Submission No. 1303
(Better Support for Carers)
Acc 5/3/09

SUBMISSSION TO HOUSE STANDING COMMITTEE ON FAMILY, COMMUNITY, HOUSING AND YOUTH

INQUIRY INTO BETTER SUPPORT FOR CARERS

David Peetz

Professor of Employment Relations

Griffith Business School

Griffith University

March 2009

1. I am making this submission to the House Inquiry into Better Support for Carers as a direct result of a recommendation of the Senate Committee Report into the Fair Work Bill 2008, which was tabled last Friday 27 February. Part of that Committee's report is directly relevant to carers of disabled adults and children.

2. That Committee recommended[1] as follows.

> 2.41 The committee majority recommends that the government gives careful consideration to any recommendations of the inquiry into better support for carers being conducted by the House Standing Committee on Family, Community, Housing and Youth on additional measures that should be taken within the workplace relations framework to assist carers.
>
> 2.42 In particular, the government should carefully consider any recommendation that the NES be amended to extend the right to request flexible working arrangements for employees caring for a child with a disability and carers of adults in need of care.
>
> 2.43 The committee majority also considers that employers and employees should be able to provide in their enterprise agreement that the agreement's dispute resolution clause can deal with disputes over the right to request flexible working arrangements.

3. These recommendations arose in part from submissions I had made to that Inquiry.[2] The purpose of this submission is to draw to the attention of the House Committee the reasoning behind my submission that the NES be amended to extend the right to request flexible working arrangements for employees caring for a child with a disability and carers of adults in need of care. References to clause and sub-clause numbers are, of course, to clauses in the Fair Work Bill.

---

[1] Senate Standing Committee on Education, E. a. W. R. (2009). Fair Work Bill 2008 [Provisions]. Canberra, Senate. 26 February. pp25-26.
[2] Ibid. pp24-25.

Extending the right to request to carers

4. The proposed right to request flexible working hours is restricted to parents with children under school age. This is an overly narrow restriction on eligibility, one that fails to recognise the range of workers who may have a genuine family need for flexible working hours.

5. In the UK, the right to request flexible working is available to parents of young children under 6 years of age, or disabled children up to 18 years of age, and carers of adults in need of care.

6. In a report supported by the European Social Fund, the UK Equal Opportunities Commission commented:[3]

> The 'right to request' is an effective tool in driving cultural change but, because it is only for specific groups, it has tended to reinforce the 'concession culture' that sees this as not about the business mainstream but only for special groups on an ad hoc basis. This approach can also lead to resentment from colleagues who see that they may have to make work changes to accommodate flexibility for parents and carers when no similar arrangements are on offer to them.
>
> There is clear evidence from innovative employers that opening up new ways of working to everyone in the company delivers a wide range of business returns. This voluntary approach of 'open to all' flexible working is gathering ground, supported by many of the employer organisations, including the Institute of Directors and the CBI.
>
> The Work Life Law Centre has compared the impact of the 'right to request' regulations in the Netherlands, UK and Germany and concludes that it makes business sense to extend flexibility rights to all employees. It reports that forward-looking employers have found it easier to manage the right to request flexible working if it applies to all employees, irrespective of care-giving status. Limiting the right to a sub-group such as parents of pre-school children, as is the case under UK law, not only causes resentment but also makes it more difficult to accommodate requests. Parents of young children tend to be fairly homogenous in their-demand for working hours; whereas when all employees are included there is a better chance of covering the whole array of the employers' working-time needs. The Dutch and German right to request laws apply to all employees, irrespective of their reasons for wanting to change their working hours.[4]
>
> There is strong evidence emerging that people would like the 'right to request' to be extended to all employees.
>
> In our survey:
>
> > 60% of people (58% men, 63% women) think the 'right to request' should be extended to all employees.

---

[3] EOC (2007). Enter the timelords: Transforming work to meet the future. *Final report of the EOC's investigation into the Transformation of Work.* Manchester, Equal Opportunities Commission. June.

[4] Hegewisch, A. (2005). Employers and European Flexible Working Rights: When the Floodgates Were Opened. *Issue Brief.* San Francisco, Centre for work life law. Autumn.

68% of people who supported the extension (65% men, 70% women) said it was likely they would use the 'right to request' for all employees if it were available.[5]

The DTI's Third Work-Life Balance Survey reported that 90% of employees felt that employers should give all employees the same priority when considering requests to work flexibly.[6] The CIPD/KPMG survey found that 35% of employers were in favour of extending the right to request to all employees and only 3% were strongly against.[7]

European and UK case studies show that organisations will reap real benefits from flexible working once they go beyond a piecemeal response to individual requests and integrate flexibility into their broader strategic approaches.[8]

While the right to request in the UK has been associated with improvements in working time flexibility in the UK, it is worth noting the EOC observation that:

International research based on 8,000 companies in 32 countries shows that despite claims of a flexible labour market, Britain is lagging behind its competitors in flexible work arrangements. Only 48% of companies offer flexi-time compared with 90% in Germany, 94% in Sweden and 92% in Finland.[9]

7. As a minimum, the right to request should apply not only to parents of pre-school age children but also to parents of *children with a disability or chronic illness*, regardless of whether they are at school, and to *carers of adults with a disability or chronic illness*,. These groups are no less deserving of access to a right to request than parents of pre-school-age children.

