Family-friendly Work Practices and The Law

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Abstract

Finding an acceptable and workable balance between paid work and family commitments 'is one of the central tasks for employment law.' For women, finding this balance is also fundamental to the quest for gender equality in work. In this paper, prompted by a number of recent cases, we examine how two alternative regulatory approaches in employment law can be — and have been — used to enforce or encourage work practices that are family-friendly and hence assist in achieving the two related goals of a more acceptable work-family balance and gender equality in work. On the one hand are public equality laws, and on the other private contract law.

The claimants in the cases we consider used these two approaches to make claims for particular family-friendly provisions, specifically unpaid maternity leave and the right to work part-time hours after maternity leave. These are only two particular benefits, but we consider these as examples of family-friendly practices more generally and attempt to draw implications for a wider range of practices. While Australian anti-discrimination legislation is primarily reactive and does not impose any positive duty on employers, by characterising practices that are contrary to work-family balance as discriminatory (on the basis of sex or pregnancy), workers in these cases had some success in compelling family-friendly practices. Further the cases show that human resource policies and manuals that express aspirations about commitments to work-life balance and family-friendly practices can be contractually enforceable.

1. Introduction

In a chapter titled 'Work and Life' in his book *Employment Law*, Hugh Collins narrates the story of the Luddite rebellion in 1812 against the mill owners who threatened to impose a 'new geography of industrialisation' on the common people — a brutal separation between work time in the factory, and domestic life.[1] Contemporary life is a testimony to the mill owners' success. Many working people struggle to balance the competing demands of paid work away from home

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1 Hugh Collins, *Employment Law* (2003) at 77.

and their non-work commitments. Family caring responsibilities are the most common non-work commitments that compete with work demands. Finding an acceptable and workable balance between paid work and family commitments 'has been, and will continue to be, one of the central tasks for employment law'.[2]

For women, finding an acceptable balance between paid work and family commitments is also fundamental to the quest for gender equality in work. The biological role that women play in child bearing and the traditional role they play in caring for dependants in our society are undoubtedly significant factors in the disadvantage they continue to experience in the workplace.

In this paper, prompted by a number of recent cases, we examine how two alternative regulatory approaches in employment law can be — and have been — used to enforce or encourage work practices that are family-friendly and hence assist in achieving a more acceptable work-family balance. On the one hand are public equality laws, and on the other private contract law.

2. *Work-Family Balance & Family-Friendly Practices*

Family-friendly work practices form a central plank in strategies for achieving work-family balance, along with accessible and affordable dependant care services, supportive social structures and public income support. While 'family-friendly' is now a familiar term, what sort of practices does the term cover? On a pragmatic level, family-friendly practices are simply practices that help workers balance their family and employment responsibilities and aspirations. They include providing: parental leave and other family leave, the option of working part-time or job-sharing, support for or access to dependant care services, and flexible work hours and locations.[3]

On a deeper level, the aspiration for family-friendly workplaces challenges the structures that define the stereotypically 'ideal' worker[4] in a workplace. In most workplaces, the 'ideal' worker has been constructed as one who is able to work full-time and long hours, can cope with demands to work overtime on short notice (and often without further remuneration), and does not require any flexibility or

2 Id at 78.

3 For a discussion of the range and development of family-friendly arrangements (including a typology) in Australian workplaces, see Glenda Strachan & John Burgess, 'The "Family Friendly" Workplace: Origins, Meaning and Application at Australian Workplaces' (1998) 19(4) *Int'l J of Manpower* 250. Strachan and Burgess rightly point out that a broad categorisation of family-friendly arrangements would also include 'income security' and 'employment security' as employment that provides insufficient income to support a family will 'put pressure on family living standards and family structures' and 'insecure employment reduces the opportunity for planning and financial commitment, and may be often associated with benefit exclusion'. Id at 251. For a government summary of family-friendly provisions in Australian workplaces see Australian Government Department of Family and Community Services, *OECD Review of Family Friendly Policies: The Reconciliation of Work and Family Life: Australia's Background Report* (2002) at 46–50.

4 The notion of an 'ideal' worker being unencumbered or independent of non-work demands is raised in much of the feminist literature on work and gender. See, for example, Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000) at 2.

HeinOnline -- 26 Sydney L. Rev. 396 2004

extended leave to deal with competing, non-work demands.[5] It is no wonder that the typical working parent is rarely an 'ideal' worker. Family caring work is time-consuming and the demands of childcare are both relentlessly routine, and yet often unpredictable. Sick children also demand immediate, unpaid overtime from their carers. This can certainly limit a worker's capacity to put in long hours or be infinitely flexible about overtime or varying hours. But does this mean that the typical parent or carer is a less valuable worker? Is the stereotypical 'ideal' an appropriate measure? In this ideal, time, and specifically 'face time' or visibility at the workplace, and absolute flexibility are used as direct or proxy measures for value. For a start, information technology and email communication offer many workers the opportunity to work from home, without the need to be geographically on site, although we note that changing the location of work will not alone address the central issue of conflicting time demands.[6] An employer willing to revise criteria for staff selection, reward and promotion to value productivity, loyalty, commitment, creativity and other contributions, not merely face time, can create a truly family-friendly work culture,[7] which allows parents to better participate and compete in the workplace without compromising fulfilment of family obligations.[8]

It is in this way that family-friendly practices are also gender-equality practices. While generally framed in gender-neutral terms, the underlying company policies of family-friendly practices are largely directed toward women in recognition of the biological and cultural role women play in relation to family.[9] In this way, these policies can work to attract, motivate and retain women as employees. By helping to reduce conflicts between family and work responsibilities, conflicts most acutely experienced by women, family-friendly practices can both effect and signify the cultural and structural changes needed to bring about greater gender equality in the workforce. It should be noted, however, that family-friendly policies that are directed toward women can also have the perverse effect of further entrenching traditional, gendered divisions of family caring responsibilities.[10] Truly gender-neutral policies can enable and even encourage men to take up greater responsibility for family caring work, as well as enabling women who hold such responsibilities to participate more easily.

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5 For a more detailed analysis of the way in which time norms structure the 'ideal' worker, see Belinda Smith, 'Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change' (2002) 11 *Columbia J of Gender & Law* 271, Part II.

6 Michelle Travis argues that without significant external control, technological innovation can be simply adapted to and governed by the existing employment structures and gender roles rather than challenge or transform existing gender norms in the workplace or the home. Michelle A Travis, 'Equality in the Virtual Workplace' (2003) 24 *Berkeley J Emp & Lab L* at 283.

7 See Lotte Bailyn, *Breaking the Mold: Women, Men, and Time in the New Corporate World* (1993) at xii for an argument that the introduction of family-friendly benefits is not enough to achieve real change and instead 'companies *must* include – explicitly, imaginatively, and effectively – the private needs of employees when reengineering their work'.

8 Smith, above n5.

9 For a comprehensive analysis of the limited use Australian men make of family-friendly work provisions see Michael Bittman, Sonia Hoffmann & Denise Thompson, Australian Government Department of Family and Community Services, *Men's Uptake of Family-Friendly Employment Provisions*, Policy Research Paper Number 22 (Canberra: AGPS, 2004).

HeinOnline -- 26 Sydney L. Rev. 397 2004

3. *Gender Equality & Regulatory Tools*

Those who advocate a more acceptable work-family balance are faced with a raft of regulatory tools that could be used to achieve this. The diversity of employment and family needs that must be balanced suggests that no single regulatory approach would be adequate to solve the work-family challenge. Dickens proposes that to achieve equality in work, a tripod of regulatory approaches needs to be adopted as a multi-pronged strategy encompassing legal regulation (or legislation), joint or social regulation (collective bargaining) and, in effect, the unilateral regulation of employers that is primarily driven by business case arguments.[11]

Baird, Brennan and Cutcher support this, arguing in the Australian context that such an approach might be the best way to achieve paid maternity leave, which is a key step in the quest for equality in relation to family responsibilities work disadvantage.[12] They, among others, have examined how each prong or regulatory mechanism has been used with some success to achieve work entitlements that are 'family-friendly' or supportive of family commitments.

Legislation, for instance, has been used to provide most employees with an entitlement to (unpaid) maternity and paternity leave under either the *Workplace Relations Act* 1996 (Cth) or equivalent state legislation, such as the *Industrial Relations Act* 1996 (NSW).[13] *Paid* maternity (let alone parental) leave is notably absent from the legislative safety net,[14] other than for a select group of employees, namely some public servants.[15] Other basic family-friendly benefits, such as the right to work part-time hours, are also not found explicitly as legislative rights. However, while legislation has not explicitly prescribed many family-friendly benefits, it does provide limited equality rights that show potential as a means to assert such benefits, as we explore in this paper.

As a precursor and supplement to legislative rights to family-friendly work practices we have seen standards established in Australia through award test cases covering a variety of entitlements such as maternity leave,[16] parental leave,[17] and

10 Such concerns were expressed in the recent debate over paid maternity leave, where many advocates of paid leave argued that it should be 'parental leave' not merely maternity leave so as not to reinforce the traditionally gendered role of women caring for newborns. Belinda Smith, 'A Time to Value: Proposal for a National Paid Maternity Leave Scheme' (2003) 16(2) *AJLL* 226 at 228–229; Sex Discrimination Unit of the Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, s14.2 (*A Time to Value*) (2002).

11 Linda Dickens, 'Beyond the Business Case: A Three-Pronged Approach to Equality Action' (1999) 9(1) *Human Resource Management Journal* 9.

12 Marian Baird, Deborah Brennan & Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia' (2002) 13(1) *Labour and Industry* 1 at 3.

13 See *Workplace Relations Act* 1996 (Cth) s170KA and *Industrial Relations Act* 1996 (NSW) Ch2, Pt4.

14 This prompted the recent national inquiry by the Sex Discrimination Unit of the Human Rights and Equal Opportunity Commission, *Valuing Parenthood: Options for Paid Maternity Leave: Interim Paper 2002* (2002), culminating in a proposal for a national scheme of 14 weeks leave. *A Time to Value*, above n10. As Baird, Brennan & Cutcher sum up in relation to this particular benefit, paid maternity leave, 'The missing element in Australia is a national legislative foundation, and it is long overdue.' Baird et al, above n12 at 17.

