



Pregnancy and Return to Work National Review

Unions NSW Submission to the Australian Human
Rights Commission

31 January 2014

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1. Introduction

- 1.1. Unions NSW welcomes the opportunity to make a submission to the Pregnancy and Return to Work Inquiry being conducted by the Australian Human Rights Commission.
- 1.2. Unions NSW is the peak body for trade unions and union members in NSW. It has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State.
- 1.3. Affiliated unions cover the spectrum of the workforce, stretching from workers in finance to footwear and construction to communications. Unions NSW is the largest member based organisation in NSW.
- 1.4. In NSW there are over 280,000 women union members who represent 47% of all union members in the State. In representing these union members, Unions NSW acknowledges the reality that most primary carers are women.
- 1.5. Unions NSW convenes a Women's Committee. This is a working committee comprised of female union representatives from Unions NSW affiliates. The Committee meets monthly to discuss issues that face women in the workplace and to develop actions and campaigns to address the same. The Women's Committee has played an active role in the preparation of this submission.

2. Recommendations

2.1. Recommendation One

The Right to Request be strengthened and provide employees with an avenue to appeal decision made by management and employers. These appeal rights should provide employees with access to the Fair Work Commission for conciliation and

arbitration. Fair Work Australia should require an employer to bring evidence regarding what 'business grounds' exist to decline the request and whether these grounds are 'reasonable'. If the employer cannot meet the test the request should be granted.

2.2. Recommendation Two

The strengthening of the 'right to request' in the Fair Work Act would make family friendly working arrangements within permanent forms of work more accessible, thus limiting the over-representation of women and carers in casual employment.

2.3. Recommendation Three

When calculating employer provided PPL, the Fair Work Act should require that years worked as a casual or contractor be taken into account.

2.4. Recommendation Four

Short term contract employees should be given the right to accrue and access paid parental leave based on their total years of service.

2.5. Recommendation Five

Discrimination legislation and guidelines should be amended to make it clear that training and trainee requirements cannot discriminate against pregnant women and new parents. The Government should require all accredited training programs be reviewed to remove such discrimination.

2.6. Recommendation Six

Employers to be restricted from watering down PPL entitlements except in cases of genuine financial difficulty.

2.7. Recommendation Seven

Better education of employers and employees in how to be family friendly employers and how to identify what discrimination looks like and the avenues that

can be taken to address it.

2.8. Recommendation Eight

Discrimination legislation and guidelines should be amended to make it clear that employers must not use work rostering to purposely place pressure on an employee's childcare arrangements.

2.9. Recommendation Nine

The Australian Human Rights Commission should develop guidelines and training for employers on family friendly rostering.

2.10. Recommendation Ten

Better education of employers and employees on how to be a breast feeding friendly workplaces, how to identify breast feeding discrimination and what avenues women experiencing breast feeding discrimination can take to address it.

3. Experiences of discrimination

3.1. Pregnancy and return to work discrimination may be experienced by workers as direct, indirect or systemic discrimination.

3.2. Examples of pregnancy and return to work discrimination include:

- A work contract is not renewed when an employer discovers that an employee is pregnant or when they return from parental leave;
- A worker is denied or overlooked for promotion either because they are pregnant, on parental leave or have young children;
- Access to parental leave entitlements is restricted by the nature of casual and/or seasonal work;
- An employer uses Government provided paid parental leave entitlements as an excuse to reduce employer provided paid parental leave;
- A worker is denied training opportunities;

- A worker is not able to meet professional training requirements because of parental leave;
- A worker's request for flexible work arrangements to assist with caring responsibilities is denied for no appropriate reason;
- An employer makes inappropriate comments about a worker's pregnancy or child care responsibilities;
- A workplace does not provide an appropriate space for breastfeeding or expressing breast milk;
- A workplace does not allow employees to be relieved in order to breastfeed or express breast milk;
- Requests for leave or appointments relating to a pregnancy or child are denied or restricted;
- On returning from work after parental leave, a worker's position is 'downgraded' or 'removed';
- A worker has unreasonable work demands and hours requested of them that are designed to place strain on childcare arrangements;
- Rostering is used by a manager to place pressure on child care arrangements. This is particularly an issue for shift workers;
- A worker is 'squeezed' out of a job or the workplace by an employer or colleagues.

3.3 This list is based on discussions with our affiliates and the experiences of their members.

This list is not exhaustive and has been used to indicate the types of discriminatory behaviours and practices that exist in workplaces.

