain at 94% women and 6% men. Clearly, even on that basis, those figures demonstrate that there are considerably more disadvantaged women than disadvantaged men and considerably fewer advantaged women than advantaged men.

20. At this stage I remind myself of the concurring submissions of Counsel that should be especially guided in my approach to this case by the decision of the Court of Appeal in *R. v. Secretary of State for Employment, ex parte Seymour-Smith* [1995] ICR 889. I find it a helpful case and I have already shown that I have leant heavily on it. It reinforces two fundamentally important matters. The first is that, subject to the concept of justification, indirect discrimination on the ground of sex is made out if it is shown that there is a considerable difference in the number or percentage of one sex as against the other sex, either in the advantaged group or in the disadvantaged

group. The second point is that the material facts are those which applied at the time the measures actually affected the claimant. It is common ground that this was in April - June 1989 when the claim for family credit was made and adjudicated.

21. It follows that the first issue before me is whether on the evidence presented Mr. Drabble has discharged the burden of proving on the balance of probabilities that the absence of a disregard in respect of child care costs in 1989 in the family credit scheme impeded access to employment disproportionately in relation to women as compared to men. He has sought to show that on the basis that a disproportionate number of women rather than men are only able to work by incurring a loss in income compared with the position on income support.

22. In the European Courts' preliminary ruling in this case at paragraph 20, the Court acknowledged, and I accept, that "according to the legislation referred to by the United Kingdom in its written observations, the aim of the benefit is to ensure that families do not find themselves worse off in work than they would be if they were not working". Consequently it can hardly be gainsaid that the appropriate section of the population to focus on consists of all individual parents in low income families who might expect to benefit from family credit when working. I have considered with the utmost care the evidence of Ms. Holtermann and Ms. Moore and the accompanying plethora of figures, reports and studies, although I note that a striking feature of many of the reports and studies referred to were concerned with a later period than 1989 and even when they related to an earlier period, many were not published until the nineties. At the end of the day, I accept Ms. Holtermann's approach and analysis, subject to the criticisms relating to her identification of the relevant pool made by Ms. Moore in her second affidavit. At the same time, it seems to me that the various exclusions from the pool made by Ms. Holtermann fairly reflects Ms. Moore's criticisms, yet disparate impact, in my judgment, is still manifestly made out. The figures speak for themselves. Having substantially accommodated Ms. Moore's reservations about Ms. Holtermann's original figures, Ms. Holtermann's evidence, which I accept, is that the proportions of women and men in the disadvantaged group consist of 94% women and 6% men, in the advantaged group consist of 39% women and 61% men, while the pool consists of 43% women and 57% men. On those figures, I am persuaded that the Family Credit (General) Regulations 1987, as they stood in 1989, by not providing for child care costs to be disregarded in the calculation of net family income, had a disparate impact on women. Accordingly, I turn to consider the issue of objective justification.

23. In the *Seymour-Smith* case, Lord Justice Neill sets out at page 953, paragraphs D to G, the factors which have to be borne in mind when considering the concept of objective justification:

> "The considerations which have to be taken into account where discriminatory provisions are found in national legislation were explained in *Rinner-Kuhn v. F.W.W. Spezial-Gebaudereinigung G.m.b H & Co. K.G.* (Case 171/88) [1989] ECR 2743, 2760, paragraphs 14-15, where the Court said:
>
> > "if the Member State can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that the provision affects

> much greater number of female workers than male workers cannot be regarded as constituting an infringement of article 119.
>
> 'It is for the national court, which has sole jurisdiction to assess.the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying independently of the sex of the worker, actually affects a greater number of women than men, is justified by reasons which are objective and unrelated to any discrimination on grounds of sex.'
>
> In *Reg. v. Secretary of State for Employment Ex parte Equal Opportunities Commission* [1994] ICR 317 the House of Lords considered the question of justification in the context of provisions relating to redundancy payments in the Act of 1978. Lord Keith of Kinkel in his speech examined the criteria set out in the *Runner-Kuhn* decision [1989] ECR 2743 by which objective justification is to be tested. These criteria oblige the Member State to show: (a) that the means chosen meet a necessary aim of it social policy; (b) that the means chosen are suitable for attaining that aim; and (c) that the means chosen are requisite for attaining that aim."

