

8. RELEVANCE OF DISCRIMINATION LAW

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Introduction

[8.1] The ACTU¹ contend that there is a body of case law developing around indirect sex discrimination, and direct discrimination on family responsibilities grounds, which support the granting of the ACTU applications. However the ACTU fails to show where and how, concession of its claims are supported by anti discrimination law. General descriptions of case law development and general citing of cases on subject matter areas, does not operate to show how and why the ACTU's claims should be granted on such a broad basis.

[8.2] ACCI contend that the development of anti discrimination law is a matter for the Commonwealth and various state parliaments, together with the judicial and non judicial bodies who have been granted specific jurisdiction under anti discrimination legislation. The Commonwealth parliament has made specific provision for direct discrimination on the grounds of family responsibilities but has specifically elected not to prohibit indirect discrimination on the family responsibilities ground. Accordingly, principles of indirect discrimination are not principles which the Commission is obliged to consider under section 89 of the *Workplace Relations Act, 1996* in this test case.

[8.3] Furthermore, the Commission's obligation under section 89 of the *Workplace Relations Act, 1996* is to have regard to the principles as enshrined in the various anti discrimination Acts. It is not to make new law or to have regard to principles which are either as yet unsettled in case-law.

¹ At 7.14 of the ACTU's core contentions.

[8.4] The cases cited by the ACTU are either unsettled or simply demonstrate the application of principles which are subject to be determined on the facts of each individual case. They are not “*principles embodied in the [Acts] relating to discrimination in relation to employment*” Even if it were appropriate to consider indirect discrimination principles in a family responsibilities case when parliament has specifically elected not to prohibit such discrimination, ACCI contends that the cases cited by ACTU add nothing to their claims, and in fact in some instances undermine their claims.

Relevance of Anti Discrimination Law

[8.5] The development of new anti discrimination law is a matter for the Commonwealth and various state parliaments. It is a well established principle of constitutional law that the Commission, as an administrative body, cannot exercise judicial functions. The Commission however, may set down new obligations and duties on parties within (and only within) its statutory jurisdiction, and only where it is necessary and appropriate to do so to constitute a fair and enforceable safety net adjustment of minimum award standards. In so doing, the Commission must operate within the statutory framework under *the Workplace Relations Act, 1996*.

[8.6] ACCI has already contended that the purpose of objects clauses such as section 3 of the Act is to set down directions as to the overall purposes of the legislation. They are statements of direction or guides to statutory interpretation in accordance with section 15AA of the *Acts Interpretation Act (Cth) 1901* rather than substantial provisions in their own right.

[8.7] In addition, the provisions of section 3 are cumulative rather than alternative, so the Commission must have equal regard to all the various objects of the Act as set down in section 3, rather than a single one of them. Finally the purpose of the Act is set down in the overall scheme of the Act in addition to the purpose clauses so that the Commission must have regard to the overall enterprise bargaining framework as initially set down by the *Industrial Relations Act 1993* and subsequently amended by the *Workplace Relations Act 1996*. The award test case standard is therefore a minimum safety net standard only.

[8.8] The interaction between the award system and Anti Discrimination Law was considered by the Commission in the Award Simplification Decision (P7500). In that decision the Full Bench determined that the award would contain a model

discrimination provision consistent with object 3(j). The new anti discrimination provision was as follows:

- 13.1 It is the intention of the respondents to this award to achieve the principal object in s.3(j) of the Workplace Relations Act 1996 through respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, natural extraction or social origin.
- 13.2 Accordingly, in fulfilling their obligations under the dispute avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.
- 13.3 Nothing in this clause is taken to affect:
 - 13.3.1 any different treatment (or treatment having different effects) which is specifically exempted under the Commonwealth anti-discrimination legislation;
 - 13.3.2 junior rates of pay, until 22 June 2000 or later date determined by the Commission in accordance with s.143(1E) of the Act;
 - 13.3.3 an employee, employer or registered organisation, pursuing matters of discrimination in any State or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission.
 - 13.3.4 the exemptions in s.170CK(3) and (4) of the Act

[8.9] In response to the Human Rights and Equal Opportunity Commission (HREOC) proposal to adopt a model Work Flexibility clause, the Full Bench decided that the purpose of such a clause is met adequately by the proposed anti-discrimination clause and the various enterprise flexibility and facilitative provisions which permit variations in working arrangements to cater for a variety of situations.

