WOMEN@WORK
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FLEXIBLE WORK
PART TWO OF A WOMEN@WORK SERIES ON FLEXIBLE WORK

FLEXIBLE WORK AND DISCRIMINATION

This series aims to inform members of rights and responsibilities around flexible work, and to inform them about the NSW Government policies. This series of articles has been written in response to a large volume of enquiries the PSA has recently received on flexible work agreements, including arbitrary refusals of applications for flexible working arrangements and arbitrary termination of existing arrangements.

CAN REFUSAL TO APPROVE AN APPLICATION FOR A FLEXIBLE WORKING AGREEMENT BE DISCRIMINATION?

In some circumstances, refusal to approve an application for a flexible working arrangement may be discrimination. Employers should respond in writing to applications for flexible working arrangements – employees should always put their applications in writing – explaining the grounds for refusal.

While employers may refuse an application for a flexible working arrangement on reasonable business grounds, merely writing "business grounds" as the rationale for refusal is insufficient.[1] The business grounds for refusal need to be explained. Further, if the refusal is challenged, the fact the grounds have not been explained may suggest the application has not been properly considered.

It is a common misconception that flexible working arrangements are only for mothers of young children. While these are the largest group requiring these arrangements, people may require flexible working hours for other reasons. Workers with a disability may also require 'reasonable adjustment'. Sometimes reasonable adjustment includes some flexibility, for example working from home on occasion. Domestic or family violence is another reason a person may require some flexibility at work.

INSTRUMENTS THAT SUPPORT FLEXIBLE WORKING ARRANGEMENTS

The *Flexible Work Practices Policy and Guidelines* outlines the types of flexible work practices available in the NSW public sector (part-time work, job sharing, working from home, varying 'flex' arrangements and absences for family or community service responsibilities).[2] You can access a copy **HERE**.

(http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0017/19331/Flexible_Work_Practices_Policy.pdf)

The *Crown Employees (Conditions of Employment) Award 2009* is the main instrument covering the working conditions of NSW public servants. Flexible work under this Award includes: part-time work,[3] job sharing and working variable hours[4] (including 'compressed hours'[5]). Options depend on the nature of the role and workplace, as well as the needs of the individual.

The Anti-Discrimination Act makes it unlawful to discriminate in employment on a number of grounds.[6] In relation to flexible work practices, grounds of potential discrimination include: carer responsibilities (irrespective of the age of the person cared for), disability, age, breastfeeding/pregnancy and returning to work after maternity/parental leave.

The *NSW Carer(s) Recognition Act* requires human resources policies for public sector agencies to be developed with regard to the NSW Carers Charter.[7] It states "carer's health and wellbeing are to be given due consideration" in Schedule 1 of the Act.

Some PSA members fall under the *Fair Work Act* (including those employed in state-owned corporations, universities and TAFEs).[8] The Fair Work Act gives examples of flexible working arrangements that may be requested, including varying hours of work; varying patterns of work (such as job sharing) and locations of work (including working from home). The following groups of people specifically have the right to request flexible working arrangements:

- those with responsibility for the care of a child under school age;
- carers (as defined by the Carer Recognition Act);
- anyone with a disability;
- workers aged 55 or older;

- people experiencing family or domestic violence or caring for a member of their household who requires care and support due to family or domestic violence.

Any employee (including a casual employee) who has worked for the same employer for 12 months or more has the right to request a flexible working arrangement. Under the Fair Work Act employers must respond to applications in writing within 21 days. Refusal can be made on 'reasonable business grounds'.

However, employers are not limited to accepting or refusing. The 'spirit of the Act' encourages employees and employers to discuss the situation and negotiate a mutually acceptable arrangement. This could include a combination of options (for example part time and working from home on certain days, rather than simply reducing hours) that creates a bespoke solution.

DISCRIMINATORY RULES

The rules and requirements that you have to follow to do your work must be reasonable. They must not unreasonably disadvantage people with a carer's responsibility or a disability more than people without these characteristics. Employers must also provide reasonable adjustment if necessary, unless this is not reasonable and/or it would cause them unjustifiable hardship.[9]

COMPLAINTS

It is against the law to harass or treat people unfairly because they have complained about discrimination (including complaints to the Anti-Discrimination Board (ADB)), or have supported someone else with a discrimination complaint. If this happens, you can lodge a separate complaint of victimisation.