3.4 The Unions NSW Submission will look at some of the key systemic issues that give rise to the kinds of workplace behaviours and actions listed above. Our recommendations are focussed on legislative and policy changes that will seek to address some of these key issues.

4. Right to Request

- 4.1. Under the National Employment Standards, employees with caring responsibilities of children under school age have the right to request flexible working arrangements to meet their caring needs. New parents also have the right to make a request to the employer for an additional 12 months of unpaid parental leave. This is commonly referred to as 'the right to request'.
- 4.2. Employers must consider these requests and respond in writing. If an employer denies a request they are not required to explain why, except to say that the request is unfeasible on 'reasonable business grounds'. Workers are provided with no avenue to challenge these decisions.
- 4.3. The 'right to request' has been operational for four years and in this time unions have found that employer decisions on the 'right to request' are open to employer bias and discrimination.
- 4.4. The NSW Teachers Federation reported that members taking parental leave often make requests to extend their period of unpaid parental leave to two years. The request is made to the school principal and in most cases it is rejected.
- 4.5. Most workers accept this and either return to work after their initial 12 months of parental leave, or they leave their job. A small number of women challenge the decision of the principal and ask the Department of Education and Communities for a review.
- 4.6. In almost cases where the Department is asked to review the request is approved, overturning the decision of the principal. This illustrates the personal or workplace bias that many employers may bring to decisions concerning new parents and their caring responsibilities.

4.7. Unions reported that a number of employers in their sectors held clear contempt towards employees with children and caring responsibilities. One union reported management referring to women as “constantly being on maternity leave” and “ripping off employers”. If views such as these exist among employers and management, then it is hard to know if all rejections of ‘right to requests’ are actually based on ‘reasonable business grounds’.

4.8. A number of unions have reported that employers reject requests with little grounds to do so.

4.9. Unions have also reported that they no longer advise members to access the right to request when seeking flexible working hours, as it is not enforceable and provides no guaranteed rights.

4.10. Recommendation One

The Right to Request be strengthened and provide employees with an avenue to appeal decision made by management and employers. These appeal rights should provide employees with access to the Fair Work Commission for conciliation and arbitration. Fair Work Australia should require an employer to bring evidence regarding what ‘business grounds’ exist to decline the request and whether these grounds are ‘reasonable’. If the employer cannot meet the test the request should be granted.

5. Insecure Work

5.1. The lack of access to flexible working arrangements for workers with caring responsibilities compels many workers into casual and other types of insecure work. Women are over-represented as carers and as casual workers. About quarter (22%) of female employees are engaged in casual employment, compared to 17% of all

male employees¹.

5.2. The overrepresentation of women in insecure employment exacerbates pregnancy and return to work discrimination.

5.3. Insecure work is a double edged sword for pregnant women and employees with caring responsibilities. While the lack of flexibility often experienced in permanent work leads women to insecure work; the precarious nature of this work limits their access to some important workplace rights that exist to support new mothers and carers.

5.4. *Casual workers*

5.5. Unions NSW welcomed the introduction of a universal paid parental leave entitlement in 2011 which included provisions for casual workers.

5.6. Despite this recent advancement in the law, casual employment often acts as a barrier to workplace rights.

5.7. The NSW Branch of the National Tertiary Education Union reported that their members' can access between 26 and 36 weeks of paid parental leave (depending on which University they work at). Access to this leave requires that the worker is employed on a permanent or fixed term contract basis and have between 0-5 years of service (depending on the institution). Some casual employees can access 14 weeks paid service if they have been working regularly for an institution for a couple of years, but breaks in service can negate access to this provision.

5.8. For casual and fixed term contract workers at Universities, an inability to demonstrate a guarantee of future work, or any breaks in service results in many employees being unable to access paid parental leave provisions. In many

¹ *Gender Indicators Australia, 2013*

agreements, casual service will also break service requirements for employees who have become fixed term or permanent. For example, at some Universities, even if an employee has more than the required service period to access 26-36 weeks, if that period of service has included casual work, the employer will only count from when a fixed term contract or permanent employment commenced.

5.9. Casual employees' lack of job security often makes it difficult for them to speak up about workplace issues. For pregnant women, and workers returning after the birth of a child, this could include not speaking up about discrimination, lack of access to safe and clean lactation areas and blocked access to flexible working arrangements.