[8.10] In addition, the Full Bench deleted the sexual harassment provision on the basis that it was not allowable but they also noted that remedies are provided in other legislation to resolve sexual harassment claims.

[8.11] It is therefore, submitted, that the Full Bench in the Award Simplification Decision, in contemplating the objects in section 3 in accordance with the process of simplification, determined that a generic anti-discrimination provision was sufficient and that the clause would form the basis of consideration of anti-discrimination issues relating to clauses contained within Awards and how

workplaces would manage the intentions of the anti discrimination clause including work flexibility.

[8.12] Accordingly, the requirement in section 93 is to have regard to the principles as set down in the *Sex Discrimination Act, 1984* and the *Disability Discrimination Act 1992* not as developed by case-law or as the ACTU would like the law to develop. The *Sex Discrimination Act, 1984* applies to discrimination on the grounds of sex or marital status of the aggrieved person and on the ground of pregnancy or potential pregnancy.² The *Sex Discrimination Act, 1984* does not provide for indirect discrimination on the grounds of family responsibility but rather prohibits direct discrimination and termination of employment³ on the family responsibilities ground.

[8.13] Notwithstanding the above, anti discrimination law is complex and the detail does vary from State to State. There are existing statutory bodies which have the function and obligation to enforce anti discrimination law under the various statutes. The function of the Commission is as set down by section 93, to have regard to the legislative principles rather than undeveloped or uncertain areas of case law.

Relevance of Case Law

[8.14] In many areas, it is not possible to draw general principles which can be applied to all cases. Each case turns on its own facts which is why it is a matter for the statutory body to interpret and apply the applicable law. The drawing of general principles from case law, as distinct from principles set down in the statute, is neither appropriate nor easily applied to an award test case standards. In fact it would be dangerous to do so whilst a body of jurisprudence is still developing.

[8.15] Only a tiny proportion of cases reach a conclusion and the published judgments are therefore not necessarily reflective of the vast bulk of employer and employee relationships which operate within the existing stated law and where matters are resolved without recourse to litigation.

2 sections 5,6,7 Sex Discrimination Act, 1984
3 section 7A, section 14(3A)

Relevance of Indirect Discrimination

[8.16] In the case of direct discrimination, the law is reasonably clear. ACCI makes it clear that we do not support any form of direct discrimination. Direct discrimination on the grounds of family responsibilities is prohibited by section 7A of the *Sex Discrimination Act, 1984*. Direct discrimination has only limited application to the cases cited by the ACTU in section 7 of its core contentions. The ACTU is, however, predominately seeking to rely on case law developments in indirect discrimination. As will be seen below, this is a far from settled area of law. It is not for the Commission to make judicial pronouncements in this area, let alone base the exercise of arbitral discretion on such grounds.

[8.17] The *Sex Discrimination Act, 1984* prohibits direct discrimination on the grounds of family responsibilities but does not prohibit indirect discrimination on the grounds of family responsibilities. This is not contested by any party to this matter. However, the ACTU is seeking to rely on indirect discrimination cases on the basis of gender and pregnancy discrimination, in support of some of their claims.

[8.18] First, Parliament has specifically provided that the Commission is to have regard to principles as laid down in discrimination legislation⁴. Secondly, Parliament has specifically considered and elected not to provide for indirect discrimination on the grounds of family responsibilities. The obligation on the Commission is therefore limited to the provisions of section 93A of the *Workplace Relations Act, 1996* and it is not open to the Commission to go beyond that role.

[8.19] Even if the issue of indirect discrimination was appropriate or relevant to be considered, there are very real and practical difficulties in applying principles of indirect discrimination to award test case standards. In cases of indirect discrimination, in general there are four separate elements which must be considered. These are considered on the facts of every individual case. The individual must show at the outset that the conduct complained of falls into one of the prescribed categories of treatment⁵ e.g. the employee must show that that they have suffered detriment. Further in order to show indirect discrimination, the individual must prove that:-

⁴ Section 93, Workplace Relations Act, 1996

⁵ s14 *Sex Discrimination Act, 1984*

1. there was a requirement rule condition or policy with which everyone was required to comply.
2. a substantially higher proportion of women cannot comply with the requirement compared to men
3. the particular complainant cannot comply with the requirement
4. the requirement is not reasonable in all the circumstances.

[8.20] These are principles which are applied on the individual facts of every case. They are not generally principles which can easily be applied to an award test case standard. For example, which attribute do you seek to protect? Under the *Sex Discrimination Act, 1984* it is sex, as family responsibilities are not subject to the indirect discrimination principles. Nor can the *Disability Discrimination Act, 1992* be used in a general manner as not all care givers are responsible for people with disabilities.