24. However, Mr. Pannick has referred me to a quartet of recent decisions by the European Court in each of which, it seems to me, the Court has put greater emphasis than it has in the past on the extent of the discretion which Governments have in framing their social and employment policies, which suggests to me that the Court in this area has adopted a somewhat more flexible approach. The first such case and the most important one is *Nolte v. Landesversicherungsanstalt Hannover* [1996] IRLR 225. The headnote, in part, reads:

> "National provisions excluding those employed for less than 15 hours per week and earning less than one seventh of average earnings on the statutory invalidity and old age insurance scheme were not precluded by Article 4(1) of Social Security Directive 79/7, even though considerably more women than men were affected thereby, since the measures were based on objective factors and unrelated to any discrimination on grounds of sex.
>
> A legislative measure is based on objective factors unrelated to discrimination on grounds of sex where the measure chosen reflects a legitimate social policy of the Member State, is appropriate to achieve that aim and necessary in order to do so.
>
> However, social policy is a matter for the Member State. Consequently, the Member States have a broad margin of discretion in exercising their competence to choose the measures capable of achieving the aim of their social and employment policy.
>
> In the present case, the social and employment policy aim put forward by the German government was that the exclusion of persons in minor employment corresponds to a structural principle of the German social security scheme, that there is a social demand for minor employment which could only be fostered by excluding it from compulsory insurance, and that coverage would lead to an increase in the loss of employment and circumventing devices. This social and employment policy aim was objectively unrelated to any

discrimination on grounds of sex and the national legislature, in exercising its competence, was reasonably entitled to consider the legislation instion was necessary in order to achieve that aim."

At page 235, paragraphs 33 to 36, the Court said, and in the context of this case, I stress the reference to both social policy and employment policy:

> "33. The Court observes that in the current state of Community law, social policy is a matter for the Member States (see *Commission of the European Communities v. Kingdom of Belgium,* [1991] IRLR 393, para. 2). Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion.
>
> 34. It should be noted that the social and employment policy relied on by the German government is objectively unrelated to any discrimination on the grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.
>
> 35. In those circumstances, the legislation in question cannot be described as indirect discrimination within the meaning of Article 4(1).
>
> 36. Accordingly, it should be stated in reply to the first question that Article 4(1) of the directive must be interpreted as not precluding national provisions under which employment regularly consisting of fewer than 15 hours work a week and regularly attracting remuneration of up to one-seventh of the average monthly salary is excluded from the statutory old-age insurance scheme, even where they affect considerably more women than men, since the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex".

The issues in the second case, *Megner and Scheffel v. Innungskrankenkasse Vortertfalz* [1996] IRLR 236 are similar to those in *Nolte* and, all I need to say, is that the Court reached the same conclusion and gave the same reasons. The judgment of the European Court in *Y.M. Posthuma-van Damme v. Bestuur van de Bedrijfsverenitmg voor Detailhandel and anr* (case C/280/94), dated 1 February 1996, included the following paragraphs:

> "24. "As the Court has consistently held, Article 4(1) of the directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim and are necessary in order to do so (see, most recently, the judgments in *Nolte*, para. 28, and *Megner and Scheffel,* para. 24).
>
> ..

26. As the Court has held in *De Weerd, nee Roks, and Others* at paragraph 28, Directive 79/7 leaves intact the powers reserved by Articles 117 and 118 of the EC Treaty to the Member States to define their social policy within the framework of close co-operation organised by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. In exercising that competence, the Member States have a broad margin of discretion (*Nolte*, para. 33, and *Megner and Scheffel*, para. 29).

27. It must be held that guaranteeing the benefit of minimum income to persons who were in receipt of income from or in connection with work which they had to abandon owing to incapacity for work satisfies a legitimate aim of social policy and that to make the benefit of that minimum income subject to the requirement that the person concerned must have been in receipt of such an income in the year prior to the commencement of incapacity for work constitutes a measure appropriate to achieve that aim which the national legislature, in the exercise of its competence, was reasonably entitled to consider necessary in order to do so.