5.10. It is difficult for unions to report accurately on the extent of this issue, as many casual employees are too scared to even raise these issues with their union, especially when they are juggling work and child care responsibilities.

5.11. *Short term contracts*

5.12. Accessing paid parental leave and continued employment is difficult for pregnant women and new parents employed on short term contracts. Union members have reported that it is often the timing of their pregnancy and its 'announcement' to their employer that determines their continued employment and what parental leave entitlements they are able to access.

5.13. A number of unions reported that pregnant members who were employed on short term contracts were often unlikely to have their contracts renewed if their employer was aware of their pregnancy. This has led to a number of women reporting that they concealed their pregnancy during contract negotiations in order to ensure their contract was renewed. Other women have reported that they attempted to time pregnancy to coincide with short term contract cycles.

5.14. The Australian Salaried Medical Officers Federation and the National Tertiary Education Union reported that pregnant members, who were near the end of their

contract, only received PPL for the time remaining on their contracts. For example, a health worker is generally entitled to 14 weeks of paid parental leave. However, a pregnant employee who had four weeks left of her short-term contract when she went on parental leave was only able to access four of the 14 weeks of paid leave. In the university sector, if an employee is able to demonstrate that their work is ongoing and that they would be issued with another contract, they are able to access the full quantum of leave. However, due to the nature of external funding arrangements and short term contracts this is often difficult to demonstrate.

5.15. Short term contract employees have the right to accrue and take sick leave, annual leave and personal leave. These employees should also be given the right to accrue and access paid parental leave. Particularly in circumstances where these employees have a series of short term contracts that are consistently renewed.

5.16. Recommendation Two

The strengthening of the 'right to request' in the Fair Work Act would make family friendly working arrangements within permanent forms of work more accessible, thus limiting the over-representation of women and carers in casual employment.

5.17. Recommendation Three

When calculating employer provided PPL, the Fair Work Act should require that years worked as a casual or contractor be taken into account.

5.18. Recommendation Four

Short term contract employees should be given the right to accrue and access paid parental leave based on their total years of service.

6. Training

6.1. A number of professions/occupations require workers to undertake formalised training programs to either gain or maintain qualifications. Unions are concerned about the interaction between these requirements and the parental leave needs of

pregnant women and new parents.

6.2. The NSW Health Services Union and ASMOF have reported that the Australian Medical Council requires trainee doctors to undertake two years of vocational training to qualify as a doctor. This training is workplace based and a break in the training is not permitted.

6.3. The union has reported that one manager advised junior doctors that their training contract will not be renewed or extended if they are pregnant and choose to take leave. This issue also affects men who are unable to take paternity leave during the vocational training.

6.4. Unions have also found that members have their access to workplace training restricted when they are pregnant or returning to work after parental leave, particularly when they return on a part-time basis.

6.5. Recommendation Five

Discrimination legislation and guidelines should be amended to make it clear that training and trainee requirements cannot discriminate against pregnant women and new parents. The Government should require all accredited training programs be reviewed to remove such discrimination.

7. Government schemes used to water down conditions

7.1. Some employers have used the Federal Government's Paid Parental Leave Scheme to reduce current conditions.

7.2. For example, members of the Health Services Union at one hospital have had their employer paid parental leave reduced from 14 weeks to 4 weeks after the introduction of the Federal Government's scheme. Further, if employees did not return to work for 12 months after returning from maternity leave, they were

required to pay the 4 weeks of employer paid leave back to the employer.

7.3. Unions NSW is concerned by recent reports that the Abbott Government is considering removing all employer provided forms of paid parental leave, instead requiring employers to provide employee with the Government scheme only. Employers would be restricted from providing any additional parental leave entitlements above this.

7.4. Unions NSW sees this as an attempt to strip parents of parental leave entitlements that have been fought for by workers and their unions. Frequently, improvements in PPL are negotiated at the expense of other claims. These changes would also restrict workers from workplace bargaining to seek improvements to paid parental leave. No other form of paid leave faces such restrictions.

7.5. Recommendation Six

Employers to be restricted from watering down PPL entitlements except in cases of genuine financial difficulty.

8. Employer prejudices and blatant discrimination

8.1. As with most forms of discrimination, personal and cultural prejudice often informs and fuels discriminatory behaviours.

8.2. In the last 30 years workplaces have been required to be more accommodating to the caring responsibilities of their employees. In some circumstances this has bred a culture of resentment. Managers and employers have been known to refer to women as “constantly being on maternity leave” and “ripping off employers”.

