

**IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MATTER NO. C2003/4198 AND OTHERS**

**WORK AND FAMILY TEST CASE**

**CONTENTIONS OF THE  
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION,  
INTERVENING**

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## Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) was granted leave to intervene in these proceedings on 26 September 2003.
2. HREOC's contentions are made in the context of its role and functions under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Disability Discrimination Act 1992* (Cth) (DDA) with regard to the elimination of discrimination in employment,<sup>1</sup> and as the complaint handler for complaints of unlawful discrimination on the grounds of:
  - family responsibilities, sex and pregnancy under the SDA; and
  - being an associate or carer of a person with a disability under the DDA.<sup>2</sup>

## Outline of position

3. HREOC does not address each of the applications individually, nor make any contention as to the specific form that award variations should take.
4. HREOC in principle supports specific "family friendly" employment provisions in awards to assist workers balance their family and caring, and employment responsibilities. HREOC does not support any provision that would reduce existing employment conditions or result in the diminution of employment conditions of employees with family and caring responsibilities as compared with other employees. HREOC contends that family friendly employment provisions should be available be accessed at the initiative of the employee.

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<sup>1</sup> In particular, the functions conferred on HREOC by ss 48(1)(d), (e), (g) and (h) of the SDA, and ss 11(1)(g), (o) and (p) and ss 31(c), (j) and (k) of the HREOC Act.

<sup>2</sup> Part IIB of the HREOC Act (ss 46P to 46PV) provides for redress for 'unlawful discrimination' as defined in the HREOC Act. Division 1 of Part IIB of the HREOC Act (ss 46P to 46PN) provides for the inquiry into and conciliation of complaints by the President of HREOC; Division 2 of Part IIB of the HREOC Act (ss 46PO to 46PV) provides for proceedings in the Federal Court and the Federal Magistrates Court. The phrase 'unlawful discrimination' is defined in s 3 of the HREOC Act to include unlawful conduct under Part 2 of the DDA and Part II of the SDA and includes any conduct that is an offence under Division 4 of Part 2 of the DDA and s 94 of the SDA. The termination of a complaint by HREOC and the notification of the termination to the complainant are preconditions to the entitlement of a complainant to invoke the jurisdiction of the Federal Court and the Federal Magistrates Court: s 46PO of the HREOC Act.

5. HREOC's view is that a principal function of a healthy society includes raising and caring for children and caring for people with disabilities. The whole of society should assist Australian families in these functions. The workforce is a key institution in this partnership. Providing employees with flexibility in their conditions of work suited to their family and caring circumstances and regulation of these conditions are crucial to the healthy functioning of society.
6. In particular, HREOC contends that the Australian Industrial Relations Commission (AIRC) should introduce additional family-friendly employment provisions into the relevant awards on the basis that such measures will:
  - be consistent with the AIRC's obligation to take into account Australia's obligations under international Conventions;
  - assist in achieving equality of opportunity for women;
  - help parents to balance work and family responsibilities;
  - assist in addressing workplace discrimination against women and carers of people with disabilities; and
  - systemise current trends in anti-discrimination principles and provide certainty to employers and employees in respect of their rights and responsibilities.

### **The AIRC's obligations**

7. The AIRC is required to consider Australia's obligations under international Conventions when considering these applications (ss 3 and 93A of the *Workplace Relations Act 1996* (Cth) (WRA)). In particular, the AIRC is to take account of the *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*<sup>3</sup> (Family Responsibilities Convention), which is Schedule 23 to the WRA.
8. The AIRC is also to take account of the principles embodied in the SDA and the DDA relating to discrimination in relation to employment (s 93 of the WRA). The objects of

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<sup>3</sup> Entered into force 11/08/1983; ratified by Australia 30/03/1990.

the SDA include the object of giving effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>4</sup> (CEDAW) which is annexed as a schedule to the SDA. The Family Responsibilities Convention and CEDAW require Australia to ensure the elimination of discrimination in employment against women and against workers with family responsibilities.

