Part-time work & indirect discrimination

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Can indirect sex discrimination provisions be used to demand availability of part-time work in a wider range of occupations and on decent terms and conditions?

Working hours have traditionally been the subject of industrial regulation in Australia, while anti-discrimination laws have tended not to be used to question the way that jobs are defined and structured. Indeed, when anti-discrimination laws were first enacted, the industrial arena was largely exempted from their operation. With the gradual removal of these exemptions, what scope is there for women who wish to work part-time due to family responsibilities to argue that part-time work arrangements, or the lack thereof, are discriminatory?

Availability of part-time work

Around 75% of part-time workers in the Australian labour force are women, and of these, the majority are mothers working part-time in order to maintain an income and/or job skills while taking primary responsibility for child rearing. It would seem that there is plenty of part-time work available for women. More than half of the 1.8 million jobs created between 1973 and 1993 were part-time positions.[1] In the period 1978-93 there was an 89.6% increase in part-time employment, compared to only a 14.2% increase in full-time employment. Part-time employment grew from 16.0% to 23.9% of total employment.[2] Moreover, part-time job growth largely occurred in female-dominated industries, such as retail, finance, community services and recreation and personal services.[3]

Part-time employment has, however, been confined to low paid occupations such as sales and clerical work, and occupational sex-segregation has been shown to be directly related to the use of part-time labour.[4] 'Women's ...access to occupations is highly dependent on whether they offer themselves for part-time or full-time work.'[5] Managerial and professional positions (for example, in law firms) have been seen as incompatible with part-time work;[6] there have been few attempts to redefine these positions to suit women's needs.[7]

In this context, some women have turned to anti-discrimination law to claim the right to part-time managerial or professional work. The first success was achieved in the case of *Home Office v Holmes* [1984] ICR 678, under the UK *Sex Discrimination Act 1975*. Ms Holmes was a single parent and civil service executive officer, whose contract required full-time work. On returning from leave after the birth of her second child, Ms Holmes applied for a transfer to part-time work, which was refused. She then complained to an industrial tribunal that the full-time requirement indirectly discriminated against women. That is, it was a requirement with which a higher proportion of men than women were able to comply, and it was not justified in the circumstances. The tribunal's decision in her favour was upheld on appeal.

Two subsequent Western Australian cases reached a similar result. In *Speering v Ministry of Education* (1993) EOC 92-513 and *Nicholls v Minister for Education* (1994) EOC 92-573, the complainants were temporary teachers who were unable to work full-time because of

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family commitments. The Ministry of Education introduced a scheme to enable temporary teachers to convert to permanent employment, on completion of one year's full-time probation. The Western Australian Equal Opportunity Tribunal accepted that the requirement of full-time probation was indirectly discriminatory.

It might be queried, then, why these decisions have not had more of an impact. One possible reason is that indirect discrimination provisions are not widely used or understood in Australia.[8] Another reason is that permanent part-time employment options have been restricted by industrial awards (so as to protect full-time jobs for male breadwinners).[9] Many awards made no provision for permanent part-time employment, or limited the allowable proportion of such employment. In the Australian Public Service, for example, the former award imposed a service-wide quota of 6% permanent part-time staff.

As noted above, the provisions of awards were generally exempted from anti-discrimination legislation. Western Australia was one of the few States to remove this exemption at an early stage, which enabled the *Speering* and *Nicholls* cases to be brought there. Most jurisdictions have now followed suit, however. It is possible, for example, to lodge a complaint under the *Sex Discrimination Act 1984 (Cth)* in respect of allegedly discriminatory action under an award. The Australian Industrial Relations Commission is also required to remove discriminatory provisions from existing awards, and must take account of the principles of the *Sex Discrimination Act* in making new awards.[10] The Government's *Workplace Relations and Other Legislation Amendment Bill 1996* maintains these arrangements. Thus, the unavailability of or limit on permanent part-time work in a federal award (or certified agreement) or in many State awards would now be open to challenge. In future, the *Workplace Relations Bill* will not allow award clauses restricting the proportion of part-time work to be made (proposed s.89A(4)(a)). The terms of enterprise or workplace agreements (as well as individual contracts) are also fully subject to anti-discrimination law. Women seeking to argue that limits on part-time work are indirectly discriminatory will also be assisted by recent amendments to the *Sex Discrimination Act*, which place the onus of proving the reasonableness of a challenged requirement on the respondent.[11]

Conditions of part-time work

Where permanent part-time work was not provided for or was limited in an award, part-time workers were employed as 'casuals' and paid a casual loading in lieu of benefits and entitlements. In 1993, 67.2% of part-time workers were employed as casuals.[12] In recognition of the disadvantages of casual employment, much effort was made in the award restructuring process in female-dominated industries to convert casual to permanent part-time employment, thereby giving women pro rata access to leave entitlements, superannuation, redundancy pay, rights against unfair dismissal, and in some cases, opportunities for job mobility and transfers to full-time work.