If you believe you have been the victim of discrimination, for example your application for a flexible working arrangement on the basis of carer responsibilities, disability or other relevant grounds have been refused unreasonably, the first step is to discuss this with your boss – preferably with a PSA delegate or a support person present. There are important reasons for this. Most bosses have expert knowledge in the area of work they supervise, but not necessarily anti-discrimination law or flexible work policies. You and your delegate or support person can bring these policies and legislation to their attention. At such meetings, it is important to ask why the application cannot be supported. Where the application is genuinely unable to be supported, this will be difficult to challenge. However, if you do not believe the reasons are genuine, you should make a note of the reasons provided. This may assist later. If, after speaking to your boss, you do not believe you have been treated fairly, you can lodge a grievance. If you are still not satisfied with the outcome, you can make a formal complaint to the ADB or AHRC. This can be done either by filling out the complaint form (available on the ADB or AHRC website), or simply writing a letter to them. The PSA (or a delegate) can assist you with this if required, or you can contact the ADB or AHRC directly to discuss the issue and how to lodge a complaint. Both the ADB and AHRC aim to operate with the minimum of formality, and to resolve complaints as quickly and cheaply as possible. You have one year to make a complaint.

DIRECT AND INDIRECT DISCRIMINATION

Discrimination can be direct or indirect. Direct discrimination is fairly straightforward. This occurs when someone is treated less favourably in employment and some other areas because of protected characteristics such as sex, pregnancy, marital status, family responsibilities, breastfeeding, age, disability and some other grounds. Limited exemptions/exceptions apply.

Examples include: only hiring young employees because the manager wants a 'fresh' look to the workplace,[10] or suggesting a pregnant woman resign because it is assumed she will not be able to do her job properly when she becomes a mother.

Indirect discrimination is more complex and sometimes difficult to 'see'. Indirect discrimination occurs when a rule or policy (other than inherent role requirements) is the same for everyone but unfairly disadvantages people who share a protected attribute, including sex, pregnancy, breastfeeding, age or disability, because it is more difficult, or even impossible, for them to comply. Again, limited exceptions/exemptions apply.[11]

Examples of indirect discrimination include: a shift worker applies for a special roster, such as working certain shifts or having certain days off, due to carer obligations. The application is denied on the basis that it is a requirement, perhaps pursuant to rostering policies or procedures, that everyone is available to work 24/7. On the surface this appears fair, because everyone is subject to the same rule. However, this may disproportionately impact on carers. Where an employer properly considers the application and has valid grounds for refusal, such as the shifts/days are not available, and can demonstrate they have genuinely considered the application but are not able to accommodate it, this may not be discriminatory. However, failure to

properly consider the application, for instance simply ticking 'denied' and stating a reason like 'shift workers must be available 24/7' without really considering whether the request can be accommodated, could constitute discrimination, especially if the employee is able to demonstrate that the shifts/days requested were in fact available. Another example could be an employee requesting to work from home on occasion due to a disability. Where this is genuinely unable to be accommodated it may not constitute discrimination – for instance, if they need to be physically present to do the job. However, where no thought is given to the application, this may be discrimination.

Below are two interesting examples of flexible working requests that were declined. Both employees pursued their matters and the Courts found in their favour. The first example is an application for a flexible working agreement on the basis of carer responsibilities in the Commonwealth system and the second example is an application for a flexible working agreement in the NSW public sector, as part of 'reasonable adjustment' due to a disability.

EXAMPLE 1: PART-TIME WORK DUE TO CARER RESPONSIBILITIES

Ms Mayer was employed by the Australian Nuclear Science and Technology Organisation (ANSTO). She took 12 months' maternity leave and applied for an extension of two years. Her boss only approved an additional 12 months.

Other employees had received an extension of two years. The Court found this was direct discrimination.

When Ms Mayer was due to return to work, she asked to return part time. ANSTO declined her request, saying there was no part-time work available and her only option was to return full time. The employer did not explore flexible working options or any reasonable adjustments to accommodate her return to work. The Court found this to be indirect discrimination. Ms Mayer was able to provide evidence that ANSTO did have flexible duties available for her to work part time and that they did not bother to explore the available options.[12]

This case shows examples of both direct and indirect discrimination through a lack of consideration for reasonable adjustment on the employer's part.

EXAMPLE 2: WORK FROM HOME AND REASONABLE ADJUSTMENT DUE TO DISABILITY

Ms Huntley's employer discriminated against her by failing to provide reasonable adjustment.[13]

She was diagnosed with Crohn's disease and only capable of performing some of her previous duties (everything except field work).

Ms Huntley then performed 'modified duties' but was advised by her employer that that this was an 'informal arrangement' only, and could not continue indefinitely. She was then referred for a medical assessment, which found her permanently unfit for her substantive position, but able to do office-based work provided there was reliable access to toilet facilities. She then successfully applied for a secondment to another office-based position within her Department.