15 See, for example, *Maternity Leave (Commonwealth Employees) Act* 1973 (Cth).

16 *Maternity Leave Case* (1979) 218 CAR 120.

HeinOnline -- 26 Sydney L. Rev. 398 2004

other family leave.[18] This mechanism is of particular importance for that section of the workforce that relies predominantly or even solely on awards for their terms and conditions of employment. But the benefit of such standards is not restricted to this group, as newly established benefits in a test case can flow through to all awards and in this way underpin bargaining, both collective and individual. The role of such test cases in raising public awareness and providing valuable research on the issues should also not be underestimated; they can help to shift the public expectation of a safety net as well as the content of the legal right. The Family Provisions federal awards test case currently being run by the Australian Council of Trade Unions (ACTU)[19] demonstrates ongoing use of this mechanism as a means for establishing family-friendly entitlements in the safety net for workers.

Enterprise bargaining, or joint regulation, has become one of the means favoured by this federal Government, as well as the previous Labor government, to achieve workplace change including any changes to the compatibility of work with family responsibilities.[20] While there is potential for employees to bargain for family-friendly work benefits, being dependent on collective organisation and bargaining power this mechanism has many well-known limitations as a means of achieving better conditions for workers. Baird, Brennan and Cutcher report, in relation to one key benefit that:

> [D]espite the growing importance of enterprise bargaining and the increasing attention to the so-called 'family-friendly' issues… [the evidence does] not suggest a rapid uptake of paid maternity leave in the bargaining agenda at either the state or federal levels.[21]

And this is the case also for family-friendly conditions generally, with a number of studies reporting that only a minority of federal enterprise agreements contain family-friendly working arrangements.[22]

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17 *Parental Leave Case* (1990) 36 IR 1.

18 *Family Leave Test Case* (1994) 57 IR 121. Strachan and Burgess assert that this decision and the 1996 *Living Wage Case* were, at the time of their writing in 1998, probably the most important recent family-friendly working developments in Australia. Strachan & Burgess, above n3 at 261.

19 See the Australian Industrial Relations Commission website for the case: <http://www.e-airc.gov.au/familyprovisions/> (last updated 14 July 2004), or the ACTU campaign site at: <http://www.actu.asn.au/public/campaigns/workandfamily/work_family_evidence.html> (21 July 2004). In this application the unions are seeking extended unpaid parental leave, secure part-time work and emergency family leave.

20 See Strachan & Burgess, above n3 at 256–257 for pronouncements of both governments on how enterprise bargaining would encourage and enable (although not guarantee) working arrangements that were more family-friendly.

21 Baird, Brennan & Cutcher, above n12 at 10.

22 Id at 259; Bittman et al, above n9 at 17–29. Further, Burgess and Strachan warn that many provisions that are supposedly family-friendly, such as flexible hours, are not necessarily so when the worker has little control. They assert that 'Flexible working arrangements often mean working over a longer time span of what constitutes the "standard" day and the "standard" week while at the same time being denied access to penalty rates for working unsociable hours'. Id at 258 (citing Belinda Probert, Department of Education, Employment and Training, *Part-time Work and Managerial Strategy: Flexibility in the New Industrial Relation Framework* (Canberra: AGPS, (1995)).

HeinOnline -- 26 Sydney L. Rev. 399 2004

The third prong of Dickens' strategy for equality is unilateral regulation, or the uptake of family-friendly provisions by management for business reasons, rather than legal compliance reasons. For inducing rather than compelling change, the business case argument has been characterised as the carrot, rather than the stick.[23] This has become the dominant approach in a neo-liberal climate and in the absence of extensive legislated entitlements or any significant emergence of such rights out of enterprise bargaining. One of the questions we examine in this paper is whether family-friendly policies adopted by management are enforceable at law.

A number of recent cases point to two regulatory approaches that need to be considered in this debate about work-family balance and gender equality in the workplace. The two approaches are public equality laws, specifically anti-discrimination legislation, and private contract law. The claimants in the cases we consider below used these two approaches to make claims for particular family-friendly provisions, specifically unpaid maternity leave and the right to work part-time hours after maternity leave. These are only two particular benefits, but we consider these as examples of family-friendly practices more generally and attempt to draw implications for a wider range of practices.

Public equality laws, in the form of anti-discrimination legislation, do not impose a command on employers to provide specific family-friendly benefits such as parental leave or the right to part-time work. In that sense, they do not provide a clear safety net or standards of conditions for workers, as a legislated entitlement to paid maternity leave, for instance, would. However, as we will see, by providing a limited right to equality in work, these laws can be used by individuals to assert such specific rights as they are needed to avoid discrimination in the particular workplace. The legislation thus operates, in effect, primarily by providing private rights of action.

Stated generally, anti-discrimination laws establish for workers the right not to be treated less favourably because of particular, personal traits. The protected trait seemingly most relevant in this debate is family responsibilities, but, as can be seen in the cases we examine below, the protection of other traits such as sex and pregnancy also provides some scope for achieving more family-friendly working conditions. So, for instance, by characterising the need for maternity leave as a characteristic appertaining generally to women who are pregnant, the prohibition on pregnancy discrimination can be employed to help pregnant workers take maternity leave without detriment.[24]

The other regulatory approach we explore is private contract law which supports consensual, and (supposedly) mutually beneficial bargains made between those who engage labour, and those who work. Through private contract law, the business case initiatives of employers acquire legal consequences. Even though family friendly initiatives may be 'volunteered' by employers (rather than won through negotiation and bargaining), once employment is accepted on those

23 Linda Dickens, 'The Business Case for Women's Equality: Is the Carrot Better than the Stick?' (1994) 16(8) *Employee Relations* 5.

24 As was the case in *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (*Thomson*).

HeinOnline -- 26 Sydney L. Rev. 400 2004

proffered terms, employees become entitled to treat these promises as legally enforceable contract rights.

Contract rights can derive (as we shall see) from 'human resources' (HR) policies and manuals now often used in contemporary workplaces, and which frequently express aspirations (albeit often in vague phraseology) about commitments to work-life balance and family-friendly work practices. These HR policy promises are perfectly genuine: for the employer they offer an opportunity to attract and retain well-trained and conscientious staff who will sometimes be willing to trade off immediate income for these valuable benefits. When in practice these promises prove difficult to fulfil, the question arises: are such promises enforceable as common law contracts? At least one federal court decision[25] in recent times has upheld a worker's contractual claim to the benefit of a family-friendly workplace policy, as we examine below.

We will examine these two avenues — public regulation in the form of anti-discrimination statutes, and private contract law — and reflect on their efficacy in meeting the needs of contemporary Australian citizens for liveable working and family lives. We take a pragmatic approach, and examine experience through the lens of recently decided cases. The cases chosen focus on the particular demands faced by women workers with new childcare responsibilities.[26]

4. Anti-Discrimination Law

While policy statements of family-friendliness might give rise to contractual obligations, as we examine below, anti-discrimination law can give rise to a wider, more general, non-contractual obligation to review and revise existing practices for their family-friendliness. Specifically, the recent cases we examine here suggest that an obligation to provide particular family-friendly practices arises out of the duty to provide a discrimination-free workplace under federal and state anti-discrimination legislation. If family-friendly practices can improve gender equality then it is not altogether surprising that their absence arguably can somehow amount to sex discrimination.

The particular cases we examine here deal with how employers handle the return to work of employees who have taken maternity leave. They show how anti-discrimination legislation can be used to improve or compensate for poor practices. In the first set of cases — *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002), and *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 (3 October 2003) — claims were made successfully that failure to return the employees to their former or comparable positions after maternity leave amounted to *direct* pregnancy discrimination. In the second set of cases — *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 (6 August 2003) and *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 (15

25 *Thomson*, above n24.

26 We acknowledge that the broader 'work-life balance' debate encompasses a range of demands for recognition of human choice in how we nurture not only our loved ones but also ourselves. Many of the same arguments could be made for people with responsibilities for the care of elderly relatives or very ill life partners.

December 2003) — the *indirect* discrimination provisions of the *Sex Discrimination Act* 1984 (Cth) (*SDA*) were used to argue (with mixed success) for the right to work part-time hours upon return from maternity leave.

Before exploring these cases in detail, it should be acknowledged that the potential for anti-discrimination legislation to bring about workplace change is naturally determined in part by the regulatory framework of these laws.[27] In particular, there are key characteristics of these laws that limit their capacity to effect widespread or systemic change in workplaces. Firstly, all anti-discrimination laws in Australia are framed in a similar way in that the primary means by which they seek to address discrimination is to provide a tort-like right for individual victims to seek redress.[28] The legislation identifies particular traits or characteristics to be protected, such as sex or race, prohibits discrimination on the grounds of these traits, and then permits the victims of such discrimination to sue the perpetrators for compensation. There is generally no public prosecution of breaches. Thus, the only real way in which discrimination prohibitions are enforced is through individuals bringing claims, at their own expense and for their own redress. Success in the litigation depends on the ability of the applicant to squeeze her real life situation into the artificial boxes of the elements of discrimination as defined under the legislation. Any system of regulation that relies on traditionally disempowered individuals being able to navigate the legal system to enforce rights is inherently limited. This reservation applies equally to enforcement of contract rights in common law courts.

Secondly, all anti-discrimination laws in Australia use confidential and compulsory conciliation as the first and primary means of resolving discrimination disputes; only after such conciliation has been tried do applicants have the option of pursuing the matter by formal hearing.[29] Most claims are settled at these conciliation conferences, with few matters ever making it to a court or tribunal. It is arguable that such an approach to dispute resolution benefits individual complainants because it is less formal and less intimidating than public litigation,[30] but the private nature of the conciliation naturally limits the public awareness and possible disapprobation brought to bear on respondents.

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27 For a comprehensive discussion of the limits on anti-discrimination legislation to achieve change and, in particular, the importance of the understanding of tribunal members and judges who hear matters that go to hearing, see Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *MULR* 325.

28 In addition to their dispute resolution roles, the administrative agencies responsible for implementing anti-discrimination legislation are generally also charged with addressing discrimination by other regulatory means, such as education and training. See, for example, s11(1)(h) *Human Rights and Equal Opportunity Commission [HREOC] Act* 1986 (Cth) empowers the HREOC to undertake research and educational programs to promote human rights.