8. In the near future, consideration should be given to extending the right to all employees, for equity reasons (parents of children at school also frequently require access to flexibility), to avoid resentment of employees with access to it, to make it work effectively, and to maximise the efficiency and flexibility gains for both employers and employees from it.

Casual employees (clause 65(2))

9. The Bill says

> (2) The employee is not entitled to make the request unless:
> (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
> (b) for a casual employee—the employee:
> (i) is a long term casual employee of the employer immediately before making the request; and

[5] Holmes, K., C. Ivins, J. Hansom, D. Smeaton & D. Yaxley (2007). The future of work: individuals and workplace transformation. *Working Paper Series*. Manchester, EOC.
[6] Hooker, H., F. Neathey, J. Casebourne & M. Munro (2006). The Third work-life balance employees survey: executive summary. *Employment Relations Research Series No. 58*. London, DTI.
[7] CIPD/KPMG (2006). Labour market outlook. London, Chartered Institute of Personnel and Development. November
[8] Hegewisch Employers and European Flexible Working Rights: When the Floodgates Were Opened.
[9] EOC Enter the timelords: Transforming work to meet the future.

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

10. This is an unduly negative approach to flexible working hours, implicitly setting an impediment to informal flexibility by indicating that casuals or employees with short job tenure are not allowed to even make a request. It would be more appropriate to word this the other way around, ie to indicate that an employer is not required to consider a request from a short term casual or an employee with less than 12 months service.

11. Hence clause 65(2) should be reworded as follows:

> (2) The employer is not required to consider the request unless it is made by an employee who:
>
> (a) for an employee other than a casual employee—has completed at least 12 months of continuous service with the employer immediately before making the request; or
>
> (b) for a casual employee—:
>
> (i) is a long term casual employee of the employer immediately before making the request; and
>
> (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Consultation (clause 65)

12. The steps involved in assessing an employee's request are manifestly inadequate. Although the Exposure Draft of the National Employment Standards referred to how the

> United Kingdom experience has demonstrated that simply encouraging employers and employees to *discuss options* for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees[10]

and stated that, on this issue, the

> proposed flexible working arrangements...sets out a process for encouraging discussion between employees and employers[11]

the proposed right actually contains no obligation on the employer to discuss options, or even the request, with the employee.

13. The UK right to request flexibility includes the following procedural rights for employees:

> An employer must hold a meeting to consider the request within 28 days after the date an application is received. (This is not necessary if the employer knows enough from the paperwork to fully agree to the employee's request without a meeting.)
>
> An employee can, if they wish, have a companion (another worker employed by the same employer) to accompany them to the meeting.

---

[10] p10, emphasis added
[11] p12

The companion must be a worker employed by the same employer, but not necessarily working at the same premises, and he or she can be the workplace trade union representative.

The companion can address the meeting or confer with the employee during it, but is not allowed to answer questions on the employee's behalf.

If the companion is unable to attend the meeting, the employee should re-arrange the meeting for a date within seven days of the originally proposed time, ensuring the new time is convenient to all parties; or, consider an alternative companion.

The employer must write to the employee informing them of their decision within 14 days after the date of the meeting.[12]

14. If there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to understand the circumstances of the request. This is especially the case for workers who might be disadvantaged in the labour market, including younger workers, and workers from a non-English speaking background, who may have difficulty in clearly expressing in writing all the aspects of their case.

15. To fully explain their needs, or to enable the employee to properly understand the implications of what is being said or proposed by the employer in response to the request, many employees will need the support of an accompanying person. This is especially the case for employees who are less confident, less articulate, less familiar with English, or less experienced.

16. Similarly, if there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to take the request seriously, or to feel a sense of obligation to attempt to meet the employee's request within the needs of the business. A meeting will reinforce the employer's appreciation of the personal circumstances of the employee concerned.

17. Accordingly, a right to a meeting, including a right to bring along a companion, should be included in the right to request, and should be modelled on the UK framework. This would go after subclause 65(3) and say:

    If the employer does not know enough from the paperwork to fully agree to the employee's request without a meeting – the employer must hold a meeting to consider the request within 21 days after the date an application is received.

    The employee can, if they wish, have a another worker employed by the same employer accompany them to the meeting.

[12] BERR (2007a). Flexible working: the right to request and the duty to consider. Part 1. *URN No: 07/1390/A1.* London, Department for Business Enterprise and Regulatory Reform.