28. The fact that the scheme replaced a scheme of pure national insurance and that the number of persons eligible to benefit from it was further reduced to those who had actually lost income from or in connection with work at the time when the risk materialised cannot affect that finding".

Finally, in the fourth case, *C B Lapperre v. Bestuurscommissie Beroepszaken in de Provincie Zuid Holland* (case C/08/94) in their judgment dated 8 February 1996 the Court said:

"13. By its questions the national court essentially asks whether Article 4(1) of the directive has to be interpreted as meaning that a national statutory scheme, such as that established by the IOAW which provides for a benefit designed to guarantee beneficiaries income at the level of the social minimum, irrespective as to whether the claimant has any resources but subject to conditions relating to his previous employment and age, involves discrimination on grounds of sex where it is established that much more men than women find in that scheme a way of avoiding the means test which, in contrast, has to be satisfied in the case of another scheme, such as that established by the RWW, which, albeit providing for a benefit of the same type, is less favourable, or whether Article (4)(1) has to interpreted as meaning that the scheme in question does not entail such discrimination because it is justified by objective factors unrelated to any discrimination on grounds of sex.

14. In this connection, it should be recalled that the Court has consistently held that Article 4(1) of the directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of a much higher percentage of women than men, unless that measure is based on objective factors unrelated to any

> discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see Case C-343/92 *De Weerd, nee Roks, and Others* [1994] ECR 1-571, paras. 33 and 34; see also Case C-444/93 *Megner and Scheffel* [1995] ECR 1-0000, para. 24).
>
> ...
>
> 18. The Court first observes that, in the current state of Community law, social policy is a matter for the Member States (see Case C-229/89 *Commission v Belgium* [1991] ECR I-2205, para. 22). Consequently, it is for the Member States to choose the measures capable of achieving their social policy aim. In exercising that competence, the Member States have a broad margin of discretion (see *Megner and Scheffel,* para. 29).
>
> 19. It should next be noted that the aim relied on by the Netherlands Government comes under its social policy and is objectively unrelated to any discrimination on grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.
>
> 20. In those circumstances, the legislation in question cannot be described as entailing indirect discrimination within the meaning of Article 4(1) of the directive."

25. Against the backdrop of those decisions of the European Court, Mr. Pannick first submits that the United Kingdom Government has a broad discretion in relation to social and employment policy and that it has to be borne in mind that it is the responsibility of Ministers and not the courts to decide how those policies should be implemented by legislation, whether primary or secondary. I accept that submission without hesitation. However, Mr. Pannick then says, if I understand him, that it follows where, as in this case, the complaint is against the absence of a provision in the statutory scheme then there is a stronger indication of a policy situation than in the case where the complaint is concerned with an existing statutory condition. I am unable to accept such a proposition. No authority has been cited in support of it and I see it as being clearly contrary to principle. The key issue is simply whether the statutory scheme as framed gives rise to unjustifiable gender discrimination. As Lord Justice Neill said in the *Seymour-Smith* case at page 953:

> "... any proposed legislation, particularly in the social field, which may have a disparate impact between the sexes will have to be examined before it is introduced to see whether **any consequential disparity can be objectively justified.**" (my emphasis)

26. In approaching the issue of justification, Mr. Pannick submits, and I accept, that the first step is to identify the policy aims behind the introduction of family credit in April 1998. That matter, he points out, has been settled by the European Court upon my reference:

> "The policy aim of the benefit" the Court said "is to ensure that families do not find themselves worse off in work than they would if they were not working" and "... is therefore intended to keep poorly paid workers in employment".

As Mr. Pannick observes, that language reflects the policy objectives set out in the evidence of Ms. Moore and demonstrates that family credit is concerned with access to employment.

27. At the heart of Mr. Pannick's case is the contention that the chosen design of the family credit scheme reflected and implemented those aims and was a choice the Government was entitled to make. Applying the law as set out by the European Court in the *Nolte* and subsequent cases and on the basis of an overall view of the voluminous evidence before me, I am persuaded that he has made out that case.

28. As a first point Mr. Pannick says that part of that design was not to distinguish between whether the man or woman in a couple works, provided one of them does for 16 hours (from 1992, 24 hours) and that the decision as to which partner works is a family decision, although since its inception the vast majority of people receiving family credit have been women.