29 See, for example, *Anti-Discrimination Act* 1977) (*ADA*), s92 Resolution of complaint by conciliation and s94 Reference of complaints to the Tribunal. Note that it is not compulsory to hold a conciliation conference; it is compulsory to attend if one is held. The agency has discretion to decide not to conciliate on the basis that the matter is unlikely to be resolved by conciliation.

HeinOnline -- 26 Sydney L. Rev. 402 2004

Finally, whether by settlement or court order, damages pay-outs are often quite low. In some jurisdictions, such as New South Wales, damages are also limited by a statutory cap.[31] In this way, Australian anti-discrimination legislation lacks even the threat of a big stick to compel or encourage compliance with non-discriminatory norms.[32]

Some commentators remind us that, while these limitations are significant, anti-discrimination legislation still plays an important role in struggles for equality. In proposing her tripod of regulatory approaches, Dickens points out the potential that such equality legislation presents, arguing that it can play an important role in, for example,

> setting and broadening employer equality agendas; in shaping the climate within which employer decisions are taken (a 'symbolic' function of law); in providing universal standards and minima, thus generalising and underpinning good practice; and in altering the costs of discrimination and employer inaction.[33]

We examine here how the individual applicants in these particular cases fared and ponder the implications of these cases. But, in contemplating the nature of any legal duty imposed by anti-discrimination law, it is worth bearing in mind some of these inherent limitations of the regulation to achieve widespread or systemic change.

A. Maternity Leave

To appreciate the significance of the first cases, *Thomson* and *Rispoli*, we first need to remind ourselves of the nature of maternity leave in Australia.

Maternity leave in Australia is still largely unpaid.[34] Only 38 per cent of female employees have any legal entitlement to paid maternity leave and 'there are very limited cases in Australia where women receive the international standard of a minimum of 14 weeks [and] in many cases available leave falls well short of this standard.'[35] As noted above, there is no right to paid maternity leave provided for

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30 For one critique of this see Margaret Thornton, 'Equivocations of Conciliation: the Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Mod LR* 733. See also Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) at 362.

31 $40 000 in New South Wales. See s113(4) *ADA*.

32 This can be contrasted with potentially huge damages pay-outs under discrimination suits in the United States where, under federal legislation, liability and damages awards for discrimination are not capped and are usually decided by juries. As Susan Sturm explores, the potential liability for very large damages payments has fostered the development of insurance policies against liability. Interestingly, this in turn has prompted the insurers to promote or even require as a policy condition the auditing and improvement of management practices to minimise the incident of discrimination and hence the risk of liability. Insurers have thus become significant actors in initiating measures to avoid discrimination in the workplace. Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101(3) *Colum LR* 458.

33 Dickens, above n11 at 13. Each of these roles warrants a further exploration but must be left for another paper.

34 *A Time to Value*, above n10 at 28–36. HREOC reports that 'The most recent data on paid leave arrangements found that 38 per cent of female employees reported that they were entitled to some form of paid maternity leave' and concludes 'Existing paid maternity leave arrangements are limited, haphazard and fall significantly below what could be considered a national system'. Id at 29 and 25, respectively.

35 Id at 35.

in legislation, other than for some public servants. While it can be provided for in enterprise agreements, the evidence shows that only approximately seven per cent of federal enterprise agreements provide such leave,[36] and an even smaller proportion of federal awards,[37] leaving this important benefit largely to individual arrangements and company policies.

Despite the efforts of the federal Sex Discrimination Unit in researching, consulting and developing a comprehensive and credibly costed proposal for a national paid maternity leave scheme of 14 weeks of government funded leave,[38] no such scheme has yet been developed. And we suggest no one hold their breath waiting for one, with both the Government and federal Opposition supporting instead a 'baby bonus' lump sum means-tested payment to be made to all mothers, irrespective of employment.

However, the entitlement to unpaid maternity leave is quite widespread and it has a relatively long history in Australia. Under federal law this dates from 1973 for Commonwealth employees,[39] 1979 for federal award employees[40] and currently exists as a minimum entitlement under the *Workplace Relations Act* 1996 (Cth).[41] As noted above, State legislation similarly provides for unpaid parental leave,[42] with some states having more liberal eligibility criteria than under the federal entitlement.[43]

Being unpaid leave, the essence of maternity leave for most Australian women is the right to take time off work for the birth (or adoption) of a child and to return to the same or equivalent position afterwards. In effect, the right is simply and only one of job security — the right to get your old job back at the end of the leave, as one does after sick leave, annual leave, long service leave and the like.

But what aspects of the job are secure and how can this security be enforced? The *Thomson* and *Rispoli* cases provide one answer. We focus on *Thomson v Orica* because it was the first of these cases, more comprehensively reasoned, issued by the Federal Court, and it was applied in *Rispoli*.

(i) Facts — Thomson v Orica

The Thomson and Orica dispute arose out of the following facts. Cynthia Thomson started working for Orica Australia Pty Ltd in 1989, had taken maternity leave without a hitch in 1996–97 and had then worked her way up to a key account manager position before seeking to take maternity leave again in 1999. Her boss reacted angrily to this request shouting that he 'would never employ a female

36 Id at 30 reporting that 'for the two-year period from 1 January 2000 to 31 December 2001 seven per cent of federal certified agreements made in that period contained paid maternity provisions, a decrease of three per cent from the 1998–1999 period.'

37 HREOC reports that a 2000 'review of 100 federal awards with the highest coverage of workers… found that only six federal awards included provision for paid parental leave.' Ibid.

38 Ibid. See Smith, above n10 for an outline and summary of the report.

39 *Maternity Leave (Commonwealth Employees) Act* 1973 (Cth).

40 *Maternity Leave* Case (1979) 218 CAR 120.

41 Section 170KA.

42 See, for example, *Industrial Relations Act* 1996 (NSW) Ch2, Pt4.

43 For example, the *Industrial Relations Act* 1996 (NSW) extends eligibility to 'regular casual employees' as defined in s53(2).

HeinOnline -- 26 Sydney L. Rev. 404 2004

again', that 'there's laws against this' and that 'now I've got *three* women on maternity leave'.[44]

Thomson took her leave, but on returning was not allowed to resume her former position, which continued to be occupied by her replacement. Instead of being returned to her position as an account manager for select high value clients in the Chemnet division of the company, she was to be placed in a position managing a multitude of lower value clients in the Spectrum division. While the salary and job title were unchanged, the new position was found to be an inferior position in two ways: lower status and significantly less responsibility. The replacement employee certainly experienced her move as a significant promotion and did not want to be returned to the position Thomson was being offered.

Orica had a family leave policy that reflected legislative entitlements to maternity leave under the *Industrial Relations Act* 1996 (NSW).[45] It provided that an employee was entitled to maternity leave and, after their leave, entitled 'to return to their previous position, or if this no longer exists, to a comparable position if available'.

(ii) Discrimination Claims — Thomson v Orica

Cynthia Thomson argued that the promise to return her to her former or comparable position after maternity leave covered not only her pay and official title, but also the benefit of a particular level of responsibilities and status. She argued successfully that the position she was in fact returned to was not comparable in these ways, and that as a result, she suffered loss or injury for which Orica should be liable. She argued that this failure to reinstate her into a comparable position amounted to direct pregnancy discrimination because Orica had, in effect, used her pregnancy (or her maternity leave) as a basis for the change.

Direct pregnancy discrimination under the *SDA* was the primary claim in this case. Thomson argued that Orica discriminated against her on the basis of pregnancy, by not returning her to her former or a comparable position upon her return from maternity leave. Cast in the language of anti-discrimination law the question posed to the Court was: Did the applicant suffer a detriment in employment from being treated less favourably than someone who was not pregnant in circumstances that were not materially different because of her pregnancy? In essence, Thomson argued:

- that she was demoted on return from maternity leave;
- that maternity leave is a '*characteristic appertaining generally*' to pregnancy;
- that she was demoted *because* she took maternity leave, and thus demotion amounted to pregnancy discrimination.

DETRIMENT?

Thomson argued that she suffered detriment in various ways,[46] including, centrally, a demotion. However, the question of whether Thomson was demoted at

44 *Thomson*, above n24 at para 51 (emphasis in the original).

45 *Industrial Relations Act* 1996 (NSW) s66.

46 *Thomson*, above n24 at para 149.

HeinOnline -- 26 Sydney L. Rev. 405 2004

all was a surprisingly contentious one and much of the judgment focused on the evidence about this. Orica's position was that so long as it maintained Thomson's salary, title and grade, it could allocate work without this amounting to a breach of policy (or contract) and, importantly for the discrimination action, without it amounting to a detriment in employment.

To determine whether Thomson had suffered a detriment Allsop J looked at her treatment and the company's policy. Thomson had not argued that the policy should include maternity leave; it did include this benefit. She argued, in effect, that the company had not applied the policy correctly and, in doing so, had imposed a detriment or treated her less favourably. Looking at the use of the term 'position' in the company's policy, Allsop J held that position was more than merely grade and salary. He also noted that the policy was likely to have been based on similar legislative rights in the *Industrial Relations Act* 1996 (NSW) (and its predecessors), and that a similar conclusion had been reached in jurisprudence on these provisions.[47] He found that 'Thomson was offered duties and responsibilities of significantly reduced importance and status, of a character amounting to a demotion (though not in official status or salary)',[48] and 'no one with any experience in the organisation of Orica could have realistically or rationally thought otherwise'.[49]

Although not radical, this is an important finding. It says to employers that aspects of employment such as status and responsibilities are important to employees and that these benefits are not necessarily discretionary. They may in fact be enforceable. Contract law has already been used to show that employment is more than a work-wage bargain; a significant reduction in responsibilities or status can constitute a repudiation of the contract. And, in a new economy where future employability may ride on one's existing status and responsibilities, the value of these aspects of employment has probably only increased.

