

18. WITNESS EVIDENCE

Introduction

[18.1] The ACTU has provided witness statements from 30 employees in support of their claims. It has also provided witness evidence from various experts on several issues.

[18.2] Preliminary ACCI comments on the witness evidence are contained below. Additional submissions regarding the evidence and the ultimate implications of the evidence for this case will be made by ACCI following cross-examination.

Employee Witness Evidence

[18.3] The witness evidence advanced by the ACTU itself in this matter:

- a. Provides no support for the ACTU claim. In fact, it provides strong grounds for rejection of the ACTU claim.
- b. Conversely, the employee witness evidence provides support for the award variations sought by ACCI members in the ACCI work and family application.

[18.4] In summary, the ACTU employee witness evidence establishes that:

- a. Generally, issues surrounding balancing work and family issues are resolved satisfactorily in workplaces, often through discussion and compromise.
- b. Employers, in general, act reasonably when faced with requests by employees for changed hours, leave, or other requests.
- c. There is considerable bargaining regarding work and family issues, and on many occasions employees and trade unions are successful in their efforts to have additional work and family measures incorporated into agreements. There is no manifest failure to bargain on these issues.
- d. Requests to change hours, time and place of work in response to family responsibilities or other personal issues are made on a regular basis, and are often agreed to by employers, when circumstances allow. There is no

evidence of any requirement for additional award regulation in relation to this issue.

- e. Employees are capable of successfully requesting changes to their employment status on the basis of their family responsibilities (e.g. requesting a change from full-time status to part-time status).
- f. Employees attest to the utility of the very award flexibility provisions sought by ACCI/NFF, for example, in relation to long service leave, single day annual leave or casual employment.
- g. Many employees experience difficulties accessing childcare that is affordable or meets their requirements.
- h. For many employees, a choice to return to work from a period of parental leave or work full-time is driven by financial necessity, and results in perceived role overload. In simple terms, people may be 'putting too much on their plate' and their capacity to balance work and family responsibilities may be stretched. However the additional award regulation (or any award regulation for that matter) sought by the ACTU does not ameliorate this issue and it is principally an issue for government incomes and family support policy.

Evidence of employers acting reasonably

[18.5] In addressing the ACTU claims for additional award regulation, the Commission should reasonably ask whether the conduct of employers in the workplace is such that additional protections, in the form of rights, are required, or whether in fact the issues that form the heart of this case are being considered, negotiated and satisfactorily resolved by employers and employees at the workplace at present.

[18.6] The standard of reasonableness cannot be that employees get everything they seek in each instance. The ACTU witness evidence in summary demonstrates that employers consider employee requests, and appear to respond reasonably and constructively to such requests in many cases.

[18.7] For example:

- a. Witness statement of Kathleen Drayton (para 13):

“At my Performance Management Program (PMP) assessment in February 2000 I explained that I continued to work part-time and asked to change my hours so that I worked one day on a weekend and two during the week. This request was accommodated without any problem.”

- b. Witness statement of Patricia Jack (para 10):

“When my son was starting school, I requested that I start at 9.30am and finish at 2.15 pm. This gives me time to get back to the school by 5 minutes to 3pm when my son’s school finishes, with a little bit of time if the traffic is bad. This request was agreed without any trouble.”

- c. Witness statement of Catherine McAnda (para 24):

“I was asked to work until 5pm on Fridays. I would have preferred 4.30pm so I could get an earlier train. We compromised at 4.45pm which means it isn’t so much of a rush....”

- d. Witness statement of Kathleen Smalley (para 9):

“A number of employees have negotiated flexible working hours in order to care for pre-school aged and school aged children. The management of ERL are approachable to discuss any matters relating to flexibility of working hours, and if it fits in with branch requirements, the needs of employees are accommodated.”

[18.8] ACCI is not suggesting that there are not examples in the witness evidence of situations that may have been handled better, or of situations that could not be entirely resolved to each employee’s satisfaction, but the overwhelming impression that must be taken from an examination of the witness evidence is that, by and large, work and family issues are considered on a reasonable basis at the workplace level and largely resolved or accommodated by discussion and negotiation between employers and employees.

Capacity to bargain on work and family issues

[18.9] The witness evidence provided also demonstrates that, with reference to formal bargaining, employees and trade unions are successfully negotiating the introduction of provisions of a similar nature to those sought by the ACTU in this case as additional award rights. To that extent, this evidence compels additional

caution in relation to the need for additional rights in the award safety net at this time.