[8.21] If the Commission sought to apply principles of indirect discrimination and to set down an award test case standard on the basis that the vast majority of people with family responsibilities are women, it would enshrine in award standards, a stated principle that the majority of caregivers are women. This would enshrine in awards, a principle that this obligation is less of a responsibility on men.

[8.22] To do this could be considered contrary to Article 1 of the ILO Convention on Workers with Family Responsibilities, which provides “*This Convention applies to men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity*”

[8.23] It would also be contrary to Article 18 of the UN Convention of the Rights of Child of which paragraph one provides “*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child...*”.

[8.24] It also is contrary to the meaning of section 93A which makes it clear that the provision is directed for the benefit of both men and women. Even if it were relevant to apply principles of indirect discrimination in this instance (which we do not accept), how could the Commission apply the general principles of

indirect discrimination to all employers and employees in all cases as would be required by virtue of imposing a minimum safety net standard?

[8.25] To do this, the Commission would initially have to make an overall finding that a requirement to work full time or at a particular place of work is imposed in all cases. Secondly, the Commission would have to make an overall finding that a requirement to work full time amounted to subjecting employees to a detriment or fit into one of the other categories of employment prescribed by discrimination law. Finally, the Commission would have to make an overall finding that such a requirement was unreasonably imposed in all cases. In practice it would not be possible to do, even if it were appropriate or relevant, which it is not. The ACTU's logic that such principles somehow support their claims is misguided and incorrect.

[8.26] Furthermore, how can you say, in general minimum award standard terms, that this is something that a higher proportion of men can comply with, as distinct from women (as people with family responsibilities are not subject to indirect discrimination)? It is neither possible nor appropriate for the Commission to make general findings of fact on this basis. Then there is the requirement of "**reasonableness**" as required by section 7B of the Act which is a difficult and inappropriate principle to apply in an award test case standard.

The reasonableness test

[8.27] For the purposes of this section of these submissions we will consider the principles of reasonableness as set down for gender discrimination in the *Sex Discrimination Act, 1984* as this is the Act required to be considered by Section 93 of the *Workplace Relations Act, 1996*. However it should be noted that similar provisions exist in all anti-discrimination legislation. Section 7B provides: -

- (1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.
- (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
 - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and

- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

[8.28] The provision and case law⁶ makes it clear that the issue of what is *reasonable in the circumstances* will depend on all the facts of the case and the category of matters to be considered is not closed.

[8.29] Hunter⁷ confirms the view that reasonableness is a test which will vary from case to case.

“According to anti-discrimination laws, however, unlawful indirect discrimination occurs where a criterion has both an adverse impact and is “not reasonable in the circumstances of the case”. Clearly, the notion of “reasonableness” cannot be discussed here in any more than a general way, since the particular circumstances within which “reasonableness” must be judged will vary from case to case. Moreover, even if the maintenance of a discriminatory employment criterion appeared to be reasonable in the circumstances of a particular case, it would still be open to the employer to find ways of reducing its impact in accordance with any affirmative action requirements they may be subject to.”

[8.30] In *Chester v. Coles Supermarket Australia Pty Ltd*⁸, an employer’s request to change hours was not unreasonable. Amongst the relevant factors which the employer submitted to be considered in this case were

- The nature of the business and fact that overstuffed
- The nature of complainants employment (part time heavily dependent on operational needs of store at any one time)
- The fact that alternations of hours were minimal
- The extent of negotiation which had taken place
- The relevance of some of the alternatives suggested by complainant
- not whether other alternatives existed but whether the option which employer chose took it outside realm of reasonableness

6 see cases considered below

7 Indirect Discrimination in the Workplace: Rosemary Hunter, 1992 Federation Press at 121

8 [2002] VCAT 843

[8.31] Therefore, the only guiding legal principle that can be drawn in these cases is that the issue of reasonableness is a legal concept, and one which must be taken into account and applied according to the facts of each individual case. That is the legal position as set down in legislation and applied in case law.

[8.32] The Court of Appeal decision in Schou⁹ makes it clear that the onus of showing lack of reasonableness is a matter for the claimant. It is not, with respect, a standard which can be used for the purpose of more general regulation by being easily incorporated into an award test case standard. The case law indicates that these are matters which should be left to the statutory authorities and courts to determine in each individual case.