'Characteristic Appertaining Generally'

How does pregnancy relate to maternity leave under anti-discrimination legislation? The *SDA*, like other anti-discrimination legislation,[50] specifically expands protection to cover not only the particular trait but also a penumbra of characteristics that appertain generally or are imputed to people with the protected trait.[51] Allsop J readily accepted that maternity leave, 'the taking of a period of leave before and following the birth of a child,' was a characteristic that *appertains generally* to women who are pregnant.[52] No argument was put to the contrary.

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47 Id at paras 133–134 citing *Illawarra County Council v Federated Municipal & Shire Employees' Union of Australia* (1985) 11 IR 18.

48 *Thomson*, above n24 at para 53.

49 Id at para 110.

50 For example, *ADA* (NSW) s24(1A) (sex discrimination).

51 See, for example, *SDA* s7(1)(b) and (c), respectively.

52 *Thomson*, above n24 at paras 165–166. In accepting this Allsop J at para 166 applied the decision of the Human Rights and Equal Opportunity Commission in *Gibbs v Australian Wool Corporation* (1990) EOC 92–327.

HeinOnline -- 26 Sydney L. Rev. 406 2004

This finding could have proven to be a critical step in establishing that the employer conduct was discriminatory. Ultimately, as we see below, the significance of this was moderated by the way Allsop J framed the comparator question.

CAUSATION

Ultimately, the real challenge for Allsop J was to decide causation: Was the demotion 'because of' pregnancy, or a characteristic appertaining generally to pregnancy, and therefore prohibited discrimination?

The causation and comparator questions under Australian anti-discrimination legislation are often, and perhaps necessarily, conflated. Most Australian legislation employs a comparator model, asking the applicant to show that they have been treated less favourably than someone in similar circumstances who does not have the protected trait.[53] In theory, such a comparison should be useful in illuminating the cause or true basis of any different treatment: if all circumstances are equalised and the only difference between the applicant and the comparator is the protected trait, then we should be able to conclude by implication that the treatment was 'because of' that protected trait.

However, this exercise has not proven easy or, in many cases, even useful. The comparator requirement poses all sorts of difficulties. For Thomson, the first difficulty was in trying to establish the attributes of the comparator. The second was having to show causation as a separate and additional element.

What attributes should the comparator have? Allsop J struggled with this question. It is clear that the comparator cannot be pregnant. That is, they must not have the very trait that is to be protected; the legislation says this much. But what about the other characteristics of a pregnant person? And why does this matter?

If the taking of maternity leave is a characteristic generally appertaining to pregnancy, can this characteristic be attributed to the comparator? The legislation requires that the circumstances of the comparator be not materially different. The critical question is: If something is accepted as a characteristic (that is, identified as integrally part of the trait that is being protected), can it also be a material circumstance (that must be attributed to the comparator in order to take it out of the equation)? Applied to the Thomson facts, the question becomes: Should Thomson, who took maternity leave, be compared with someone who has also taken leave — treating leave as a circumstance — or should she be compared with someone who has not taken any leave?

While Allsop J accepted that the taking of maternity leave was a characteristic appertaining generally to pregnancy, he then refused to say the legislation required that someone taking maternity leave should be treated as well as someone who has not taken any leave at all. In trying desperately to ensure that all material circumstances were removed from the equation, his Honour identified the comparator as:

53 See, for example, *SDA* s5(1), *ADA* s24(1)(a).

> a similarly graded account manager with Ms Thomson's experience *who, with Orica's consent, took twelve months leave and wanted to return [and] ... had a right to return on the same basis as Ms Thomson*. [Emphasis added.][54]

By attributing the comparator with the taking of leave the Court thereby accepted that the employer merely had to treat those returning from maternity leave as it would treat those returning from any other sort of similar leave. Fortunately for Thomson's case, Allsop J did find that she was treated less favourably than such a comparator in that the returning policy was not properly followed in respect of Thomson and there was no evidence that Orica would treat a comparator employee contrary to its own policy on leave.

His Honour is not alone in adopting this reasoning. A similar question was posed for the High Court in the recent case of *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (11 November 2003),[55] where this approach was adopted by the majority (although on the basis of slightly different legislation). Justices Kirby and McHugh, however, in the *Purvis* dissent offer a comprehensive, progressive and persuasive argument for the alternative reasoning.[56] They state unambiguously:

> Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator.[57]

They cite numerous cases in support of this interpretation, starting with the oft-quoted words of Sir Ronald Wilson in *Sullivan v Department of Defence* (1992) EOC 92-421 at 79 005:

> It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment… could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.[58]

It is arguable that the majority of the Court was pushed to adopt this approach in *Purvis* due to an apparent anomaly in the relevant legislation, which denied the respondent a defence of 'unjustifiable hardship'[59] in trying to cope with the

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54 *Thomson*, above n24 at para 121.

55 This was a direct disability discrimination claim under the *Disability Discrimination Act* 1992 (Cth). In brief, the case concerned a challenge to a school decision to remove the applicant, a disabled boy, from a mainstream school because of his violent behaviour toward staff and other students. The key questions were whether his behaviour was the reason for the decision, whether his treatment should be compared with someone who exhibited the same behaviour but who was not disabled and whether the behaviour could be considered so inseparable from the disability that a decision based on the behaviour was a decision based on the disability.

56 McHugh & Kirby JJ dissented. *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 at paras 16–176.

57 Id at para 119.

58 Ibid.

HeinOnline -- 26 Sydney L. Rev. 408 2004

demands of a violent disabled student. However, the Court did not suggest that their reasoning should be limited to the facts of the case or even to the disability discrimination legislation. The implications are consequently quite significant, potentially limiting the scope of anti-discrimination provisions which were arguably inserted in order to extend protection beyond some narrow understanding of the trait to reach characteristics associated with or stereotypes attributed to those who held the trait.

While the Thomson case shows that even under this narrow interpretation a court might still, at a stretch, find that the treatment was discriminatory, it certainly makes it harder to show that the trait is ever the reason for the poor treatment. It denies the special status that the legislation aims to give, in this case to pregnancy, in order to eradicate discrimination. The bottom line is that giving the comparator an attribute that relates to the protected trait undermines the very protection that the legislation aims to afford.

Despite this more difficult test, Thomson was still able to establish that she was treated less favourably than a comparator. However, under Allsop J's interpretation, she faced yet another hurdle of having to establish that this different treatment was *because of* the trait of pregnancy. Why this additional step? Because the comparator question generally is, and was in this case, interpreted as a distinct element of the action, rather than as a means of establishing causation.

Fortunately, or unfortunately, for Thomson, she had the best kind of evidence for proving causation: her boss had expressed blatant hostility and prejudice about pregnancy and the taking of maternity leave to her face. Recall the outburst upon her request for maternity leave? Those harsh statements, coupled with the lack of a credible reason for the change to Thomson's position, led to a finding that the taking of maternity leave was, at least in part, the reason for Thomson's dismissal.[60]

(iii) Rispoli v Merck Sharpe & Dohme

The facts in the case of *Rispoli* were very similar to those in Thomson. Frances Rispoli held a relatively senior managerial position before taking maternity leave and she took this leave with an assurance that she would be returned to her former or equivalent position. This assurance was based on company policy, which, in turn, reflected industrial relations legislation. When Rispoli returned from leave she found that her remuneration was maintained, but her new position was two grades lower and there was an equivalent loss of status.[61] She accepted this new position for approximately 12 months, and was then unsuccessful in getting the discrepancy rectified when she finally raised it with her employer. This prompted the discrimination claim.

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59 The *Disability Discrimination Act* (1992) (Cth) provides that in deciding whether to accept into a school, but not in deciding whether to expel a student, educators are permitted a defence to discrimination of 'unjustifiable hardship'.

60 *Thomson*, above n24 at paras 163–164.

61 *Rispoli v Merck Sharpe & Dohme & Ors* [2003] FMCA 160 at para 78.

As in *Thomson*, Rispoli argued that the promise to return her to her former or comparable position after maternity leave covered not only her pay and official title, but also the benefit of a particular level of responsibilities and status, and failure to provide these amounted to direct pregnancy discrimination.

In this case Driver FM applied the reasoning of Allsop J in *Thomson*. He concluded that Rispoli had not been returned to a comparable position on returning from maternity leave and that this amounted to a demotion and a breach of the company policy[62] (as well as a breach of the contract of employment, as discussed below). Further, Rispoli suffered pregnancy discrimination in that she was 'treated less favourably than a comparable employee would have been who was not pregnant and who was returning after nine months leave and with rights of the kind reflected in the maternity leave policy.'[63]

B. Part-time Work after Maternity Leave

While maternity leave is critical, it represents only the first stage of the work-family balancing act for new parents. The sleepless nights might abate, but the challenges of parenting certainly do not magically stop at the end of maternity leave! And so we turn to the ongoing needs of mothers once they return from maternity leave.

One way that many mothers try to cope with the sometimes competing demands of work and parenting is by changing from full-time to part-time working hours. Continuing our look at anti-discrimination law, the question considered here is whether anti-discrimination law provides any basis for asserting a right to make this shift within a job.

As with the cases just discussed, it is arguable that the general duty to provide a discrimination-free workplace might compel this family-friendly practice. A number of recent federal cases — namely *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 and *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 — have dealt with the claim that the failure to allow this change in hours amounts to sex discrimination under the *SDA*.

This is not a new idea: over 10 years ago Rosemary Hunter suggested that the requirement to work full time could amount to indirect sex discrimination against women.[64] There have also been a few cases which have successfully shown this,[65] although mostly they have been from different jurisdictions or decided by administrative tribunals and thus of limited value as precedents for Mayer and Kelly. Nonetheless, they are worth noting here if only to provide the jurisprudential context in which the Mayer and Kelly claims were brought.

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62 *Rispoli*, above n61 at para 82. See below, Implication in Fact, below n99 onwards, for a discussion of how the policy in this case was found to be contractually binding.

63 Ibid.

64 Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) at 156–158. See also Rosemary Hunter 'Part-time Work and Indirect Discrimination' (1996) 21 *Alt L J* 220 (exploring Australian cases to see how career advancement depends on working full-time hours).

65 Beth Gaze provides a useful analysis of these cases and relevant legal literature on part-time work in 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 1(2) *QUTLJJ* 199.