[18.10] Evidence of a proven capacity to bargain includes:

- a. Witness statement of Peter Gough (para 9):

“In 2002 the company introduced a new rostering system, Austriacs. As part of that introduction our workplace delegate for the Transport Workers Union successfully gained company support to introduce family-friendly rosters who chose to work ‘reduced’ hours.”

- b. Witness statement of Kathleen Smalley (para 7):

“Within our enterprise agreement we have negotiated flexible working hours and leave provisions.”

- c. Witness statement of Annette Rowlands (para 4):

“During my maternity leave, 15 months maternity leave became available through the enterprise agreement. I was able to extend my maternity leave to 15 months, which I did. At the end of the 15 months I was not able to get child care so I resigned.”

[18.11] It has been ACCI/NFF’s view (and one that is confirmed by the evidence and materials advanced by parties in this case so far) that the ‘work and family balance’ issue in relation to each employee, and the preferences of employees in connection with better management of the interaction between employment and family responsibilities, varies markedly and is very much an individualised matter.

[18.12] Conversely, the capacity of employers to meet such concerns, with reference to their market conditions, financial constraints, and operating conditions, also varies significantly. For these reasons it remains our view that bargaining, whether formal or informal, represents the best approach for resolving work and family balance issues. This is also the approach that is required under the *Workplace Relations Act 1996*. Furthermore, it is an approach that works.

[18.13] The witness evidence advanced by the ACTU provides no evidence of any widespread or significant failure, on the part of employers, to consider and respond to these issues in bargaining negotiations.

Capacity to vary hours, times and place of work

[18.14] There is considerable evidence in the witness statements provided of the capacity of employees to request variations to hours, start and finish times, and place of work. The witness evidence advanced by the ACTU itself furnishes an extremely strong argument against any need for additional award regulation on this matter.

[18.15] Employees make such requests regularly, and are also successful in changing their hours of work to suit their family responsibilities.

[18.16] ACCI estimates that, in the employee witness statements filed by the ACTU, employees successfully changed their hours of work at least **18 times**. Witnesses who managed to successfully change their hours to suit their preferences include:

- a. Kathleen Drayton, who changes her hours of work on four separate occasions (see paras 12, 13, 19 and 20 of her witness statement).
- b. Lea Formigoni (see para 4 of her witness statement).
- c. Beth Frere (see para 11 of her witness statement).
- d. Peter Gough (see paras 12 to 14 of his witness statement).
- e. Patricia Jack (see para 10 of her witness statement).
- f. Bri-Anne Keen (see para 5 of her witness statement).
- g. Catherine McAnda (see para 19 of her witness statement).
- h. Graeme Pearece (see para 7 of his witness statement).
- i. Sonia Tatchell on two occasions (see para 12 and 15 of her witness statement).
- j. Cynthia Tutalo on five occasions (see paras 8, 30-31, 32, 35 and 37 of her witness statement).

[18.17] Once again, this is not to suggest that on every separate occasion, employees are successful in getting the particular hours of work they would like; but they are successful on many, many occasions, and this accords with the evidence of reasonable conduct on the part of employers, cited above.

[18.18] Prima facie, issues regarding hours of work are currently settled well, without the need for additional award regulation. The ACTU claim in this regard should be rejected. The ACTU witnesses themselves provide the Commission with the basis to do so.

Employment Status

[18.19] A similar but related issue concerns changes to employment status, and in particular, the capacity to request a change from full-time to part-time employment following a period of parental leave.

[18.20] The ACTU witness evidence provides 8 separate instances where employees successfully negotiated a return to work from parental leave on a part-time basis. They include:

a. Lea Formigoni (para 9):

“Prior to my return to work at the beginning of 2001, I negotiated with my supervisor and then Executive Director to return to work in a permanent part-time capacity. From 2001 till 2004 I worked for three days each week and one of my teachers would act in my position for the other two days. This year I am working four days per week and job-sharing the fifth day with one of my teachers.”

b. Beth Frere (para 3):

“I returned to work part time 0.5 in July 2000 when my 1st daughter was 9 months old. I had asked to work 0.5 until the end of 2000 so that I could properly assess how I was going and whether I could manage full time in 2001. When I originally put this request in, my manager (a different one to now) said I would have to make up my mind about working hours for 2001 in mid 2000. When I asked why, he changed his mind and agreed with the arrangement I had proposed.”

c. Samantha Weiland (para 5):

“I went on parental/family leave for the birth of my first child in October 1999. I returned from this leave on a part-time basis in October 2000.”