8.3. Attitudes such as these have become entrenched in some workplaces and come into play in workplace decision making and staff management.

- 8.4. This can be displayed in a number of subtle discriminatory actions or behaviours undertaken by work colleagues or managers, such as inappropriate remarks or lines of questioning.
- 8.5. This behaviour may also be displayed in more blatant acts of discrimination. For example, the Rail Tram and Bus Union reported that a member requested part-time work and as a result was questioned about how old she was, how old her children were and what kind of caring support she receives.
- 8.6. Many women and men don't make complaints about pregnancy and return to work discrimination. This may be because they don't know where to report it, are worried that it might be considered 'petty' by others, fear losing their job, fear further employer or co-worker retribution or simply do not want to add more stress to their life.
- 8.7. Because many workers don't make complaints about discrimination, the behaviour continues to exist within these workplaces, with managers, co-workers and employers not realising the behaviour is wrong and in most instances illegal.
- 8.8. In order to address workplace discrimination, workers need to be educated on how to identify pregnancy and return to work discrimination, the steps they can take to stop it and the kinds of practical outcomes they should expect from this.
- 8.9. Workplace education is also important. Managers, employers and co-workers need to learn what pregnancy and return to work discrimination looks like and the repercussions of being a perpetrator of discriminatory behaviour.
- 8.10. Recommendation Seven
Better education of employers and employees in how to be family friendly employers and how to identify what discrimination looks like and the avenues that can be taken to address it.

9. Childcare inflexibilities

9.1. Unions have found that some employers use the inflexibility of formal childcare to 'squeeze' parents out of the workplace.

9.2. For example, after returning from parental leave, a member of the Independent Education Union requested part time work to accommodate her caring responsibilities. The employer agreed to the request and provided the teacher with 0.4 of a full time load. However, the school had spread this work load over 4 days. This work timetable meant that the teacher needed to pay for 4 days of childcare, as formal childcare isn't generally available in half day or 2 hour blocks. The timetable was seen as a way of 'squeezing' this teacher out of the workplace.

9.3. Other union members have also had their employer regularly changing their work roster at the last minute and doing this in spite of the impact that this would have on their childcare arrangements.

9.4. Recommendation Eight

Discrimination legislation and guidelines should be amended to make it clear that employers must not use work rostering to purposely place pressure on an employee's childcare arrangements.

10. Shift Work

10.1. The irregular and constantly changing nature of shift work makes balancing work and childcare responsibilities difficult for working parents.

10.2. Shift workers who have caring responsibilities generally prefer regular shifts at times when either formal childcare is available (9am -5pm) or when their partner is able to provide caring responsibilities (overnight).

10.3. Managers are often reluctant to fulfil requests for family friendly work patterns for shift workers as they are concerned about resentment it may cause among other staff. The concern is often that carers take all the 'good shifts' – either the more social hours (9-5) or the higher paying hours (night shift).

10.4. A number of unions have highlighted this as a significant issue for their members, particularly female members, who do shift work.

10.5. This was an issue for shift workers in correctional facilities. To approach the issue, the PSA and management implemented a 'preferred rostering' system where staff were able to request their desired shifts. Since being implemented management has met preferred rosters about 90% of the time and there has been a significant reduction in workplace conflict over rostering and absenteeism.

10.6. Such a system would not be ideal or successful in all workplaces; however finding ways to accommodate the caring responsibilities of shift workers is something that needs to be given considerable attention.

10.7. Recommendation Nine

The Australian Human Rights Commission should develop guidelines and training for employers on family friendly rostering.

11. Lactation rooms

11.1. After returning to work after the birth of a child, many women have found accessing appropriate lactation rooms difficult.

11.2. One union member reported that she was forced to express milk in a parking lot as there was no other place for her to go.

11.3. When another union member requested a break to express milk she was told that she needed to wait until another staff member could relieve her before she could

leave her desk. The member was forced to wait a considerable time causing her milk to leak and increasing her risk of mastitis.

11.4. Unions NSW understands that laws are already in place to prevent the above examples, but unfortunately breastfeeding discrimination continues to exist.

11.5. Recommendation Ten

Better education of employers and employees on how to be a breast feeding friendly workplaces, how to identify breast feeding discrimination and what avenues women experiencing breast feeding discrimination can take to address it.