Commission's own attitude to Reasonableness in Award Test Case Standards

[8.33] The Commission has already considered the issue of reasonableness in the working hours test case¹⁰. The Commission considered the application of a reasonableness standard to the normal working week

"In support of its contention that *"a standard of reasonableness"* should be adopted, the ACTU relied on the views of expert witnesses to support the proposition that *"a reasonable hours standard is necessary or appropriate"*. It submitted that reasonableness is a concept well known to the law. It also relied on cases as to the meaning of *"reasonable overtime"*. It pointed to the use of the concept of reasonableness in statutes, including, for instance, in the *Occupational Health and Safety (Commonwealth Employment) Act 1991* which, among other things, requires an employer to *"take all reasonably practicable steps"* to achieve certain objectives.

We have taken all the submissions about *"a standard of reasonableness"* into account.

While such a standard may be appropriate in many circumstances it is as we have indicated a standard which is necessarily imprecise. It has apparently worked satisfactorily in relation to overtime but we are not persuaded that it should be applied on a test case basis in conjunction with a specified number of ordinary hours of work. The specification of a number of ordinary hours for a standard working week is a proven method of regulation which has the great benefit of clarity. People know where they stand. If we were to overlay the standard working week with a standard of reasonableness, we think that many situations would arise in which an employer would not be in a position to know in advance what hours are to be regarded as reasonable for each employee. This would make planning very difficult and might lead to downtime and increased labour costs."(emphasis added)

9 State of Victoria v Schou [2004] VSCA 71 (30 April 2004),
10 PR072002 at paragraph 242

[8.34] It is ACCI's contention that imposing minimum obligations on employers in respect of balancing work and family responsibilities has the effect of altering the minimum terms and conditions of employment. As with normal working hours, a standard of reasonableness would be equally difficult and inappropriate to apply to the minimum award obligations of employers and employees. However, in citing principles of indirect discrimination, that is in effect what the ACTU is asking the Commission to consider.

Place of Work cases cited by the ACTU

[8.35] Even if it were appropriate to consider the issue of indirect discrimination on gender grounds, the cases cited by the ACTU do not, as contended, support the granting of their claims.

[8.36] In both place of work cases cited by the ACTU, the employer's actions were reasonable in the circumstances and the applicant's claim failed. The ACTU acknowledged this at 7.11 of its core contentions in the case of *Gardiner* where the Tribunal held that the employer had acted reasonably in all the circumstances. This was subsequently upheld on appeal.

[8.37] In the case of *Schou*, the Court of Appeal of the Supreme Court of Victoria¹¹ has subsequently reversed the finding of the Tribunal cited by the ACTU. Therefore it is not clear what these cases cited by the ACTU do to support the ACTU's application, other than demonstrate the individual circumstances of the particular cases.

[8.38] In most of these cases, the facts are agreed between the parties and such issues are not contended. Where there are findings of fact, they are findings of fact in the particular circumstances in the case, and not illustrative of a general principle. In *Schou*¹², the principle facts had been agreed between the parties and the first VCAT tribunal's finding that the applicant could not comply with the condition and a higher proportion of employees who were not parents or carers could, was not challenged by the employer in subsequent hearings. In *Gardiner*¹³, again the employer did not challenge this on the facts, based on the pool of managers of which the applicant was one, but in *Gardiner*, the requirement to

11 *State of Victoria v Schou* [2004] VSCA 71 (30 April 2004),

12 *State of Victoria v Schou* [2004] VSCA 71 (30 April 2004), [2002] VCAT 375 (24 May 2002),

13 *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184 (11 August 2003)

relocate was found reasonable in the circumstances. This decision was also recently upheld on appeal¹⁴. It should be noted in particular that the Gardiner case, allegations of discrimination were made on the separate grounds of both sex and carer's responsibilities under the New South Wales *Anti-Discrimination Act, 1977*.¹⁵

[8.39] The place of work cases cited by the ACTU undermine the ACTU's own claims due to:-

- a. The allegations of discrimination did not succeed in either case.
- b. The cases demonstrate the test of reasonableness which generally applies in indirect discrimination cases and which ACCI contend, is neither appropriate nor suitable for inclusion in minimum award test case standards.
- c. The cases demonstrate how such issue turn on the particular facts of each case and the great difficulty in setting a "one size fits all" minimum standards approach.