HeinOnline -- 26 Sydney L. Rev. 410 2004

The earliest case in which this argument was made successfully in Anglo-Australian equality jurisprudence appears to be *Holmes v Home Office* [1984] 3 All ER 449. The employer, the Home Office, was found to have indirectly discriminated on the ground of sex for refusing to allow Holmes to work part-time after maternity leave without an acceptable justification. In the UK at least this jurisprudence has developed quite favourably for applicants, prompted primarily by various EU directives on equality and part-time work.[66]

The first successful Australian claim was in the case of *Hickie v Hunt and Hunt* [1998] HREOCA 8. Marea Hickie successfully claimed that Hunt and Hunt's requirement that she return to her contract partner position on a full-time basis after maternity leave, and the non-renewal of that contract for failing to return on this basis, amounted to indirect sex discrimination. Hickie had actually returned to work under a part-time work agreement with the firm, but was then subjected to conditions and performance evaluations that were found to constitute an expectation or requirement to work full-time. Unfortunately, the decision provides very little explanation of the reasoning used by Commissioner Evatt to reach this outcome, confining the finding largely to the facts of the case.

In another tribunal decision, *Bogle v Metropolitan Health Service Board* (2000) EOC 93-069, the Equal Opportunity Tribunal of Western Australia found that the Board had discriminated indirectly against Bogle on the ground of 'family responsibilities' under the *Equal Opportunity Act* 1984 (WA), in not allowing her to return to work part-time as a supervisory dental nurse after her maternity leave. This decision is important as it found against the Board, finding that the Board's decision-making in relation to Bogle was tainted by assumptions or beliefs about whether the job could be carried out on a job-share basis, which did not amount to an adequate justification for refusing the switch to part-time work.

Finally, *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122, was the first Australian case in which this claim was argued before a court, in addition to a claim for direct discrimination on the basis of family responsibilities. The Court found that Escobar was dismissed from employment because she was unavailable for full-time work after maternity leave (due to family responsibilities) and the employer was unwilling to consider a part-time position. On this basis the Court held that the dismissal was because of family responsibilities and, in the alternative, that the employer had indirectly discriminated against Escobar on the basis of sex because the refusal to consider part-time hours was likely to disadvantage women because of their disproportionate child care responsibilities.[67]

Turning to *Mayer* and *Kelly*, we will see that while *Mayer* appears to build on the case for the right to part-time work, *Kelly* seems to throw the question open again.

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66 See Joanne Conaghan, 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on London Underground Ltd v Edwards' in Hugh Collins, Paul Davies & Roger Rideout (eds), *Legal Regulation of the Employment Relations* (2000).

67 *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122 at [37].

HeinOnline -- 26 Sydney L. Rev. 411 2004

(i) Facts — Mayer v ANSTO and Kelly v TPG

In both cases, the applicants were employed in full-time positions prior to taking maternity leave and sought, but were refused, the option of working part-time upon their return.

Samantha Mayer was employed full-time in a professional position, as a Business Development Manager, by the Australian Nuclear Science and Technology Organisation ('ANSTO') on a three-year contract. She advised ANSTO that she intended to take 12 months maternity leave. She also indicated that she would like to return to work part-time, but nothing was agreed to or even discussed at this stage. (Note that prior to taking leave ANSTO renewed Mayer's contract but only for a year, whereas it was usual for renewals to be for the same period or more. This conduct by ANSTO was found to be direct pregnancy discrimination).

Three months before returning to work, Mayer asked about the possibility of returning part-time, noting that she could not get full-time child care. She was advised by ANSTO that her position could not be done on a part-time basis and thus her request was denied. However, there was evidence that her immediate supervisor had identified 'many projects' on which Mayer could have been engaged in a part-time capacity for the remainder of her contract. This option was never offered and Mayer treated the contract as terminated.

In the other case of *Kelly v TPG Internet*, Rebecca Kelly had worked in a relatively senior role, as Corporate Billing Supervisor of TPG Internet, prior to taking maternity leave. (Similarly, she too made a successful claim of direct pregnancy discrimination for treatment she received prior to taking leave, namely her appointment to a more senior position on an acting rather than permanent basis.) About three months before the date she was due to return from maternity leave Kelly asked whether she could return on a part-time basis, however there was some confusion on the part of TPG about her entitlement to return at all prior to a full 12 months of leave. Significantly Kelly not only asked to return part-time, but she was also looking for a base salary in excess of that which she had been earning prior to taking leave and she indicated that she did not want to return to the call centre division of the company.

TPG's response was to offer Kelly her original full-time position, or a *casual* reduced hours position, but only at her old rate of pay, and only in the call centre. Kelly treated these offers as terminating her employment, accepting them as a repudiation of the contract of employment.

(ii) Discrimination Claims

In both of these cases, the central claims in respect of part-time hours were framed as *indirect* sex discrimination under the SDA. The argument was that by not allowing the change to part-time hours the employer (a) imposed a condition or requirement of full-time hours that (b) had, or was likely to have, the effect of disadvantaging women, and this constituted sex discrimination.[68]

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68 *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 at para 71; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 at para 58.

HeinOnline -- 26 Sydney L. Rev. 412 2004

Under the *SDA* indirect discrimination is prohibited in respect of dismissing employees, in the offering of terms and conditions of employment, denying them access to benefits, or subjecting employees to any other detriment.[69] In both cases the applicants argued that the imposition of the requirement amounted to constructive dismissal.

MAYER V ANSTO

Mayer was successful in proving indirect sex discrimination.[70] In finding discrimination, Driver FM firstly found that Mayer was constructively dismissed on the basis of her sex when ANSTO, by refusing the request to work part-time, 'made it impossible for [her] to return to work at all'.[71] Interpreting this term widely, he further accepted that this refusal constituted a condition under the *SDA*.[72]

Federal Magistrate Driver required little to convince him of the second part of the discrimination test, that such a requirement has, or is likely to have, the effect of disadvantaging women. He stated:

> I need no evidence to establish that women per se are disadvantaged by a requirement that they work full time. As I observed in *Escobar v Rainbow Printing* [(no 2) [2002] FMCA 122] and as Commissioner Evatt found in *Hickie v Hunt & Hunt* [[1998] HREOCA 8], women are 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.[73]

The key issue in the Mayer case was whether the requirement to work full time was reasonable in all the circumstances. The 1995 amendments to the *SDA* mean the applicant no longer bears the onus in indirect discrimination claims of establishing that the requirement or condition is not reasonable, but the respondent can plead reasonableness as a justification and defence.[74] ANSTO failed to prove that the requirement was reasonable, primarily because of a single critical piece of evidence which showed that appropriate work for a part-time position was available but not offered to Mayer.[75] Importantly, it was reasonable for ANSTO to refuse job sharing or working from home in the existing position, as Driver FM accepted that the job could not be effectively performed in either way.[76] Effectively, it was not reasonable for the employer to refuse to provide a benefit that was available.

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69 *SDA* s14(2)(a)–(d).
70 *Mayer*, above n68 at para 67–77.
71 Id at para 74.
72 Id at para 71.
73 Id at para 70.
74 See *SDA* s7B and 7C.
75 *Mayer*, above n68 at para 75.
76 Id at para 77.

HeinOnline -- 26 Sydney L. Rev. 413 2004

KELLY V TPG

While the Mayer case does show that the *SDA* can be used to assert a right to return to part-time work after maternity leave, building on the case of *Hickie v Hunt and Hunt*, the more recent case of *Kelly v TPG* makes clear that this is not an unambiguous right. Two steps forward, one step back for workers?

Rebecca Kelly was not able to prove that she had a right to change from full-time to part-time hours. For the magistrate in her case, the critical issue was whether a refusal to change existing conditions could even constitute the imposition of a requirement, or whether this needed something more. Raphael FM ultimately held that because Kelly's contract was originally for full-time employment and she was merely 'being asked to carry out her contract in accordance with its terms', there was no imposition of any requirement to her detriment.[77]

He accepted the respondent's argument that finding there was a duty to provide a change in hours would amount to imposing a duty of positive discrimination. In deciding that a denial of a benefit was not the imposition of a detriment he effectively accepted that such a change was still within the employer's discretion. He did however hint at some limitations: ironically, if flexibility was generally available at the workplace, the denial could more readily be seen as the imposition of a detriment.[78] It was in this way that the Mayer case was distinguished.[79] The intervening case of *State of Victoria v Schou* [2001] VSC 321, in which Harper J refused to characterise the refusal of Ms Schou's employer to allow her to work partly from home as a requirement or condition, may also go some way to explaining the difference in the two federal magistrates' judgments.

C. Framing Claims and Choosing Jurisdiction

It is interesting to note that the claimants in these cases used prohibitions on sex or pregnancy discrimination to base their claims for the family-friendly policies of maternity leave and the right to work part-time, rather than the more recent and apparently applicable ground of family responsibilities. This is presumably because of the limitations on family responsibilities claims and the difficulties of establishing the actions. The federal prohibition on family responsibilities discrimination in the *SDA*, for instance, is limited to direct discrimination and only in relation to dismissal.[80] To date, few applicants have been successful in pursuing such claims,[81] although *Escobar* demonstrates how both sex (indirect) and family responsibilities (direct) claims could be used effectively in the alternative.[82]

77 *Kelly,* above n68 at para 79.

78 Raphael FM cited Harper J's judgment in *State of Victoria v Schou* (2001) 3 VR 655 at para 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.

79 Id at para 80.

80 See *SDA* ss7A and 14(3A), respectively.

81 See, for example, *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31 (8 March 2002); *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122 (5 July 2002); *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003) (affirmed in *Commonwealth of Australia v Evans* [2004] FCA 654 (25 May 2004)).

HeinOnline -- 26 Sydney L. Rev. 414 2004

The New South Wales *Anti-Discrimination Act* 1977 (*ADA*) prohibits discrimination on the basis of 'responsibilities as a carer'[83] and is more far reaching than the federal counterpart in that it prohibits both direct and indirect discrimination[84] and applies to all stages of employment, not merely termination.[85] However, in respect of indirect discrimination, the applicant bears the heavy onus of establishing that the requirement or condition imposed was not reasonable.[86] This was the element Ms Gardiner failed to prove in the first case under the provisions.[87] The latest instalment in the case of Deborah Schou against the State of Victoria, ruling against Ms Schou's claim of indirect discrimination on the basis of her status as a carer or parent, also illustrates the difficulties faced in trying to establish this element.[88]

Further, the NSW prohibition has the significant limitation for applicants that employers can plead a defence of 'unjustifiable hardship' in cases of hiring and firing.[89] In effect, this defence is akin to a defence of 'reasonableness' but, importantly, it applies to direct discrimination as well as indirect discrimination.