9. Other relevant international Conventions to which Australia is a party are:
  - *Convention Concerning Discrimination in Respect of Employment and Occupation* (ILO 111);<sup>5</sup> and
  - *Convention on the Rights of the Child*<sup>6</sup> (CROC), which requires Australia to render appropriate assistance to parents in the performance of their child-rearing responsibilities, recognizing that both parents have common responsibilities for the upbringing and development of the child and the best interests of the child will be the parents' basic concern.<sup>7</sup>
  
10. HREOC contends that to insert specific family friendly provisions into awards is consistent with the abovementioned international obligations.

## **Equality for women**

11. A fundamental objective of the SDA is to promote the recognition and acceptance within the community of the equality of women and men.<sup>8</sup> The importance of pregnancy as a social function and the right of women to combine work, pregnancy and family are also fundamental principles underpinning the SDA. Work requirements that prevent or limit the ability of people with family and caring responsibilities to participate in paid work will have a disproportionate effect on women, as women tend to bear the majority of family and caring responsibilities in Australian society.<sup>9</sup> Such

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<sup>4</sup> Opened for signature 18/12/1979, 1249 UNTS 13 (entered into force 3/09/1981; ratified by Australia 28/07/1983).

<sup>5</sup> Opened for signature 25/06/1958, 362 UNTS 31 (entered into force 15/06/1960; ratified by Australia 15/06/1973).

<sup>6</sup> Opened for signature 20/11/1989, 1577 UNTS 3 (entered into force 2/09/1990; ratified by Australia 17/12/1990).

<sup>7</sup> See for example Article 18, CROC.

<sup>8</sup> Section 3(d) SDA.

<sup>9</sup> See for example *A Time to Value: Proposal for a national paid maternity leave scheme* HREOC Sydney 2002, pp73-77.

requirements operate as a barrier to women's full access to the benefits of workforce participation and impede the redress of historical workforce gender imbalances. Family friendly employment provisions can assist in improving women's ability to enter and remain within the paid workforce and in achieving genuine equality of opportunity.<sup>10</sup>

## **Helping parents to balance work and family responsibilities**

12. CEDAW requires States Parties to take all appropriate measures to modify the social and cultural patterns of men and women, with a view to eliminating all practices based on stereotyped roles for men and women.<sup>11</sup> The United Nations Commission on the Status of Women (CSW) confirmed its commitment to employment measures as a means of achieving gender equality at its 48<sup>th</sup> session, held in March 2004. As part of its Agreed Conclusions at that meeting, CSW urged relevant stakeholders to: “(a) adopt and implement legislation and/or policies to close the gap between women's and men's pay and promote reconciliation of occupational and family responsibilities, including through reduction of occupational segregation, introduction or expansion of parental leave, flexible working arrangements, such as voluntary part-time work, teleworking, and other home-based work”.<sup>12</sup>
13. CEDAW recognises the common responsibility of men and women in the upbringing of their children, and therefore all employees should have access to the benefit of appropriate family friendly employment provisions, regardless of sex.<sup>13</sup> This would enable fathers to have the opportunity to play a greater role in the day-to-day care of their children, and assist in achieving greater equality between men and women.
14. A recent survey in the United Kingdom found that when work flexibility was available, a high proportion of fathers took time off from work for caring reasons: “Forty-four per cent of female employees with children under six took time off for caring reasons

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<sup>10</sup> See for example *A Time to Value: Proposal for a national paid maternity leave scheme* HREOC Sydney 2002, pp73-81 and *Pregnant and Productive: It's a right not a privilege to work while pregnant* HREOC Sydney 1999, pp 9-17.

<sup>11</sup> CEDAW, Article 5.