29. Then, basing himself on Ms. Moore's first affidavit, Mr. Pannick says that in framing this new scheme the Government recognised that a family with children has additional overheads and that lone parents may well, in that respect, have special needs in order to be able to work. Those needs were not ignored. There was, he says, a subsidiary policy aim to assist with those needs and that was implemented again through the general design of family credit by providing help in the form of income from work rather than by allowing actual expenditure to be taken into account. That assistance was:

> (i) to apply to lone parents (although there was one less adult to feed and otherwise support) the same basic benefit allowance in calculating family credit for couples; and
>
> (ii) to disregard in the calculation of family credit, one parent benefit as a supplement to child benefit, amounting at 1995/6 rates to an extra £6.30 a week compared to a couple on similar earnings.

30. It is also pertinent to add here that significant feature of the family credit scheme was, and is, that by regulation 20 of the Family Credit (General) Regulations 1987 the assessment of the benefit is based on a claimant's weekly income less income tax and social security contributions, apart from certain disregards. This constituted one of the main differences between family credit and its immediate predecessor, family income supplement. It is noteworthy that in The Law of Social Security by Ogus Barendt and Wikeley (Fourth Edition) at page 521, a work of high standing, the authors say:

> "This method of calculating entitlement, which involves no withdrawal of benefit until an income threshold is reached, has undoubtedly reduced work disincentives for low earners".

31. Two further points developed by Mr. Pannick have especially impressed me. The first is grounded on Ms. Moore's telling evidence that in 1989 alone parent with average child care costs was better off in work with family credit than not working.

Indeed, despite the fact that the claimant's child care costs of £60 per week were clearly, on any reasonable view of the evidence, substantially more than the average (Ms. Moore's evidence being that only 7% of working lone parents had child care costs of £41 or more a week), she was better off in work than a couple with a child of the marriage taking account of equivalised income, that is to say on the basis that a somewhat higher income is needed to maintain the same standard of living where there are two adults to be maintained. I use the phrase "somewhat higher income" deliberately as I have taken account of the evidence that the Finer Committee Report, published back in 1974, opined that, in effect, the household expenses of a single parent amounted to almost as much as those of a couple.

32. The second point is that when a child care disregard up to £40 per week for children under the age of eleven (Ms. Moore's evidence being that the average child care cost in the summer of 1993 was under £25) was introduced in October 1994, only 9% of lone parents took advantage of it. Moreover, the current evidence is, according to Ms. Moore, that 95% of those receiving family credit are parents and that 71% of them with low incomes do not pay for child care. Those figures have not been challenged and they are significant figures indeed.

33 There are two strands to Mr. Drabble's response to those submissions on the issue of objective justification. The essence of the first is that Mr. Pannick's case is flawed because he has not properly identified the Secretary of State's policy aims behind family credit and child care. It follows, he says, that the case put forward by Mr. Pannick has wholly failed to address the proper question which is to ask what quantum of child care costs were reasonably required in 1989 to get people with families back to work. Thus, Mr. Drabble says, it is a misconception or Mr. Pannick to seek to base his case on the level of average child care costs at the relevant time and consequently he has not discharged the burden of proof.

34. That submission, in my view, is not well founded and nothing in it, or indeed in his other submissions, displaces Mr. Pannick's submissions under this head. It ignores the policy aims of family credit as accepted by the European Court following the reference and it takes no account of the fundamental principle that the Government has a wide discretion in implementing those aims. Having regard to the aims and design of the family credit scheme and the evidence presented, the Government was perfectly entitled, in my view, to implement a policy which provided that lone parents paying average child care costs would be better off in work than not working.