These limitations might have prompted the applicants to use sex and pregnancy as the grounds for their claims.[90] Discrimination in respect of these grounds extends to both direct and indirect discrimination, and the prohibition is not limited to dismissal. The *SDA* offers particular appeal for indirect discrimination claimants because of the shifted onus, permitting the respondent to claim reasonableness rather than requiring the applicant to prove lack of reasonableness.[91]

Further pondering the choice of jurisdiction, the cases of *Thomson* and *Rispoli* both highlight how federal anti-discrimination claims that have been pursued to a hearing allow for the addition of a separate claim for breach of contract, which will be discussed below. Being heard by a federal court, as opposed to an administrative tribunal, the applicant is free to attach an associated contract claim to be heard simultaneously. This might make the federal jurisdiction more attractive than state discrimination jurisdictions,[92] although applicants face a higher risk of having costs awarded against them in a federal court, militating against the jurisdiction.[93] The absence of a damages cap under federal legislation similarly might make the federal jurisdiction more attractive.

82 Above n67.

83 Part 4B.

84 *ADA* s49T defines discrimination on the ground of a person's responsibilities as a carer.

85 *ADA* s49V.

86 *ADA* s49T(1)(b). Note the applicant bears this onus in respect of indirect discrimination claims under any grounds in the ADA. See, for example, s24(1)(b) (sex).

87 *Gardiner v Work Cover NSW* [2003] NSWADT 184.

88 *State of Victoria v Schou* [2004] VSCA 71.

89 *ADA* 49V(4).

90 Although, if the cases are typical, they would not have been preceded by a high level of analysis about the most effective strategy. It is probably more typical that the applicant has, prior to legal advice, turned to whichever agency she has heard of, to complain of mistreatment, and it is only later that the claim becomes formalised into a legal action.

91 See *SDA* ss7B & 7C.

92 Although it appears from interlocutory decisions in *Thomson* that the contract claim was not even raised until very late in those proceedings, and thus was not a factor in choosing jurisdiction.

93 Conversely, it might be more feasible to engage legal representation and hence pursue a claim in a costs jurisdiction.

HeinOnline -- 26 Sydney L. Rev. 415 2004

D. *Implications for Family-Friendly Practices*

What do these cases tell us about the usefulness of anti-discrimination legislation as a tool to compel family-friendly work practices? The focus of anti-discrimination regulation on individual claims will always limit its effectiveness in achieving any kind of widespread change. However, by setting a precedent and getting publicity, the successful cases we have examined here do warn employers that there is some risk of legal liability for failing to implement family-friendly practices.

In respect of direct discrimination, the maternity leave cases make clear that an applicant will be able to refer to all aspects of her position to establish employment detriment or less favourable treatment; salary is not the only enforceable aspect.

However, as is often the case under anti-discrimination legislation, applicants will struggle to prove that the reason for the detriment was the protected trait. The approach adopted in *Thomson* (and by the High Court in *Purvis*) whereby characteristics can be treated as circumstances undermines what limited potential the comparator device had for establishing causation. It says that if an employer can show that it treated the applicant no differently than it would treat someone else who took a long period of leave — and it refrains from blatantly hostile outbursts — it may avoid a finding of direct pregnancy discrimination. By equating maternity leave with, for example, long service leave, it ignores the critical link between the trait of pregnancy and the taking of maternity leave and thereby denies that the legislation was established and is designed to protect people with particular traits that have been identified as the source of past and ongoing disadvantage.

How might this play out in respect of other characteristics and other policies? It would not be controversial to say that workers with family responsibilities are generally unable or less able to perform overtime (or at least to do so on short notice), and similarly less able to travel for work outside of ordinary work hours. Would it be discriminatory for an employer to treat these workers less favourably by, for example, not hiring them or considering them for promotion? Our federal and state anti-discrimination legislation supposedly protects against direct discrimination on the basis of family responsibilities, including characteristics appertaining generally to those with family responsibilities. It is arguable that the limitations on their capacity to do overtime or travel for work could be characterised as characteristics generally appertaining to those with family responsibilities. The hollowness of formal equality, on which direct discrimination definitions rest, is that it not only allows employers to utilise such 'ideal worker' norms (especially under managerial prerogative to determine inherent requirements of a job), it goes as far as saying that they are not discriminatory so long as you impose the criteria in the same way across all workers. This treatment would impact harshly on those with family responsibilities, but that is permissible under the formal equality approach so long as it also impacts harshly on others who cannot perform overtime or travel because of, say, sporting commitments or second jobs or responsibility for pets. While direct discrimination prohibitions might be effective in targeting blatant hostility or prejudice toward particular groups, this example demonstrates how they have limited potential to challenge the inherent bias of workplace norms.

HeinOnline -- 26 Sydney L. Rev. 416 2004

This is where the indirect discrimination provisions suggest real potential, in challenging norms or rules that by their nature, rather than intent, have a disparate impact on particular groups of workers. *Mayer*, building on *Escobar* and *Hickie* (and the English precedent of *Holmes*), illustrates how a claim for the right to part-time work can be framed as an equality claim under anti-discrimination legislation. However, the potential of direct discrimination actions is significantly limited by the reasonableness requirement, whether this is an element that the applicant must prove or a defence available to the respondent. And the decision in *Kelly* shows that in fact every element is still open to contest, with one judge seeing the question of full-time versus part-time as a 'requirement or condition' being imposed (as in *Mayer*) and another seeing a similar scenario as involving a request for special treatment or positive discrimination (as in *Kelly*).

Success in using anti-discrimination law to achieve family-friendly practices such as part-time hours has been more forthcoming in the United Kingdom,[94] but arguably this has been influenced by the UK becoming subject to various European Union directives on working conditions, a supra-national regulatory pressure not felt in Australia. Presumably also, the context in which questions of reasonableness or justification for particular workplace practices are decided has been altered by the strong position taken by the 'New Labour' Government since its election in 1997.[95]

Ironically, while a central equality strategy is to enable and even encourage men to take up more of the domestic load, actions for family-friendly practices that rely on claims of sex discrimination as opposed to family responsibilities discrimination are generally unavailable to men. In relation to direct discrimination, it is difficult for men to claim that caring responsibilities or the need for parental leave is a characteristic appertaining generally to men, as they currently are for women. And the gender imbalance of domestic work is the very factor that leads to family-*un*friendly practices having a disparate impact on women, supporting indirect sex discrimination claims. As Joanne Conaghan asserts:

> The success of a sex discrimination strategy thus hinges on the continued unequal allocation of labour in the home and, if/when statistical evidence ceases to support the dominant perception that childcare and other domestic responsibilities are largely performed by women, this strategy will fail.[96]

However, maybe when family caring responsibilities are being shared evenly in the home, we will not need a sex discrimination strategy!

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94 Conaghan, above n66.

95 See Joanne Conaghan, 'Women, Work, and Family: A British Revolution' in Joanne Conaghan, Richard Michael Fischl & Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) at 53 for a discussion and critique of the 'family-friendly workplace as progressive labour law strategy' and New Labour's family-friendly working policies.

96 Conaghan, above n66 at 178–179.

5. *Contract Law*

So much for anti-discrimination legislation and its potential to compel family-friendly work practices. Our second promise was to investigate the contribution that private contract law may make. In two of the cases examined above — *Thomson v Orica* and *Rispoli v Merck Sharpe & Dohme* — the claimants argued that the employer conduct which amounted to unlawful discrimination also constituted a breach of contract. And in both cases, the contract argument succeeded (although in *Rispoli*, the plaintiff was held to have waived her entitlement to sue for breach of contract by sitting on her rights for too long and effectively accepting the breach).

Before we consider whether and if so how a promise of family-friendly work practices can have contractual effect, we need to identify why this conclusion is so significant. As every law student will know, the remedy for breach of contract is damages based on expectation. So long as it meets the requirements for contract formation, the common law will enforce a consensual bargain between parties on the basis that each is entitled to be given the benefit of the contract. Damages will be assessed to put the disappointed party in the position she or he would have been, had the contract been properly performed. Of course, because the common law is deeply reluctant to specifically enforce contracts for personal services, this means that the disappointed party will be paid the court's assessment of the financial value of the benefit. This means that a person with a promise of family-friendly conditions can sue for damages assessed on the basis that they are entitled to enjoy those benefits. For a highly paid person who is forced into resignation because a contract term is not fulfilled, this can mean a substantial damages award, not capped by any statutory limit set by discrimination legislation.

Contract law therefore provides a means for legally enforcing promises of family friendly working conditions — whether those promises have been explicitly bargained for or offered on the initiative of the employer for business case reasons.

A. Human Resources Policies and the Contract of Employment

Before a claim can be made in contract, there must be a contractual promise which has been breached. In each of *Rispoli* and *Thomson,* counsel argued that the employee had a contractual right to return to an equivalent position after maternity leave, that this contractual right arose from the employer's policy manual, and that breach of the contract created by the policy manual should sound in damages to the employee. There are basically three ways in which an HR policy may acquire contractual force. The first is by express incorporation into the contract. The second is by implication in fact, on the assumption that the parties obviously intended the policy to have contractual force, because it was necessary to give effect to their bargain. The third option is that the policy may flesh out the employer's implied obligation of 'mutual trust and confidence.' We examine each of these options in turn.