The evidence from recent enterprise agreements is that the category of permanent part-time work is continuing to expand, but at the same time, the terms of such work may be deteriorating. To date, part-time workers have been less likely than full-time workers to be covered by enterprise agreements,[13] leaving them unrewarded for productivity increases and reliant on safety-net wage rises. Training and promotion may still not be available.[14] Even in the much lauded Sheraton Agreement, the available training is scheduled on rostered days off, making access very difficult for women with family responsibilities.[15] In banking, the boundaries between permanent part-time and casual employment have been blurred, with agreements providing for pro rata benefits on specified minimum hours, with a casual loading payable in lieu of benefits on hours worked above the minimum.[16]

Here again, anti-discrimination laws may be called on to challenge inferior terms and conditions for part-time workers. In the *Nicholls* case (above), the unavailability of promotion for part-time teachers, and a preference for full-time applicants, were also held to indirectly discriminate against women. In the European Union, part-time workers have successfully challenged denials of sick pay, severance payments and access to occupational pension schemes, lower hourly rates, and longer qualifying periods for salary increments, on the basis of indirect sex discrimination.[17] In *R v Secretary of State for Employment; ex parte Equal Opportunities Commission* [1995] 1 AC 1, the qualifying thresholds in the *Employment Protection (Consolidation) Act 1978* (UK), which distinguished between part-time and full-time workers in determining eligibility for compensation for unfair dismissal and redundancy pay, were held by the House of Lords to constitute indirect sex discrimination.

Hours of part-time work

Under the award system, permanent part-time workers were employed for a fixed number of hours per week. Enterprise bargaining has given employers, above all, greater control over the hours of work of part-time women employees, through mechanisms such as averaging hours over a four-week period, or rotating shifts. The consequences for women have been less predictability and shorter notice of changes in hours, which are inimical to stable and cost effective childcare arrangements.[18] Under the *Workplace Relations Bill*, part-time work will be completely deregulated, with the Industrial Relations Commission unable to specify maximum or minimum hours of permanent part-time work, and Australian Workplace Agreements prevailing over awards in any case.

In *Zurek v Hospital Corporation Australia Pty Ltd* (1992) EOC 92-460, several women complained to the Victorian Equal Opportunity Board that the implementation of permanent part-time work pursuant to award restructuring discriminated against them because of their sex and/or parental status. The complainants had been employed for a number of years as casual workers on weekend-only shifts, which enabled them to combine work and weekday childcare. When they were redefined as permanent part-time, they became subject to rostering arrangements that did not apply to casuals, and which required them to work some weekdays. Their case failed due to the exemption in the former *Equal Opportunity Act 1984* (Vic.) for actions pursuant to a lawful industrial agreement. The single mother complainant in *London Underground Ltd v Edwards* [1995] ICR 574 was more successful. There, a rostering change which clashed with the complainant's childcare arrangements was held to be unlawful indirect discrimination. Thus, where industrial agreements are not immunised from the operation of anti-discrimination legislation, part-time working hours which make it impossible to fulfil family responsibilities are also open to challenge as indirectly discriminating against women.

Conclusion

Permanent part-time work is one way for women to combine work and family responsibilities, although it is not necessarily the best possible solution. It does not cater well for school holidays, for example. Nor does it enable women to achieve the feminist ideal of economic independence. Other measures are also needed, such as subsidisation and/or tax deductibility of commercial childcare,[19] and a breakdown of the gender division of labour in the workforce and in the home. Likewise, a series of indirect discrimination cases would not, in isolation, achieve a systemic improvement in the status and value of part-time work. Nevertheless, the potential of indirect discrimination provisions to provide access to permanent part-time work, on decent terms and conditions and at family-friendly hours, has not yet been fully exploited in Australia. Current deregulatory moves present both dangers and opportunities, as sex discrimination legislation gains wider coverage of employment arrangements. This is an area that could fruitfully be explored by unions, Working Women's Centres and women's legal services in their efforts to make the labour market more responsive to the needs of women with family responsibilities.