<sup>12</sup> Commission on the Status of Women *The role of men and boys in achieving gender equality: Agreed Conclusions* 48<sup>th</sup> Session 1-12 March 2004, paragraph 6(m).

compared to 38 per cent of male employees with children under six. The difference was less for employees with children under sixteen, 33 per cent of females reported taking time off to care compared to 29 per cent of males.”<sup>14</sup> In addition, the introduction of new employment laws in the United Kingdom that give parents the right to request to work a flexible working pattern almost halved the rate of refusal by employers of requests for flexible working arrangements, and the United Kingdom Department of Trade and Industry concluded that this “... suggest[s] they [the new employment laws] have significantly increased employers’ willingness to seriously consider employee requests”.<sup>15</sup>

## **Federal discrimination law**

15. The SDA renders unlawful both direct and indirect discrimination in the workplace on the ground of the sex or marital status of the aggrieved person, and on the ground of pregnancy or potential pregnancy.<sup>16</sup> It is also unlawful to dismiss a person from their employment on ground of their family responsibilities.<sup>17</sup>
16. Inflexible working conditions may also amount to indirect discrimination against carers under the DDA if the conditions impact on or disadvantage greater numbers of carers of people with disabilities relative to people who are not carers, and are unreasonable in the circumstances.<sup>18</sup> Formal care arrangements for people with a disability can be restricted by administrative, statutory and budgetary constraints meaning they are not always able to be varied easily if circumstances change or breakdown. Without access

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<sup>13</sup> CEDAW, Article 5. See also *A Time to Value: Proposal for a national paid maternity leave scheme* HREOC Sydney 2002, pp104-110.

<sup>14</sup> Department of Trade and Industry *Results of the first flexible working employee survey* Employment Relations Occasional Papers DTI London 2004, p12. The survey found that male employees were less likely to request to work flexibly than female employees. Amongst those employees who requested flexible working arrangements, women were more likely to request to work part-time and reduced hours, while men were more likely to request flexi-time and to work from home on a regular basis. Department of Trade and Industry *Results of the first flexible working employee survey* Employment Relations Occasional Papers DTI London 2004, pp6&8.

<sup>15</sup> Department of Trade and Industry *Results of the first flexible working employee survey* Employment Relations Occasional Papers DTI London 2004, pp10-11.

<sup>16</sup> See SDA, ss 5, 6 and 7.

<sup>17</sup> See SDA, ss 7A and 14(3A).

<sup>18</sup> See DDA, ss 15 which makes it unlawful for an employer to discriminate against a person on the ground of a disability of any of the employee’s “associates”. “Associate” is defined to include a spouse or partner or relative (DDA, s 4). Indirect disability discrimination is defined in s 6 of the DDA.

to alternative support networks people with disabilities may face harsh consequences, including institutionalisation.

17. The effect of the prohibition against indirect discrimination is to forbid “practices that are fair in form but discriminatory in practice”.<sup>19</sup> HREOC notes that the Courts have found on a number of occasions that a requirement to work full time has a disparate impact upon women and therefore disadvantages them.<sup>20</sup> For example, in *Mayer v ANSTO* [2003] FMCA 209, Driver FM stated:

*I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time. As I observed in Escobar v Rainbow Printing and as Commissioner Evatt found in Hickie v Hunt & Hunt women are more likely than men to require at least some periods of part-time work during their careers, and in particular a period of part-time work after maternity leave, in order to meet family responsibilities.*<sup>21</sup>

18. A number of recent authorities have considered the situation of women either seeking to return to work following maternity leave (*Thomson v Orica Australia Pty Ltd*,<sup>22</sup> *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd & Ors*<sup>23</sup>) or seeking to vary or maintain flexibility in working hours to meet family responsibilities connected with a young child (*Song v Ainsworth Game Technology Pty Ltd*,<sup>24</sup> *Escobar v Rainbow Printing Pty Ltd (No. 2)*,<sup>25</sup> *Mayer v Australian Nuclear Science and Technology Organisation*,<sup>26</sup> *Evans v National Crime Authority*<sup>27</sup> and *Kelly v TPG Internet Ltd*<sup>28</sup>). With the exception of *Kelly*,<sup>29</sup> the employer was found to have unlawfully discriminated against the applicant in each of those decisions.