She subsequently began to experience fatigue and was also diagnosed with a sleep disorder. As a result she sought permission to work from home. This was refused. No proper reasons were provided for the refusal. The employer later argued it was due to "security", but was unable to explain what the precise security concerns were. (The Court found that this request to work from home on account of her disability was also a request for reasonable adjustment).

She was subsequently 'ambushed' at a meeting and informed that the secondment would cease due to her illness and excessive sick leave. She was informed that she had two choices: medical retirement or a further medical assessment.

The Court was critical that these 'options' were put to her without notice, without consultation and without any proper consideration as to whether the inherent requirements of her role could be reasonably adjusted in light of medical recommendations, and, that the employer had erred in assuming every duty in the position description was an inherent role requirement.

She alleged that the conduct at this meeting caused depression.

She was later placed on leave without pay and refused a transfer to an alternative position. Although a number of vacancies were brought to her attention, limitations were placed on her (for example, stating she was unsuitable for one position because it was "high stress" – a limitation not mentioned in any medical assessment).

The Court found the employer had discriminated against Ms Huntley by repeatedly failing to provide reasonable adjustment. The Court also found that the employer had decided she should be medically retired and sought a "medical assessment to

produce the outcome" when they should have considered reasonable adjustment.

The Court also found that there were implied terms in the employment contract of trust, safe work, good faith, the obligation to make reasonable adjustments and that the employer would not act inconsistently with its own policies – and that the employer had breached each of those terms.

Ms Huntley was awarded $98,863.89 for economic loss, $75,000 in general damages and interest.[14]

PSA ANNUAL WOMEN'S CONFERENCE 2015

The PSA's annual women's conference is held at PSA House in September each year. All women members of the PSA are eligible to attend.

The theme chosen by the Women's Council Steering Committee for this year's conference was Standing Against Domestic Violence. This is an important issue and the conference was an overwhelming success.

Talks and discussions focused on how members can deal with domestic violence in the workplace. The majority of domestic violence happens when people are in employment. The workplace can therefore do much to support victims through this period and regain control of their lives.

As with previous years, the conference featured a number of impressive and accomplished women speakers.

Eva Cox, AO, is a writer, feminist, sociologist, social commentator and activist. Eva has long advocated for a more civil society. This year, Eva spoke about the need to change the gender 'norms' that breed inequality and violence, calling violence a social disease that affect everyone.

Ludo McFerran has been an activist in the Australian domestic violence sector since 1978, fighting for domestic violence provisions in legislation to protect workers. Ludo gave a brief history of the journey working with the PSA to win the domestic violence clause in the Crown Employees Award, and the work it took to illustrate to employers that domestic violence is a workplace issue.

Shabnam Hameed, Manager of Gendered Violence and Work Program (part of the Violence Research Network) at the University of NSW, has been instrumental in securing workplace supports for employees experiencing domestic violence in Australia and overseas. With over a decade of experience, she shared some of her insights when discussing the strengths and challenges of converting provisions in legislation and industrial instruments to rights in practice, talking delegates through their workplace entitlements if faced with domestic violence issues. Her presentation ended with an update from her research in PNG, where they are currently developing policies and procedures around domestic violence.

Karen Willis, Executive Officer of Rape & Domestic Violence Services Australia, explained what the service does and how it can support delegates and members. She spoke about targeted prevention and changing gender and equity views within the workplace.

There were also conference workshops for delegates to choose from, including superannuation, women's leadership and mentoring, and domestic violence.

The final highlight of the conference was the conference dinner, kindly sponsored by First State Superannuation. The provided an opportunity for conference delegates to meet PSA staff, conference speakers and fellow conference delegates.

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1 Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209 and Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW) [2015] FCCA 1827

2 Flexible Work Practices Policy and Guidelines and Crown Employees (Public Service Conditions of Employment)Award 2009, Clause 24

3 Crown Employees (Public Service Conditions of Employment)Award 2009, Clause 13 and 75

4 Flexible Work Practices Policy and Guidelines and Crown Employees (Public Service Conditions of Employment)Award 2009, Clause 24

5 Crown Employees (Public Service Conditions of Employment)Award 2009, Clause 16

6 Anti-Discrimination Act 1977 No 48, Part 4B

7 NSW Carer(s) Recognition Act 2010 No 20, Schedule 1

8 Fair Work Act 2009 s65

9 Anti Discrimination Board Factsheet: Carers responsibilities discrimination

10 Hopper and others v Virgin Blue Airlines Pty Ltd (2006 QADT 9)

11 Australian Human Rights Commission. Definitions.

12 Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209.

13 Disability Discrimination Act (1992)

14 Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW) [2015] FCCA 1827