[8.40] Accordingly, these cases do not support the ACTU claim, and in fact undermine it. There is no general proposition regarding a requirement of place of work as asserted by the ACTU. The ACTU asserts that these cases are illustrative of a general principle that either a higher proportion of women cannot comply with the requirement to work full time or a higher proportion of carers cannot comply with a requirement to work in a particular place. With respect, that is a general principle that cannot be drawn from two cases, particularly not where those cases had a requirement for a particular place of work which was found reasonable in the circumstances.

Part Time Work Cases Cited by ACTU

[8.41] The ACTU contend at 7.10 that a number of cases have held that requiring a mother returning from maternity leave to work full-time is a requirement with which it is more difficult for women to comply with than men. They state that "*if the requirement is also unreasonable it is unlawful indirect sex discrimination*".

14 Gardiner v WorkCover Authority of New South Wales [2004] NSWADTAP 1; (2004) EOC 93-314 4 February 2004

15 Carer's responsibilities alleged contrary to section 49V(2) of the Act and on the grounds of sex under section 25(2).

[8.42] ACCI would contend that this is

- a. Not a principle embodied in the [Anti Discrimination Acts] relating to discrimination in relation to employment as required to be considered by the Commission under section 93.
- b. Not a settled area of law. Just because a number of cases have made a finding based on the particular facts of individual cases does not provide for a general statement of principle to be applied in all cases as a minimum test case standard.
- c. Anti-discrimination cases revolve around the imposition of a requirement which causes a detriment. They do not provide support for a general legal principle that a new obligation should be imposed on employers.
- d. Even if the Commission could consider that it is a principle embodied in anti discrimination legislation, it does not support the ACTU's claim.

[8.43] The ACTU claim is for an absolute entitlement to part time work. It goes further than the unsettled case law which considers the issue of reasonableness in the circumstances. We submit that those cases do not support the ACTU's claim.

[8.44] Like the place of work cases, these cases turn on their own particular facts and circumstances. A number of the cases cited by the ACTU share a similar foundation. They have sought to rely on a particular statement made by Evatt, C in *Hickie v. Hunt*¹⁶ where the employer sought to argue that no judicial finding could be made where the complainant had not presented any evidence women were more likely to be disadvantaged by the requirement than men. Evatt, C rejected that argument on the basis of evidence produced by the employer themselves and on the basis of her own general knowledge. The resulting statement has been used, somewhat controversially in a number of cases as a proposition of the more general statement.

¹⁶ *Hickie v Hunt & Hunt* [1998] HREOCA 8 The statement which has been subsequently relied upon in other cases is contained in paragraph 16.17.10 The full paragraph is reproduced here: -
 "Although no statistical data was produced at the hearing, the records produced by Hunt & Hunt suggests that it is predominantly women who seek the opportunity for part time work and that a substantial number of women in the firm have been working on a part time basis. I also infer from general knowledge that women are far 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."

[8.45] Even without the proposition of a more general statement, the cases cited revolve around the failure to provide a benefit which was available to other employees, accordingly resulting in a detriment as distinct from providing a benefit in the first instance. In *Hickie*, the individual had already been working part time on an agreed basis when the requirement to work full time was imposed. In *Escobar*¹⁷, discrimination occurred when it was made clear to the applicant that no job, either full or part time was available to her on return from maternity leave. In *Mayer*¹⁸, part time work had been made available to other employees but not the applicant. In fact she was the only employee returning from maternity leave for whom part time work had not been found.

[8.46] In *Kelly v. TP Internet*¹⁹, these cases and in particular *Mayer*, were considered by Raphael, FM who on similar facts, distinguished the *Mayer* decision. In particular he stated:-

“At [59], [60] and [65] of her written submissions Ms Ronalds attempts to distinguish between *Mayer* and the current case:

[59] The outcome of the applicant’s approach is that all women can demand the right to work part-time and require employers to create a position for them as a part-time position. The extra component of primary care givers is a “sex plus” criteria and should not be accepted as it is not part of the statutory formulae. In this case, she wanted to dictate her salary as well as her hours of work under the guise of eliminating sex discrimination.

[60] With the greatest respect, this is the error that Federal Magistrate Driver in Mayer v ANSTO [2003] FMCA 209 fell into, at paragraphs 70 to 72 of his decision. Despite his assertion to the contrary, it is an essential element of the indirect discrimination provisions that the evidence must establish that “women per se are disadvantaged by a requirement that they work part-time.” The addition of the family responsibilities criteria is an incorrect approach and it is not supported by the quotation from the second reading speech as set out by Driver FM at paragraph 72.”