35. Mr. Drabble's second point is that Mr. Pannick has not established objective justification, having failed to show that family credit has in fact achieved its policy aims. He founds that proposition on the *Seymour-Smith* case in the Court of Appeal, where the issue was whether the statutory threshold of two years not to be unfairly dismissed, set out in the Employment Protection (Consolidation) Act 1978, as amended, discriminated against women contrary to Council Directive 76/207. In dealing with the issue of objective justification, Lord Justice Neill, giving the judgment of the Court, said that "the question was whether on the evidence the threshold of two years had been proved to result in greater availability of employment", the policy aim relied upon by the Secretary of State. In the event the Court "found nothing in the evidence, either actual or opinion, which obliges or enables us to draw the inference that the increase in the threshold period has led to an

increase in employment opportunities" and, on that ground, went on to hold that the discriminatory measure had not been justified. However, it is significant that in each of the quartet of cases decided by the European Court since *Seymour-Smith* in the Court of Appeal, the European Court found that objective justification had been made out by the Government concerned but not on the basis of a close analysis of figures and statistics as to how or to what extent the policy aim or aims in question had been achieved. Instead the Court rested its decisions on the broad principle that Member States have a wide range of discretion to choose the measures capable of achieving the aim of their social and employment policies and as the aims in question were objectively unrelated to any sex discrimination and the exercise of discretion was reasonable, there was no breach of the Equal Treatment Directive. For that reason, I conclude that Mr. Drabble's contention, in the light of the law as I understand it, is not soundly based and I reject it.

36. However, if I am wrong in that view, I have no hesitation in accepting Mr Pannick's submission that on the evidence as a whole (and I include in that all of Ms. Holtermann's own evidence, especially that in annex IA to her second report on incomes in and out of work in 1989) that the introduction of family credit resulted in a large majority of families, including lone parent families, being better off in work than out of work with the obvious result of encouraging lone parents to go out to work. I am fortified in that view by observations in Marsh and McKay's "Families, Work and Benefits", published in 1993, a study to which I refer as it has figured prominently in the evidence adduced by both parties. The authors say at page 54 that the level of take-up of family credit is undoubtedly better than its predecessor, family income supplement, adding at page 194 that family credit makes "an important contribution to the labour market participation of lone parents". However, I stress that without that additional opinion evidence, I would still have accepted Mr. Pannick's submission.

37. The result is that I accept Mr. Pannick' s submission that having regard to the aims of the family credit scheme and the Secretary of State's very wide margin of discretion, the Government were perfectly entitled to decide on the evidence available at the time that the scheme was appropriate and necessary to achieve those aims. Apart from the other matters to which I have earlier referred, in reaching that conclusion I have accepted the evidence of Ms. Moore that when family credit was being devised the cost of child care did not appear to be a significant factor, and I stress the word significant, in deterring lone parents from taking up employment. I have, of course, taken account of the whole of the evidence of both Ms. Holtermann and Ms. Moore, but taking a balanced overall view of that evidence and of the dates and contents of the studies and statistics presented, I consider that it can fairly be inferred that back in the mid eighties there was little interest in the use of professional childcare and that indeed not a great deal was known about single parenthood. That only began to change in the nineties.

38. Although not strictly relevant, I mention here for completeness that Ms. Moore's evidence shows that the Government were alive to the need to monitor the introduction of the new benefit which resulted in 1992 in their modifying the scheme by encouraging lone parents to take up or return to work by improving the position considerably in two ways:

(i) by reducing the threshold for entitlement to family credit by reducing the number of working hours required to qualify for the benefit from 24 to 16 hours a week; and

(ii) by allowing claimants to keep the first £15 of any child maintenance received without their entitlement to family credit being reduced.

39. To sum up, although on the evidence before me the claimant has shown that at the time her claim for family credit was disallowed by the adjudication officer in June 1989 the absence of a specific child care disregard had a disparate impact on women, I hold, given the policy aims of the benefit and the facts and circumstances as they obtained at that time, that the structure and rules of the scheme chosen to advance those aims, including the specific assistance and incentives provided for lone parents, fell within the legitimate field of judgment available to the Secretary of State. Accordingly, I am satisfied that at all times material to this case, the family credit scheme in place was not tainted by sexual discrimination and was compatible with Council Directive 76/207.

40. To repeat what I said at the outset, the outcome of my interim and final decisions read together, is that the appeal succeeds, the decision of the appeal tribunal is set aside, and I give my own decision in the terms that the claimant is not entitled to family credit from 20 April 1989 because her income was higher than the level at which family credit is payable.

Date: 23 September 1996

(signed) Mr. A. W. E. Wheeler CBE
Commissioner