[18.21] ACCI/NFF does not seek to suggest that it is necessarily possible or easy in all or the majority of cases for an employee's contract of employment to be changed from a full-time to a part-time basis following an employee's return to work after parental leave, and regard should be had to the range of very serious concerns raised by employers in the witness statements attached to this submission.

[18.22] However the evidence suggests that where it may be possible, employers facilitate this request at present. There are a range of factors that employers have regard to in determining whether a particular position can operate effectively on a part-time basis, or whether it is necessary for the position to be full-time (see ACCI witness statements – e.g. witness statements of Toni Riley and Margaret Porritt).

Difficulties with childcare

[18.23] There is evidence in the witness statements provided of difficulties accessing childcare that either suits the needs of employees with respect to particular hours, or is affordable and accessible geographically. Evidence of childcare difficulties is found in the witness statements of Joanne Dennington (paras 10 and 7), Kathleen Drayton (paras 9 and 18), Beth Frere (para 6), Jacqueline Luttick (paras 11 and 22), Catherine McAnda (para 10) and Graeme Pearce (para 10). Employer evidence included in the ACCI Reply Submission also acknowledges these difficulties (see witness statement of Margaret Porritt).

[18.24] To some extent therefore, 'work and family' issues, may in reality be, fundamentally, issues of access to childcare. These issues cannot be addressed through additional award provisions, and the problem of better access to childcare is not solved by putting additional obligations and restrictions on the capacities of employers to manage their business.

[18.25] Furthermore, problems in relation to childcare have been noted both by the community generally and government in particular, and measures to improve the situation are being implemented. The 2004-2005 Federal Government Budget contains substantial additional funding designed to increase both the number of 'outside school hours care' places and family day care places.

[18.26] These measures have only recently been announced, and their overall impact on reducing problems with access to childcare cannot be assessed at this stage. It furthermore cannot be assumed that this represents the only effort that

governments will be willing to make to further address this issue and improve access to childcare in the future.

[18.27] The relevance of these initiatives for this case is that childcare access is a central issue for the employee witnesses provided by the ACTU. It is an issue which is being addressed by government. Rather than granting the ACTU claims at this time (to the extent that childcare access is relevant to the provisions sought), a more appropriate approach is to allow a period of time to evaluate the effectiveness of the additional measures introduced by government to improve childcare arrangements. The consequential impact of such improvements on work and family balance can then be assessed.

Household income issues and role overload

[18.28] There is also evidence in the witness statements that overriding financial need is strongly influencing decisions to return to work, and the total hours that employees work, following periods of parental leave. It may be that in some cases people simply are putting 'too much on their plate' and attempting to reconcile highly ambitious working hours with considerable caring responsibilities For example:

- a. Witness statement of Rosemary Gray (para 18):

"With my oldest child I applied for 12 months leave without pay at the time of her birth though returned to work when she was seven months old. I recall placing her in care when she was seven months old was traumatic for both my daughter and myself. I returned to work for financial reasons."

- b. Witness statement of Sally Kellett (para 8):

"I believe that it is important that children have a parent at home with them when they are young for many emotional and social reasons. Unfortunately financial circumstances require that I work so that we can survive financially."

- c. Witness statement of Sonia Tatchell (para 9):

"Ideally I would have liked more time off to spend with my new baby. However, because of our financial situation I had to return to work as early as possible. This was the only reason I returned to work as soon as when I did."

[18.29] These are not issues of work and family balance per se, or of employer conduct. They do not lend support to additional award measures and indeed the

provisions sought by the ACTU would not address the underlying problem. In the examples above, financial exigencies are driving a return to work which may not be appropriate, having regard to all of the personal circumstances of the employees.

[18.30] A better approach is to tackle the core problem, and to examine providing families and employees with family responsibilities with additional income support measures, so that a decision to return to work following parental leave becomes a far more genuine choice, and families have more options regarding how much, if at all, both parents are required to work.