Refusal (clause 65)

18. The UK provisions provide for an internal right of appeal by the employee, if the employer rejects the application and the employee believes that the request has not been properly considered. The appeal procedure is simple, and is as follows:

> An employee has 14 days to appeal in writing after the date of notification of the employer's decision;
>
> If an appeal is made, the employer must arrange an appeal meeting to take place within 14 days after receiving notice of the appeal;
>
> The employee can be accompanied;
>
> The employer must inform the employee of the outcome of the appeal in writing within 14 days after the date of the meeting.
>
> When appealing against a refused request, an employee will have to set out the grounds for making the appeal and ensure that it is dated. There are no constraints on the grounds under which an employee can appeal.[13]

19. An appeal right ensures that a right to request will be taken seriously by the employer, and not dismissed on dubious grounds by lower level supervisory employees. In short, it encourages good business practice by employers. The UK legislation leaves it up to the employer to determine what mechanisms to put in place in case of appeals.

20. The Bill should include a right of employees to appeal an adverse decision, along the lines of the UK model.

21. Thus clause 65 should be amended by the inclusion of a new sub-clause along the following lines:

> An employee has 14 days to appeal in writing to the employer after the date of notification of the employer's decision.

Unresolved applications (subclauses 739(2) and 740(2))

22. The Bill provides no indication as to what should happen if the employee believes, rightly, that their application has been unreasonably rejected, in particular if they feel that the employer has not followed proper procedure in assessing the application. Indeed it explicitly prevents FWA from settling a dispute over whether an employer had genuine business grounds (subsections 739(2) and 740(2)).

23. The UK standard does not provide for third party arbitration of a dispute over whether the employer's business reasons are appropriate. However, it does allow for external formal complaints to be made for conciliation, mediation or arbitration (to an employment tribunal or ACAS arbitration) where either:

> the employer has failed to follow the procedure properly; or

[13] BERR (2007b). Flexible working: the right to request and the duty to consider. Part 2. *URN No: 07/1390/A2.* London, Department for Business Enterprise and Regulatory Reform.

the decision by the employer to reject an application was based on incorrect facts.

24. Such mechanisms help ensure that the employer follows sound procedures and bases decisions on the facts of the case, without allowing a third party to determine the business decisions of the employer.

25. The Bill should include a right of employees to apply to Fair Work Australia for resolution of a dispute over a request for flexible working arrangements, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts.

26. Even if the Parliament decides that employees should not have an automatic right through legislation to have FWA settle a dispute over whether an employer had reasonable business grounds, this should not preclude employers and employees reaching agreement that, if such disputes arise, the matter can be settled by FWA (or any other entity). If the parties agree that this form of arbitration is permissible, the law should not prevent them from doing so.

27. Accordingly, clause 739(2) should be amended by adding a sentence stating that FWA may deal with a dispute over whether an employer had reasonable business grounds under subsection 65(5) or 76(4) where the enterprise agreement that applies to the relevant employee permits such arbitration to occur.

28. Similarly, clause 740(2) should be amended by adding a sentence stating that a person other than FWA may deal with a dispute over whether an employer had reasonable business grounds under subsection 65(5) or 76(4) where the enterprise agreement that applies to the relevant employee permits such arbitration to occur.

29. This would also amend the note that appears at the end of clause 186.

Conclusion

30. Having access to flexible working arrangements that benefit the employee is crucial to carers and parents looking after children and adults with disabilities and chronic illness. It is important that this right, proposed in the national employment standards, be extended from parents of pre-school aged children to parents of children with a disability or chronic illness and to carers of adults with a disability or chronic illness.

31. It is also important that this right be given real meaning, and contain procedures that ensure that any request is genuinely taken seriously by the employer. This includes allowing appeals to the employer when a request is initially refused, providing a right for employees to meet with the employer (with a colleague) to discuss the application, and enabling settlement of disputes where the parties wish, in an enterprise agreement, to allow such settlement to take place.

References

BERR (2007a). Flexible working: the right to request and the duty to consider. Part 1. *URN No: 07/1390/A1*. London, Department for Business Enterprise and Regulatory Reform.

BERR (2007b). Flexible working: the right to request and the duty to consider. Part 2. *URN No: 07/1390/A2*. London, Department for Business Enterprise and Regulatory Reform.

CIPD/KPMG (2006). Labour market outlook. London, Chartered Institute of Personnel and Development. November

EOC (2007). Enter the timelords: Transforming work to meet the future. *Final report of the EOC's investigation into the Transformation of Work*. Manchester, Equal Opportunities Commission. June.

Hegewisch, A. (2005). Employers and European Flexible Working Rights: When the Floodgates Were Opened. *Issue Brief*. San Francisco, Centre for work life law. Autumn.

Holmes, K., C. Ivins, J. Hansom, D. Smeaton & D. Yaxley (2007). The future of work: individuals and workplace transformation. *Working Paper Series*. Manchester, EOC.

Hooker, H., F. Neathey, J. Casebourne & M. Munro (2006). The Third work-life balance employees survey: executive summary. *Employment Relations Research Series No. 58*. London, DTI.

Senate Standing Committee on Education, E. a. W. R. (2009). Fair Work Bill 2008 [Provisions]. Canberra, Senate. 26 February.