[65] A crucial factual distinction from Mayer’s case when compared with this matter is that there was an e-mail which indicated that in one person’s view there was an availability of part-time work which Ms Mayer could perform (at [31]). The respondent’s evidence is consistent that there was no part-time position available for the applicant at her level. The applicant made it clear she was not interested in a call position but this is the role of the workplace where there is a light management structure.”

I believe the reference in paragraph [60] to part time should be a reference to full time.

17 *Escobar v Rainbow Printing Pty Ltd (no 2)* [2002] FMCA 122

18 *Mayer v ANSTO* [2003] FMCA 209

19 *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 at paragraphs 76 to 80.

I think that in fact there are great similarities between the situation of Ms Mayer and Ms Kelly. Both applied to come back to work part time following maternity leave. The essential difference was that in Ms Mayer's case the request to vary her contract of employment was being made in the context of a flexible workforce where such variations commonly occurred and where the variation could be accommodated for that particular employee. The drawing of this distinction between the two cases would appear to be the drawing of a distinction for the purposes of the reasonable test found in s.7B of the Act. The question really is whether s.7B comes into play or whether in the circumstances of either case there is no discrimination under s.5(2).

As has been recorded, Ms Ronalds argues that there is no discrimination under s.5(2) for two reasons. The first is that the demand to work part time constitutes a form of request for positive discrimination and is therefore not within the compass of the SDA as presently drafted. The second argument rests on the fact that there is no proof of the requisite type that women are disadvantaged in this particular workplace or that the requirement or condition affects persons of their sex generally.

I have come to the view that there is much force in Ms Ronalds' first argument which is supported by the dicta in Waters and Schou that what is being sought in this case (and was being sought in Mayer) was the provision of a benefit and not the imposition of a detriment. In my view Hickie was not such a case. The Hunt & Hunt partnership had accepted the continued employment of Ms Hickie on a part time basis but then subjected her to the detriment of taking away her plaintiff practice and not renewing her contract because she would not work full time. Section 5(2) makes it unlawful for a discriminator to impose or propose to impose a condition requirement or practice but that condition requirement or practice must surely relate to the existing situation between the parties when it is imposed or sought to be imposed. The existing situation between the parties in this case is one of full time employment. No additional requirement was being placed upon Ms Kelly. She was being asked to carry out her contract in accordance with its terms. As Harper J said in Schou at [658]:

“The section does not turn the denial by an employer of a favour to the employee into discrimination, although if the favour is generally available to other employees, its denial to one could conceivably, in the particular circumstances, amount to an offence against the Act.”

I would suggest, with respect, that this is what Driver FM was really considering in Mayer. The evidence in that case was all one way. There was a refusal of a benefit generally available. But that is not the evidence here.”

[8.47] In a more recent case *Commonwealth v. Evans*²⁰ one of Raphael FM's own decisions on direct discrimination was partially overturned on appeal, on the basis that there was no evidence before him as to how a male who took the same amount of leave would be treated. This goes to show how strict the evidential requirements are generally in these cases.

[8.48] In other words, the requirement of evidence to support a finding is a firm requirement in discrimination cases. In any event this is but one of four factors to be generally shown in a case of indirect discrimination. Indeed in one of the cases where the general statement was relied upon, *Mayer*, the employer had not given reasonable consideration to a proposal of part time work and had also granted part time work to other employees in similar situations. Therefore on the particular facts of *Mayer* itself, evidence existed to justify the finding in the absence of any general proposition.

[8.49] Further, there is no nexus between the part time work clause proposed by the ACTU and the current legal standard of reasonableness as required in anti discrimination law. The ACTU clause is fundamentally unbalanced in requiring an entitlement only of an employee and not balancing the needs of employer and employee as set down in current anti discrimination law. In some cases, requirements have been unreasonable, in others reasonableness has been shown to exist, e.g. *Schou*, *Gardiner*.

[8.50] If an unbalanced entitlement existed as proposed by the ACTU, in the factual circumstances of either *Schou* or *Gardiner* the employer might be put in a position of breaching the award that the ACTU would have the Commission make. This would be bad public policy.

[8.51] This current legal approach more than amply demonstrates the need to balance the needs of employers with the circumstances of employees in such cases. For example, it would be an interesting hypothesis to imagine what would be the case in *Schou* in the event that there had been an entitlement in such instance to work from home or flexible working arrangements, without the imposition of the reasonableness requirement. This is in effect the nature of the ACTU's core contention.