References

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3. Dawkins and Norris, above, p.7. See also Lever-Tracy, Constance, 'The Flexibility Debate: Part Time Work', (1988) 1 *Labour & Industry* 210, 217; Jamieson, Natalie and Webber, Michael, 'Flexibility and Part-Time Employment in Retailing', (1991) 4 *Labour & Industry* 55, 61.
4. Jamieson and Webber, above, pp.64, 56.
5. Watts, Martin and Rich, Judith, 'Equal Employment Opportunity in Australia? The Role of Part-Time Employment in Occupational Sex Segregation', (1991) 17 *Australian Bulletin of Labour* 160, 168.
6. 'Only So Many Hours', above; Meadows, Helen, 'Flexible Work Practices: Individual experiences', (1995) 69 *Law Institute Journal* 646, 648. Some law firms are 'receptive' to individual requests from legal staff to work part-time, while the general organisational culture of full-time work remains firmly in place: see Meadows, 649; Martin, Michelle, 'Working Nine to Five: *Not* a Way to Make A Living if You're Bringing up Young Children', (1992) 66 *Law Institute Journal* 286, 287.
7. Jamieson and Webber, above, pp.59, 67; see also NSW Public Employment Office, *Guidelines on Flexible Work Practices*, p.9.
8. See Hunter, Rosemary, *Indirect Discrimination in the Workplace*, Federation Press, Sydney, 1992; Hunter, Rosemary and Leonard, Alice, 'The Outcomes of Conciliation in Sex Discrimination Cases', Centre for Employment and Labour Relations Law, The University of Melbourne, Working Paper No.8, August 1995, p.9.
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15. Charlesworth, above, p.75.
16. Barlow and others, above, p.44.
17. *Rinner-Kuhn v FWW Spezial-Gebaudereinigung* [1989] ECR 2743; *Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591; *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607; *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541; *Jenkins v Kingsgate* [1981] IRLR 228; *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.
18. Barlow and others, above, p.44; Charlesworth, above, p.72; Alcorso, Caroline and Hage, Ghassan, 'Bargained Away? Enterprise Bargaining and Non-English Speaking Background Women Workers', ANESBWA, Policy Paper 2, Sydney, 1994, p.35.
19. Watts and Rich, above, p.161.

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refuses to pay the outworker. This highlights the limitations for industrial action by outworkers, who are isolated and disorganised. Westco is one example of the 146 labels documented by the TCFUA as being made by below award paid outworkers. A list of such labels was submitted to the Senate Inquiry by the TCFUA, including well known brands: Sussans, Katies, Laura Ashley, JAG, Perrie Cutten, Ojay and Anthea Crawford.

The TCFUA has also been working directly with retailers and manufacturers, who have the ultimate responsibility of eradicating the exploitation of their workers. One example of employers recognising this responsibility is the deed of cooperation signed between the TCFUA and Target Australia in 1995. The agreement subjects the company and its suppliers to monitoring to ensure that all Target garments are made by workers who receive their lawful pay and conditions. Companies who sign these agreements are promoted as best practice organisations. The TCFUA is encouraging other retailers and label owners to enter into similar agreements rather than continue to shield themselves from responsibility for the workers producing their products.

Most recently, the TCFUA and the Uniting Church are involved in the Fair Wear Campaign. The Campaign is intended to lobby retailers and manufacturers to adopt a code of practice for the garment industry, to lobby the Australian Government to ratify the Convention and to educate consumers about the exploitation of homeworkers and ethical shopping.

Conclusion

In conclusion, the nature of outworking links women as workers, mothers, carers and producers into an exploited and vulnerable underclass in Australia today. Conditions for this group of workers are now worse than those experienced by garment workers 100 years ago. Legal protection has gone some way to legitimising outwork, but so far minimum conditions elude the majority of home-based workers. Labour organising has focused on the factory-based workforce which is declining in numbers. The challenge now before unions and the legal system is how to be relevant to this group of workers.

Broader initiatives have begun in earnest in the last two years which now show evidence of the links between ethical sourcing and ethical consumerism and the issues affecting outworkers. Working alliances between the union and community organisations, women's groups, churches and aid organisations have laid the foundations for future work to assure outworkers can access minimum protection.

For more information about the Fair Wear Campaign contact: Uniting Church, 4th Floor, Little Collins Street, Melbourne (03 9654 2488) or Annie Delaney, Outwork Coordinator, TCFUA (03 9347 3377).