

IN THE FAIR WORK COMMISSION

Outline of Claim: Family Friendly Work Arrangements

For: The Australian Council of Trade Unions (ACTU)

DATE: 28 October 2014

D No. 135/2014

Lodged by: ACTU

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1. This outline of claim is filed in response to the statement and Directions issued by the President on October 1 2014.

Matters the ACTU wishes to pursue

2. The ACTU seeks variations to all awards in respect of the issue of family friendly work arrangements¹. We regard the claim as a common issue in respect of the 2014 modern award review. We do not at present have a fixed view on how the claim should be expressed as an award term, however we believe that it should include the following elements:

Requests for family friendly work arrangements during pregnancy or upon return to work from parental or adoption leave

3. Employees returning from parental leave are often unable to avail their right to return to their substantive (full time) position because of their new caring responsibilities. The FW Act does not provide employees with meaningful assistance to return to work in a manner which accommodates their changed circumstances. Section 65 of the Fair Work Act (1996) simply requires that the employer's refusal be on 'reasonable business grounds' and to state the reason for refusal in writing within 21 days of receiving the request. Unless employees have the right to do so under the provisions of their workplace agreement, they are unable to appeal an unreasonable refusal.
4. The ACTU claim:
 - a) Creates a new, distinct right for an employee who is pregnant or returning to work after taking parental or adoption leave to request a change in the work arrangements of their substantive position to assist the employee to care for the child.
 - b) Requires employers to properly consider and endeavour to reasonably accommodate the request.
 - c) Provides that the employer, having demonstrated that they have considered all relevant circumstances, may refuse a request on serious countervailing business grounds.

¹ Please note that the United Firefighter's Union intends to advance tailored provisions of this claim in relation to awards that cover operational fire fighters including the *Firefighting Industry Award 2010*.

- d) If the request to change working arrangements to the employee's substantive position is reasonably refused, the employer shall properly consider and endeavour to reasonably accommodate the request in a suitable alternative position commensurate in status and pay to that of the substantive position.
- e) Provides employees with rights to appeal an unreasonable refusal of a request, either as a breach of the relevant award term or through dispute resolution in the Commission.

Right to return to substantive position and work arrangements

- 5. The ACTU claim addresses the circumstances where, in order to accommodate a request for changed work arrangements, an employee accepts employment in an alternative position. Often this has a long term detrimental effect on the employee's career development and earnings capacity.
- 6. The ACTU claim provides that an employee who, in order to accommodate a request for changed work arrangements, accepts employment in an alternative position, shall be entitled to return to the position / work arrangements they held prior to returning to work from parental or adoption leave. The employee may exercise this right at any time, subject to reasonable notice provisions, within two years of the date of birth or placement of the child.

Other elements of the ACTU claim

- 7. Ensure that employees may access their personal leave to attend ante-natal, pregnancy and / or adoption related appointments; and
- 8. A requirement that employers properly consider and endeavour to reasonably accommodate an employee's request for an extension of unpaid parental or adoption leave (under new provisions), which the employer, having demonstrated that they have considered all relevant circumstances, may refuse only on serious countervailing business grounds.

The need for a safety net of support for all workers

9. It is widely acknowledged that in order to achieve a sustainable economy for an aging population, Australia must increase its female workforce participation. However, women, who still assume most of the primary caring role for young children, continue to face outdated workplace practices and inadequate laws which make it difficult for them to return to work and often require them to accept lower paid, lower status and insecure work with little career development opportunities. Consequently, Australia has one of the lowest participation rates for mothers in the OECD².
10. Despite the barriers to mother's employment participation, the majority of modern families now have both parents in paid work and most rely on two incomes to meet their financial obligations.³ The inability of workplace practices and workplace laws to keep pace with modern working families, presents significant difficulties for working families. The ACTU Census of 40,000 workers in 2011 found that the 2nd most important issue of concern for both men and women was balancing work and family.
11. It is clear that a cultural and legal shift in the way we organise, structure and regulate work arrangements is required.
12. Discriminatory attitudes towards pregnant employees and those returning to work from parental leave remain prevalent in our workplace. The 2014 AHRC Pregnancy and Return to Work National Review found that one in two mothers reported being discriminated against: 27% during pregnancy, 32% when requesting or taking parental leave and 35% when trying to return from parental leave. Around one quarter of both men and women who were discriminated against resigned from their employment.
13. Lack of effective regulatory support for employees who are pregnant or returning to work from parental leave has a profound negative effect on women's employment patterns and earnings and is a significant contributor to the gender pay gap.

²Women's, particularly mothers', workforce participation rate in Australia is 19% lower than men's- the fifth highest gap in the OECD. AMP NATSEM, Income Wealth Report "She Works Hard for her Money" Australian Women and the Gender Divide, University of Canberra, April 2009, p.1.

³ ABS Australian Social trends 4102.0 December 2011, 'Fifty Years of labour Force: Now and Then', p.2; AMP NATSEM Report, Issue 34 "Modern Family- The Changing Shape of Australian Families", October 2013

14. Women generally have low bargaining power and mothers are likely to have a history of disrupted work patterns, be on lower incomes and more often be employed in casual and part-time employment and therefore less likely to be able to negotiate improvements to family friendly work arrangements through the bargaining process.
15. The system of enterprise bargaining is predicated on the capacity to tailor arrangements to the individual needs of a workplace, over an appropriate minimum safety net. Inclusion of family friendly work arrangement provisions in modern awards will ensure an adequate safety net of entitlements to those workers who are unavailable to access support through workplace bargaining alone.
16. The provisions of this claim are reasonable and strike a balance between the challenges for employers in accommodating the needs of pregnant employees and those returning from parental leave with the challenges employees face in returning to work with new caring responsibilities, and the long term effects these challenges have on their career, earnings capacity and retirement savings.