[8.52] In each case the Hansard sub-editors had similar family circumstances and if such an entitlement existed, potentially all subeditors could have requested such working arrangements. In the absence of the current legal position as set down in indirect discrimination cases, the employer would have been in a legal position where it could not legally refuse such a request, yet in complying with all such requests would have been unable to effectively conduct its business.

Unilateral Alteration of Duties and Other Cases

[8.53] The third group of cases cited by ACTU concerning unilateral alteration of duties during parental leave. Again these cases turn on their own facts and represent application of individual statutes applied in the cases, rather than elucidation of general principles as attempted to be argued by the ACTU. *Thompson v. Orica*²¹ does deal with the issue of unilateral alternation of job role, not through lack of communication, but rather the view of her manager that a position on equivalent pay and conditions was a “comparable position” without regard to loss of status. In *Rispoli*²², the issue was not lack of communication as alleged by the ACTU, but rather the issue of indirect discrimination caused by an agreed change in role following return from maternity leave which resulted in a loss of status to the complainant unforeseen at the time of embarking on maternity leave.

[8.54] The issue in *Song v. Ainsworth Game Technology*²³ was not about a requirement to work fixed hours per se. In fact in that case the individual had had a flexibility arrangement where she left the workplace mid afternoon to transfer her son from one caregiver to another. This appeared to be unknown to her employer but continued for nearly a year. Subsequently the employer claimed that the arrangement was not agreed or authorised and advised her that she would have to transfer to part time work if the arrangement was to continue. There was evidence that the employer claimed that otherwise she would be in breach of the relevant award although her contract of employment specified she was not an award covered employee. Even if she was, the employer’s reason was without foundation. Other employees had flexible work arrangements.

[8.55] The Federal Magistrate found that in transferring the individual to part time work a dismissal had taken place which was contrary to section s.14(3)A of the *Sex Discrimination Act, 1984*. It is difficult to see what this case adds to the ACTU’s application, other than demonstrating the current effective operation of the prohibitions against direct discrimination on the grounds of family responsibilities.

21 *Thomson v Orica Australia Pty Ltd* [2002] FCA 939

22 *Rispoli v Merck Sharpe & Dohme & Ors* [2003] FMCA 160

23 [2002]FMCA 31

Men and Family Responsibilities – Relevance of Anti Discrimination Law

[8.56] At 7.14 of its core contentions, ACTU contend that:-

“The gendered nature of care, combined with the limited prohibition of family responsibilities based discrimination in the Sex Discrimination Act 1984 (Cth) means that men in identical circumstances to the applicants in these cases are unable to bring claims of indirect discrimination based on family responsibilities, while women can claim indirect sex discrimination ground. This anomaly supports the argument that the AIRC has a different and higher obligation than that imposed under the Sex Discrimination Act.”

[8.57] With respect, that is not the case. The obligation on the Commission is set down by section 93 and section 93A of *Workplace Relations Act, 1996*. This requires the Commission to “take account of the principles embodied in the [Anti-Discrimination Legislation] relating to discrimination in relation to employment”. It also requires the Commission to take into account the principles embodied in the *Workers with Family Responsibilities Convention*²⁴, in particular those relating preventing discrimination against workers with family responsibilities or helping workers reconcile their employment and family responsibilities. The last requirement in particular, is a gender neutral obligation, but it is not for the Commission to attempt to “fill the gap” in anti-discrimination legislation.

[8.58] The obligation on the Commission is to have regard for legislative principles, not to extend the statutory principles which parliament has specifically elected not to do. If there is an anomaly in the legislation or an argument from the ACTU that the parliament has not gone far enough, it is for parliament to address that contention, not the Commission.

[8.59] The primary obligation on the Commission is to take into account legislative provisions, not codify unsettled case law that turns on specific facts. Case law in anti discrimination cases cannot be said to set down general principles as each case is decided on its own facts and circumstances. In the area of part time work, the case law is unsettled and, even if it were accepted as settled, fails to operate to support the extent of the ACTU’s claim. In other areas such as place of work, hours of work and communication during pregnancy, the case law cited does not support the ACTU’s claims.

²⁴ ILO Convention No. 156

[8.60] To say therefore, as the ACTU are doing at 7.14 that a seeming anomaly gives the Commission a different and higher obligation, ignores the specific provisions of the *Workplace Relations Act, 1996* and makes a quantum leap in logic on the basis of case law cited, that is simply not justified.