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<sup>19</sup> *Griggs v Duke Power* (1971) 401 US 424 at 431.

<sup>20</sup> *Hickie v Hunt and Hunt* (1998) EOC 92-910 at [16.17.10] – [16.17.12]; *Victoria v Schou* at [17] and [25]; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122 at [33] and [37]; *Mayer v ANSTO* at [68]- [73]; *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184.

<sup>21</sup> At [70].

<sup>22</sup> (2002) EOC 93-227; [2002] FCA 939.

<sup>23</sup> [2003] FMCA 160.

<sup>24</sup> (2002) EOC 93-194; [2002] FMCA 31.

<sup>25</sup> [2002] FMCA 122, digest of decision appears at (2002) EOC 93-229.

<sup>26</sup> [2003] FMCA 209.

<sup>27</sup> [2003] FMCA 375.

<sup>28</sup> [2003] FMCA 584.

<sup>29</sup> HREOC respectfully contends that *Kelly* is a decision with a number of difficulties and one which ought to be considered carefully in the context of its particular facts.

## HREOC's complaint handling role

19. As the Federal complaint handling body in respect of complaints of unlawful discrimination under the SDA and DDA,<sup>30</sup> HREOC receives many complaints relating to parental leave, changes to the job while a person is on parental leave, and the availability of part time work or other forms of flexible work arrangements following a period of parental leave or in order to care for a person with a disability. For example, in the 2002/2003 financial year, HREOC received 380 complaints under the SDA, and 66 per cent of all complaints under the SDA related to discrimination on the grounds of sex, pregnancy, or family responsibilities.<sup>31</sup> In 2002/2003, 87 per cent of all complaints received under the SDA related to discrimination in the area of employment.
20. Many of the complaints received by HREOC settle through the confidential conciliation process - in 2002/2003, 43 per cent of complaints finalised under the SDA settled through conciliation.<sup>32</sup> Of the matters which are not conciliated and are terminated by HREOC, few proceed to final hearing in the Federal Court or Federal Magistrate's Court.
21. The complaints HREOC receives in respect of issues surrounding family responsibilities under the SDA represent only a small proportion of the incidence of this form of discrimination in the community.<sup>33</sup> HREOC also notes that in the 2002/03 reporting year there was a further increase in the percentage of complaints alleging

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<sup>30</sup> See footnote 2.

<sup>31</sup> *Human Rights and Equal Opportunity Commission Annual Report 2002-2003* HREOC Sydney 2003, p77. Note that one complaint may have multiple grounds. Note also that the other grounds for complaint under the SDA not relevant to the present proceedings are marital status discrimination, sexual harassment and victimization.

<sup>32</sup> *Human Rights and Equal Opportunity Commission Annual Report 2002-2003* HREOC Sydney 2003, p78; see also examples of complaints conciliated by HREOC in 2002/2003 at pp 54-57. It is important to note that resolution through conciliation does not necessarily represent an admission by an employer that discrimination has occurred. There are many reasons why an employer may choose to settle a complaint through conciliation, including a desire to avoid litigation and publicity of the case, to settle the dispute more quickly or to minimise workplace disruption.

<sup>33</sup> Historically, complaints processes established by anti-discrimination legislation are under-utilised – see for example R.Hunter, *Indirect Discrimination in the Workplace*, Federation Press Sydney 1992, p 75. HREOC also notes that it recently conducted a national household telephone survey on the incidence and nature of sexual harassment experienced in the Australian community. This survey found that 28 per cent of all interviewees considered they had personally experienced sexual harassment at some time in an area of public life, however less than 2% said they had pursued a complaint through an anti-discrimination body such as HREOC: *20 Years On: The Challenges Continue ... Sexual Harassment in the Australian Workplace* HREOC Sydney 2004, p8.