HeinOnline -- 26 Sydney L. Rev. 418 2004

(i) Express Incorporation

An HR policy will not necessarily be a contract in itself, however it may be incorporated into the contract of employment by reference, if there are express statements to that effect in a letter of appointment or some other communication between the parties. A policy concerning entitlements to redundancy pay was held to be incorporated by reference into a contract of employment by the majority of the Federal Court in *Riverwood International (Australia) Pty Ltd v McCormick* (*Riverwood*).[97]

One cannot assume that a policy or policy manual will automatically be incorporated into the employment contract. It is necessary that the policy be expressly referred to in the letter of employment or other communication between the parties, and the wording must be able to be construed as a promise that the employer agrees to be bound by the policy. In *Riverwood*, the majority held that a statement that the employee agreed to be bound was enough to incorporate those parts of the policy manual which imposed obligations on the employer as well. Lindgren J dissented from the majority, and held that merely referring to a policy in a letter of appointment is not enough to incorporate it as part of the contract.

There are some traps to incorporation by reference. If the firm has ambulatory policies which are modified from time to time, then any communication which incorporates policies as contract terms needs to acknowledge that the parties agree to be bound by current policies as they are in force from time to time, so that contractual obligations reflect current policies. Of course, the employee must be made aware of the policy. No-one can have a contractual obligation thrust upon her behind her back, so employers need to promulgate their policies by some means which makes the text readily available to employees. Failure to take appropriate steps to properly authorise and disseminate a policy document proved an obstacle in *Victoria University of Technology v Wilson & Ors*,[98] a case about a university intellectual property policy. In that case, the employer's failure to properly authorise and publish the document to staff meant that it could have no contractual force.

Some policies deal with a wide range of issues that are not properly the subject matter for a private legally enforceable bargain between individual parties. These issues will not form part of any contract because they are not promissory in nature. For example, an employer's staff manual may include some statements about the employer's firm commitment to preserving the natural environment and being a socially responsible corporate citizen. If the employer later ceased its practice of recycling paper, or terminated its sponsorship of a charitable organisation, this would not give individual employees any right to sue for breach of the employment contract, because these particular commitments would not form part of their own bargain with the firm. On the other hand, any policies relating to typical industrial matters, including remuneration, work practices, performance review procedures, termination and redundancy are clearly suitable matters for an employment contract.

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97 (2000) 177 ALR 193.

98 [2004] VSC 33 (18 February 2004).

HeinOnline -- 26 Sydney L. Rev. 419 2004

(ii) Implication in Fact

Even without express incorporation, a policy may be a term implied in fact to 'give business efficacy' to the employment contract.[99] Driver FM came to this conclusion in *Rispoli*. As noted above (in our discussion of discrimination issues), Ms Rispoli brought an action against her employer for failing to provide her with a job of equivalent status when she returned to work after maternity leave. Ms Rispoli was paid her pre-maternity leave salary, but was given less challenging work and a less pivotal role in the organisation than she had filled before taking leave. Under 19th century employment contract law, Ms Rispoli would have no grounds for complaint. Unless she was an artiste of some distinction her contract of employment would not be held to include an obligation upon the employer to provide her with any kind of work at all. Payment of salary alone would meet the employer's obligations. In the 21st century, however, Ms Rispoli was able to claim a right to be given particular duties. As we saw above, she was able to make a claim for discrimination under the SDA. She was also able to claim that the employer had breached a specific term in her contract of employment constituted by the employer's policy on return to work after maternity leave.

The policy manual stated:

> It is likely that you will return to the same job or similar job (this does not include a job to which you were transferred because of your pregnancy). If your job no longer exists when you return to work, and other jobs are available, you must be given a job which, in salary and status, is most like the one you occupied before you went on leave and one for which you are qualified and which you are capable of performing.[100]

It is worth setting out in full Driver FM's findings in respect of this policy statement:

> The first respondent's maternity leave policy reflects the first respondent's obligations under the *Industrial Relations Act* [1996 (NSW)]. I accept the applicant's submission that the policy formed part of the contract of employment between the first respondent and the applicant. That is because the first respondent acknowledged its statutory obligations in relation to maternity leave in its maternity leave policy.... These were important matters of the employment relationship regulated by section 66 of the *Industrial Relations Act* and were well known to employees. In my view the terms of the policy gave business efficacy to the employment contract and should properly be regarded as forming an implied term of it.[101]

This demonstrates that Driver FM accepted the policy term as a term implied in fact, on the basis of the 'business efficacy' test propounded by Lord Simon in the Privy Council decision in *BP Refinery (Westernport) Pty Ltd v Shire of*

99 Terms are implied in fact on the principles set out in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 345–6.

100 Id at para 30.

101 Id at para 81.

HeinOnline -- 26 Sydney L. Rev. 420 2004

Hastings.[102] Driver FM based this assessment of business efficacy on the employer's acknowledgement of a statutory obligation under s66 of the *Industrial Relations Act* 1996 (NSW) to provide for a return to work.

As much as it would be convenient to find that all such policies are implied in fact into employment contracts, implication in fact is not so straightforward as Driver FM's statement would suggest. An acknowledgment by an employer of some statutory obligation that they have, even if this acknowledgement is communicated to employees, will not necessarily cause that obligation to become a contractual obligation. The High Court of Australia's decision in *Byrne v Australian Airlines Ltd* (*Byrne*)[103] (more recent than the *BP Refinery* case in any event) held that a termination change and redundancy clause in an industrial award was *not* implied in fact into a contract of employment. The High Court reasoned that the award, including this clause, had been imposed on the employer by arbitration and was not the result of a consensual bargain. The award had a different juridical nature from contract. It bound the parties only as a result of an arbitral decision, not because it formed part of the consensual bargain between the parties. The clause therefore took effect only according to the provisions of the *Industrial Relations Act* 1988 (Cth) under which it was made. It did not create any obligations enforceable under common contract law. This meant that while the employees may have been able to persuade a tribunal to order the employer to comply with the clause, and while a defaulting employer might be levied with a statutory fine for refusing to do so, the employer could not be held liable in contract to pay damages for breach. The Court held that expectation-based damages were appropriate only where the parties had voluntarily agreed to confer a particular benefit.

We might argue in the same way about the maternity leave policy in Rispoli's case. The policy has been expressed as an acknowledgement of a statutory obligation. It identified what the employer 'must' do, not what it had agreed to do. This obligation to provide equivalent work on return from maternity leave had been created by legislation, and the legislation provided its own remedies for non-compliance. These are primarily fines: see ss66(4) and 68(1). As the court stated in *Byrne*, it was by no means necessary to imply this term for the sake of business efficacy, because the obligation was already created and enforced by statutory provisions, regardless of any term of the employment contract.

If the policy were expressed as a voluntarily assumed obligation, it may well be treated as a contract term. But while it does nothing more than reiterate obligations imposed by the *Industrial Relations Act* 1996 (NSW), a court may well employ *Byrne* as authority to find that it was not an implied term of the employment contract. It may seem artificial to distinguish between policies purely on the basis of the form of words used — but this is a distinction which *Byrne* presses us to accept. According to *Byrne*, contractual obligations arise only on clear evidence of a consensual bargain.

102 (1977) 180 CLR 266 at 282–3.
103 (1995) 131 ALR 422.

HeinOnline -- 26 Sydney L. Rev. 421 2004

In Rispoli's case, this argument is merely academic. Although Driver FM found that the policy was a term implied in fact into the employment contract, and that it was breached by the employer, he also found that Ms Rispoli had waived any right to sue for breach. She had continued to work after this breach and without sufficient protest, was taken to have forgiven the breach and could no longer rely on it to support her claim based on contract. As we saw above, her remedy lay solely in compensation for breach of the *SDA*.

(iii) The Implied Duty of Mutual Trust and Confidence

There is a further avenue for finding that a 'family-friendly' policy promise has contractual force. By signalling to employees how the employer expects to treat its valued employees, an HR policy may provide some useful content for the otherwise amorphous obligation of 'mutual trust and confidence' which is implied by law into every employment contract.[104] This duty is described most commonly as the employer's duty 'not to conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

The English House of Lords decision in *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)*[105] is consistently cited as authority for the existence of this obligation. In fact, the House of Lords in *Malik* endorsed a line of authority developing in decisions of lower courts.[106] The earlier case law had developed this implied duty in the context of employer strategies to circumvent unfair dismissal protection, by using tactics to provoke resignations. *Malik* was a landmark decision because it held that an employee might also seek an award of damages for the breach of the duty itself, apart from any remedy for wrongful or unfair dismissal.

In the English jurisprudence,[107] *Malik* has engendered a rich body of case law and academic commentary, culminating in statements by eminent jurists that the employer owes employees a duty of fair dealing.[108] As an example of a recent case, in *Visa International Service Association v Paul*[109] an employer who neglected to inform an employee who was away on maternity leave of new promotion opportunities within the company, was held to have breached its duty

104 *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95 (*Malik*).

105 [1997] 3 WLR 95.

106 See, for example, *Courtaulds Northern Textiles v Andrew* [1979] IRLR 84; *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693; *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308.

107 See Douglas Brodie in 'A Fair Deal at Work' (1999) 19 *Oxford J of Legal Studies* 83; 'Beyond Exchange: the New Contract of Employment' (1998) 27 *Indust'l LJ* 79 and 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Indust'l LJ* 121, cited with approval in *Malik* at 109 (Steyn LJ).

108 See *Johnson v Unisys Ltd* [2001] IRLR 279 at 285 (Steyn LJ). Recent cases developing this jurisprudence include *Clark v Nomura International plc* [2000] IRLR 766; *BG plc v O'Brien* [2001] IRLR 496, upheld by the Court of Appeal in *Transco plc (formerly BG plc) v O'Brien* [2002] IRLR 444.

109 [2004] IRLR 42 (*Visa*).

HeinOnline -- 26 Sydney L. Rev. 422 2004

of mutual trust and confidence to her. In *Visa*, Mrs Paul was able to claim that Visa had constructively dismissed her when it failed to tell her of a job opportunity — even though it was subsequently shown that she was not qualified for the position and would not have secured it. Her claim was not based on a lost opportunity or chance to have the promotion — but on the serious damage to trust and confidence in the relationship caused by the employer's deliberate decision to exclude her from receiving information about the position.