[8.61] In any event it is not for the Commission to try to address gender relations. To the extent that it exists in Australia, the “care gap” is a fact which has been identified as a trend across all OECD countries, regardless of the level of family friendly benefits and only male specific (which are not claimed) measures have been shown to have a minor effect. It is a matter for government and social policy, not employer/employee regulation through industry wide standards.

[8.62] It must also be accepted that there is a practical limit to what can be achieved by award test case standards and the realignment of gender segregation is unlikely to be one of them. At the same time, the Commission does need to ensure that further gender segregation is not caused or contributed to.

Summary and Conclusions

[8.63] Anti-discrimination legislation is a remedial framework where each case is decided on its own facts. The obligation on the Commission is to consider the statutory framework, not anti discrimination case law and still less, unsettled areas of case law. However, even in the consideration of the statutory anti discrimination provisions, they must be considered in accordance with the provisions of the *Workplace Relations Act, 1996* and the statutory framework set down therein.

[8.64] The development of anti discrimination law is a matter for the Commonwealth and various state parliaments, together with the judicial and non judicial bodies who have been granted specific jurisdiction under anti discrimination legislation. The Commonwealth parliament has made specific provision for direct discrimination on the grounds of family responsibilities but has specifically elected not to prohibit indirect discrimination on the family responsibilities ground. Accordingly, principles of indirect discrimination are not principles which the commission are obliged to consider under section 93 of the *Workplace Relations Act, 1996* in this test case.

[8.65] The issue of indirect discrimination is already comprehensively and correctly dealt with under the various statutes to the statutory bodies assigned to decide such cases and as such, is not an appropriate matter to be considered in a test case standard. Furthermore, these cases represent a tiny percentage of the decided instances in this regard.

[8.66] Even if principles of indirect discrimination do fall to be considered in the limited areas allowed, it is difficult to reconcile the notion of indirect discrimination on the grounds of sex, which is designed to protect women, with a general obligation to “assist workers with reconciling work and family responsibilities” which is a gender neutral requirement.

[8.67] Even if the previous hurdles can be overcome, the Commission must have regard for the specific principles of indirect discrimination and in particular the particular requirements which are obliged to be shown in each individual case.

[8.68] Whether or not a requirement is something which a higher proportion of a non complainant group can comply with is individual to each particular case and the facts and circumstances to each particular case. There are some cases where it has been found on the facts that women have greater difficulty in working full time than men, there are others where such dicta has been cited, somewhat controversially in later cases as evidence of a general principle. It cannot be said that there is settled law on the point. The fact that a number of cases have made such findings on the individual facts of each particular case, does not represent a finding of general principle in all circumstances.

[8.69] In summary then, it is neither appropriate nor possible to use indirect discrimination on gender grounds in support of claims for family responsibilities provisions, when parliament has specifically elected not to prohibit indirect discrimination on family grounds. However, even if it were possible or appropriate, the tests of indirect discrimination and in particular, the test of reasonableness, is not a factor which is appropriate for a test case standard.

[8.70] The cases cited by the ACTU go to show anything, they show the highly individualised and case by case based approach required to be taken to the issue of compliance with requirements, where each case turns on its own facts and the elements of proof required in each individual case.

[8.71] The legal onus is on the complainant to show that the requirement is something with which another group is more able to comply. There is no reversal of onus.

[8.72] On the question of “reasonableness”, the cases cited by the ACTU show nothing more than what can be reasonable in one instance may not be reasonable in another instance. The list of factors to be considered is dependent on the circumstances of each individual case.

[8.73] Therefore, the only guiding legal principle that can be drawn in these cases on indirect discrimination is that the issue of reasonableness is one which must be taken into account in each individual case. That is the legal position as set down in legislation and applied in case law. The Court of Appeal decision in *Schou* makes it clear that the onus of showing lack of reasonableness is a matter for the claimant. It is not, with respect, a standard which can be easily incorporated into an award test case standard and is something which should be left to the statutory authorities to determine in each individual case.

[8.74] In the context of the ACTU’s specific claims, regard must also be had for the fact that some jobs cannot be worked on a part time or a flexible basis and the existing legal provisions in relation to indirect discrimination take account of this fact in providing for a case by case approach. The cases cited go to show that where there is an issue, the existing legal principles can be applied so as to balance the needs of employers and employees in such instances, based on the particular facts of the case. The ACTU claims go beyond this legal framework and ignore the requirement of balance arising from the application and development of case law to individual facts on a case by case basis.