[18.31] This is an issue for Government through the social security and taxation system. Additional measures to provide financial support for families have been introduced in the 2004-2005 Federal Budget. Significant new initiatives include:

- a. An increase in the rate of Family Tax Benefit (FTB) Part A of \$600 a child to be paid as a lump sum upon reconciliation of entitlement following the end of the financial year, commencing in respect of the 2003–04 financial year. The annual lump sum will be available, if required, to offset any overpayment of FTB that may have occurred during a previous year.
- b. In order to provide an immediate benefit, a lump sum payment of \$600 per child will be paid before June 30, 2004, to all families receiving or eligible for FTB Part A in the 2003–04 financial year.
- c. The introduction from July 1, 2004, of a new Maternity Payment, paid as a lump sum of \$3000 for each new born child. This will be a universal payment to all families (usually the mother). This payment will increase to \$4000 from July 1, 2006, an increase again to \$5000 from July 1, 2008. This new payment will incorporate the existing Maternity Allowance and the Baby Bonus, with the Baby Bonus still available for births prior to July 1, 2004.

[18.32] The same issues arise here as with childcare. Significant, recent government reforms in this area may be considerably influential in positively affecting work and family balance. By contrast with the ACTU claims, these measures directly address the issues that lead to role overload, and parents working when ideally they may otherwise not choose to. The ACTU claim should not be granted. Rather, appropriate time should be provided to assess the success of government initiatives to provide greater income support to families.

[18.33] A summary of government initiatives, contained in the 2004-2005 budget, in respect of family income support and childcare, is attached.

The ACCI Applications

[18.34] Several ACTU employee witnesses provide evidence of the utility of some of the work and family balance provisions sought by ACCI. They include the utility of single day annual leave (witness statement of Peter Gough, paras 19-25), casual employment (Rosemary Gray, para 19) and Kathleen Smalley (long service leave at half pay, para 31).

[18.35] These are only preliminary comments and ACCI will revisit them following cross-examination of the witnesses in this case.

How Representative is the Sample?

[18.36] To the extent that the ACTU seek to rely on their witness evidence in support of their claims, it is reasonable to examine how representative their sample of employee witnesses is.

[18.37] The answer is: not very.

[18.38] There is a heavy emphasis in the witness evidence towards the public sector and major private sector employers. Nearly half the witness evidence advanced is from the public sector (including five public sector teachers alone). Of the remaining witness statements, 9 are drawn from major private sector employers, including four from Coles Myer (Australia's largest employer – see witness statement of Judith Barnesby) and David Jones (which employs around 10,000 people: see witness statement of Patricia Clifford).

[18.39] By contrast, the profile of directly award-reliant employers is increasingly smaller employers in the hospitality, retail and health industry sectors.

[18.40] The ACTU witness evidence tells us very little about experiences in those sectors. By contrast, ACCI has advanced witness evidence from a variety of different employers in the hospitality and retail sectors which, in considerable details, outlines the range of damaging effects the ACTU claims would have.

ACCI employer witness evidence

[18.41] Attached to our written contentions are witness statements from employers in a variety of industries.

[18.42] We have in particular provided witness statements from employers in small to medium sized businesses in the retail and hospitality industry sectors.

[18.43] We have also provided witness statements from employer organisation officers, summarising their discussions with employers regarding the likely effects of the claim on their business.

[18.44] While each business is different, and the difficulties they report differ, there are several underlying themes.

[18.45] The first is that the issues which are the subject of the ACTU claim are all issues which employers deal with at the moment. All employers report that these matters are the subject of discussion and negotiation and are resolved satisfactorily at the workplace level.

[18.46] The second is that rostering and staffing is the subject of very careful consideration and are a critical component of business operations. Employers indicating considerable alarm at any award provision which significantly detracted from their capacity to design and manage rosters. Possible outcomes of the ACTU claim being granted in relation to hours of work included a failure to meet very serious duty of care obligations in relation to aged care residents (see witness statement of Neil Shankly), closing of the business for times when key staff are unavailable (see witness statements of Toni Riley and Adam Stevens), failure to meet customer demand (see witness statements of Adam Stevens and Michael Best) and added stress on other staff (John Byrne and Neil Shankly).

[18.47] The third is the difficulties caused to business of losing staff for longer periods. All employers reported difficulties in attracting and retaining key staff and in particular, raised concerns regarding replacement staff for parental leave (see witness statements of Margaret Porritt and Toni Riley).

[18.48] This is just a snapshot of some of the key concerns that emerge from the witness statements of employers filed by ACCI. There are many other issues referred to by employer witnesses in their statements which significantly weigh against the granting of the ACTU claims.