pregnancy discrimination, and that in the past three reporting years, there has been a 19 per cent increase in these complaints.<sup>34</sup>

## **Limitations of the federal discrimination jurisdiction**

22. Anti-discrimination legislation has limited potential to bring about workplace change in Australia. While the legislation may be seen by many employers as setting a standard to be complied with, breaches are generally not amenable to public prosecution and are only pursued through individuals bringing claims for their own redress, at their own cost. In any event, as noted at paragraph 20 above, many claims settle at conciliation. Litigating in the Federal Court or Federal Magistrates Court also exposes the individual to the potential liability for a costs order being made against them if they are unsuccessful.
23. In addition, Federal anti-discrimination law provides limited protection for men in respect of family unfriendly employment practices. It is unlikely that a man could successfully pursue relevant remedies unless the matter involved the termination of his employment on the ground of his family responsibilities.<sup>35</sup> In 2002/2003, HREOC received a total of 333 complaints under the SDA, 49 of them from men.<sup>36</sup>
24. HREOC contends that the anti-discrimination jurisprudence outlined at paragraph 18 above demonstrates that employers who do not give reasonable consideration to requests for family friendly employment provisions may be at risk of successful discrimination claims against them. However, decisions are made by Courts on a case by case basis, leading to uncertainty for employers as to the scope of their obligations. Therefore provisions in awards which reflect discrimination law standards would

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<sup>34</sup> Some pregnancy complaints relate to post-pregnancy issues. See *Human Rights and Equal Opportunity Commission Annual Report 2002-2003* HREOC Sydney 2003; *Human Rights and Equal Opportunity Commission Annual Report 2001-2002* HREOC Sydney 2002; *Human Rights and Equal Opportunity Commission Annual Report 2000-2001* HREOC Sydney 2001.

<sup>35</sup> However, employees may suffer discrimination on the ground of family responsibilities which does not amount to dismissal. As the cases discussed at paragraph 18 demonstrate, female employees may also be able to lodge a complaint of indirect sex discrimination, because the courts have found that women still undertake the majority of caring duties, and so being discriminated against because of family responsibilities can constitute sex discrimination.

<sup>36</sup> *Human Rights and Equal Opportunity Commission Annual Report 2002-2003* HREOC Sydney 2003, p 71.

provide clarity and consistency for employers and employees as to their rights and responsibilities.

## **Conclusion**

25. Equality between men and women requires cultural and structural change that recognises and accommodates the child bearing, family and caring responsibilities of women and employees generally, and the needs of dependents.
26. HREOC supports the insertion into awards of provisions which would assist employees to balance their family and caring responsibilities with their work commitments, so long as these provisions are optional for employees and do not result in employees with family and caring responsibilities having less favourable employment conditions than other employees, or the general erosion of existing employment conditions.
27. Making family friendly employment provisions available through the award system would ensure access to these work flexibilities for men. It would also assist more vulnerable employees who may not be in a position to make a complaint through the anti-discrimination system.
28. By systemising the trends from the anti-discrimination jurisprudence into awards, the AIRC would also be providing greater certainty for employers and employees.

## **Supporting material**

29. The supporting material listed below is now available from HREOC at the request of the AIRC or the parties. It is intended that relevant parts of this material will be provided with final submissions.

- *Human Rights and Equal Opportunity Commission Annual Report 2002-2003* HREOC Sydney 2003;
- *Human Rights and Equal Opportunity Commission Pregnant and Productive: It's a right not a privilege to work while pregnant* HREOC Sydney 1999;

- Human Rights and Equal Opportunity Commission *Valuing Parenthood: Options for paid maternity leave, interim paper 2002* HREOC Sydney 2002;
- Human Rights and Equal Opportunity Commission *A Time to Value: Proposal for a national paid maternity leave scheme* HREOC Sydney 2002; and
- Department of Trade and Industry *Results of the first flexible working employee survey* Employment Relations Occasional Papers DTI London 2004.

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**14 May 2004**