Malik has been applied in most Australian jurisdictions without any serious debate as to the existence of the implied term of mutual trust and confidence.[110] Australian academic and professional commentary has documented the acceptance of this new formula in Australian jurisprudence.[111] Here however, it has yet to develop (outside the unfair contracts jurisdiction of the NSW Industrial Relations Commission[112]) into a more general duty of 'fair dealing'. In the United Kingdom, employees have used the term to establish entitlements to particular benefits — payment of bonuses,[113] promised pay rises,[114] and severance payments on par with colleagues.[115] In those cases, courts awarded damages to recognise the employee's entitlement to have the implied promise of fairness fulfilled, and did not merely use the broken promise as justification for terminating the contract and paying out a notice period. An Australian court exercising only common law jurisdiction has yet to make such an award. Nevertheless, it is clear that breach of the duty can be called in aid of a claim of wrongful dismissal. It is no surprise then that Allsop J was confident that there was 'ample authority' to draw on this implied term, and to find in favour of Cynthia Thomson in her claim that Orica breached its employment contract with her. In our view, this avenue provides the most promising path for the development of contractual rights to family-friendly work practices.

(iv) How the 'Mutual Trust and Confidence' Obligation Helped Ms Thomson

Orica's policy document dealing with maternity leave contained the following statement:

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110 See, for example, *Sea Acres Rainforest Centre Pty Ltd v State of New South Wales* (2001) 109 IR 56 at 66 (Haylen J). See also, *Linkstaff International Pty Ltd v Roberts* (1996) 67 IR 381; *Jager v Australian National Hotels Ltd* (1998) 7 Tas R 437; *Hollingsworth v Commissioner of Police* (1999) 88 IR 282 at 318 (Wright & Hungerford JJ); *Gambotto v John Fairfax Publications Pty Ltd* (2001) 104 IR 303 at 309-311 (Peterson J); *Aldersea & Ors v Public Transport Corporation* (2001) 3 VR 499 at para 67; *Thomson v Broadley & Ors* (Qld Supreme Court, Jones J, 20 June 2002).

111 See Adrian Brooks, 'The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence' (2001) 20 *U Tas LR* 29; Joellen Riley 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *AJLL* 28; Kelly Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Confidence' (2003) 77 *ALJ* 764.

112 See s106 of the *Industrial Relations Act* 1996 (NSW). The jurisprudence about this provision has been documented in Jeffrey Phillips & Michael Tooma, *The Law of Unfair Contracts in NSW: An Examination of Section 106 of the Industrial Relations Act 1996 (NSW)* (2004).

113 See, for example, *Clark v Nomura International plc* [2000] IRLR 766.

114 *Clark v BET plc* [1997] IRLR 348.

115 *BG plc v O'Brien* [2001] IRLR 496, confirmed in *Transco plc v O'Brien* [2002] IRLR 444.

HeinOnline -- 26 Sydney L. Rev. 423 2004

> All employees granted entitled [sic] family leave have the right to return to their previous position, or if this no longer exists, to a comparable position if available.[116]

Allsop J held that the policy had been 'expressed in terms of rights and obligations'[117] and these were 'plainly intended in their expression to reflect rights and duties of both Orica and its employees'.[118] It had been made available to employees via an intranet computer system, so it signalled to employees how they could reasonably expect to be treated by the company.

After citing *Riverwood* as authority for the proposition that the policy ought to be treated as a part of the employment contract, Allsop J said that it was not necessary to make such a finding in order to give the policy contractual effect. He said that regardless of its contractual status, the existence of the policy and the manner of its breach constituted a breach of the employer's duty of mutual trust and confidence. When Ms Thomson's boss reacted angrily to her request for leave, and shouted that he would 'never employ another female again', and when he effectively demoted her to lesser duties without giving any reason, the company acted in a way calculated to destroy Ms Thomson's trust and confidence in her employment relationship with the company. Any reasonable woman would have been embittered by this treatment. It was entirely reasonable that she should accept this conduct as a repudiation of her employment contract and treat herself as constructively dismissed. She was therefore able to sustain a claim for damages in contract for wrongful dismissal. Allsop J's hearing of this matter was as to liability only. The quantum of damages (Ms Thomson claimed in excess of $200 000) was ultimately never determined because the parties settled the matter on a confidential basis following the decision.

B. Where to From Here?

The willingness of the courts in both *Thomson* and *Rispoli* to find that an HR policy had contractual force suggests considerable potential for the legal enforcement of policies which promise a balance between work and family responsibilities.

First, it is clear that an employer which breaches its own policy will be held to have constructively dismissed an employee, whether or not the employer deliberately intended to induce a resignation. As Allsop J stated: '[I]t is a matter of objectively looking at the employer's conduct as a whole and determining whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it'.[119]

If the conduct of the employer in ignoring its own policy commitments demonstrates a breach of the mutual trust obligation, the employee will be entitled to treat herself as constructively dismissed.[120] Therefore employers need to take care lest they inadvertently signal a repudiation of the employment contract, by paying scant regard to their own policy commitments.

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116 *Thomson*, above n24 at paras 78 and 124.
117 Id at para 125.
118 Id at para 144.
119 Id at para 141. See also *Easling v Mahoney Insurance Brokers Pty Ltd* (2001) 78 SASR 489 at 99.

HeinOnline -- 26 Sydney L. Rev. 424 2004

Secondly, these decisions confirm that courts will take the rhetoric of work/life balance ideals espoused in policy documents quite seriously. These particular cases dealt with promises that taking maternity leave would not of itself impair career prospects. But there are other types of policies which would attract the same judicial treatment.

The policy statement at the centre of Ms Schou's dispute with her employer in *State of Victoria v Schou*,[121] provides an example. Deborah Schou's case is, in fact, a rather sad indictment on the efficacy of discrimination law to deal with reneged commitments to family-friendly policies. Ms Schou sought to take up what appeared to be encouragement of 'flexible' work practices when she had a sick child suffering separation anxiety. She proposed to work from home via a computer modem for some of the working week. It was a short-term problem, requiring a relatively short-term solution. Nevertheless, her employer declined to assist her, she resigned and brought a claim for breach of the *Equal Opportunity Act* 1995 (Vic)[122]. The case went first to the Victorian Civil and Administrative Tribunal (VCAT), where Ms Schou won her case. The Department was unhappy with this decision and then sought judicial review of the VCAT decision before Harper J in the Victorian Supreme Court. Harper J decided[123] that the VCAT had applied the test for discrimination incorrectly, so sent the case back to be done again. The second VCAT outcome was also in favour of Ms Schou.[124] The Department sought review again, and a full court of the Victorian Supreme Court by majority overturned the second VCAT decision and substituted its own judgment, finding that there was no discrimination.[125] By this time, the sick boy was well advanced in his schooling. Time resolves these problems. Law does not. The employer's unwillingness to be flexible for the short time necessary to see the child grow out of his ailment robbed Ms Schou of her career. The law proved incapable of remedying her loss.

How might Ms Schou have fared under contract? Her employment was in fact governed by a policy which promised that the employer would 'promote… flexible and progressive work practices and reasonable changes to the way work is organised'. It also stated that this agreement was made 'in a spirit of trust and goodwill… to engender and enhance a constructive working relationship'.[126]

Those words arguably gave expression to the mutual trust and confidence term, and the subsequent promise of flexible work practices gave some substance to these aspirations. But when put to the test, the Department refused to deliver on those promises. On Allsop J's reasoning in *Thomson*, reneging on a solemn

120 This conclusion was confirmed in *Morrow v Safeway Stores plc* [2002] IRLR 9, where it was held that a breach of mutual trust and confidence necessarily goes to the heart of the contract, and will always give rise to a repudiation.

121 *Schou* (2004), above n88.

122 And its predecessor, the *Equal Opportunity Act* 1984 (Vic).

123 *State of Victoria v Schou* (2001) 3 VR 655.

124 *Schou v State of Victoria Melbourne (Department of Parliamentary Debates)* (VCAT, Duggon VP, 24 May 2002) (*Schou* (2002)).

125 *Schou* (2004), above n121.

126 *Schou* (2002), above n124 at para 71.

commitment to act in 'trust and goodwill' and to be 'flexible' and 'cooperative' may well be taken by a reasonable employee as a repudiation of the contract of employment. Perhaps if Ms Schou had argued her case on this basis, she may have had more success.

There will be cynics who will argue that words like 'flexible' and 'cooperative' are duplicitous words which, despite a miasma of generous sentiment, disguise management's real agenda, which is to squeeze every drop of productivity out of every minute of the worker's time. On this view, 'flexibility' is a monologue by management, to grease the introduction of measures dismantling any remaining rigidities in working time and practices which hinder an inexorable path to greater and greater productivity. Promises of cooperation and flexibility are a silk glove on an iron fist threatening longer, less predictable hours, and further commitment of time to the mill, at the expense of time by the hearth at home.

Contract law, however, is about dialogue. In theory at least, contract law supports the mutual expectations and aspirations of the parties, as those aspirations are expressed in the documents and discussions which formulate their bargains. If contract law is to be true to its justifications, then the words must be taken at face value, and the mutual trust and confidence obligation inherent in the relationship needs to be given full expression in the legal enforcement of family-friendly policies.

Of course, just as Ms Schou's discrimination claim proved an arduous litigious process, so would any claim in contract if it were necessary to bring it to court, and perhaps to survive a subsequent appeal. Ms Thomson was fortunate to have the resources to bring federal court proceedings. Many others are not so fortunate. Nevertheless, every strident individual who takes the financial risk of litigation creates precedent which — through the usual workings of the legal profession in advising parties on legal rights and obligations from the knowledge of past cases — can percolate through the system and influence the behaviour of enterprises keen to avoid the risks of litigation. Many a settlement has been built on knowledge of an earlier case. Ms Thomson's fortitude in pursuing her claim leaves a valuable legacy in the form of a Federal Court precedent which may assist others to reach suitable settlement of their claims.

6. Conclusion

In these cases we have seen a turning of the tide. The old technological revolution opened up a cavernous divide between working time in the mills and on the factory production lines, and time for domestic pursuits. For a time, the tension created by this divide was resolved (however unsatisfactorily) by a stereotypic division of labour — men in the public sphere and women at home by the hearth. The Luddites' great great grandchildren face a new world, which values (in fact, demands) gender equality. Workers, especially women with family commitments, need to be able to straddle both spheres. The challenge for employment law is to find appropriate regulatory tools to support these social changes and the needs of working families.

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