

17 December 2013

Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Re: Pregnancy and Return to Work National Review

Dear Sir/Madam,

Master Electricians Australia is grateful for the opportunity to contribute to the National Review into discrimination regarding pregnancy at work and return to work after parental leave.

Master Electricians Australia (MEA) is a dynamic and modern trade association representing electrical contractors. Originating as the Electrical Contractors Association in 1937, we are the leading voice of the electrical and communications industry throughout Australia. The organisation's website is: <http://www.masterelectricians.com.au>

As a long standing employer group, MEA appreciates the value of providing support to women in the workplace throughout pregnancy, parental leave and their return to the workplace. We recognise that this is particularly important as a body representing the electrotechnology industry, a sector which has traditionally been male dominated in nature. Measures that will make a genuine contribution to achieving gender equality in Australian workplaces will always be welcomed by MEA.

Below are MEA's responses to the guiding questions in order to inform the review.

Data

Can you share any data on the number and kind of issues your members seek advice and assistance on in relation to pregnancy, parental leave and return to work?

Background

Of the 25,000 electrical contracting companies operating across Australia approximately 77.5% are classified as micro businesses with five or fewer employees¹. These business owners, who represent a significant majority of electrical contracting businesses in Australia, are in particular need of support and advice in relation to the issues that arise concerning pregnancy, parental leave and return to work. They are unlikely to have dedicated human resources staff on hand and their businesses are more prone to feel the impact of an employee becoming pregnant, more so than larger businesses in the electrical industry.

¹ Department of Employment and Workplace Relations and National Electrical and Communications Association (NECA), *Skills Shortages in Australia's Electrical Industry: Perceptions of Electrical Contractors, 2008*

It is also important to note that, according to data from Job Outlook², there were 140,300 electricians employed in Australia in 2012. Based on the proportion of micro businesses in the electrical industry, this translates to approximately 108,732 electricians working in micro business. It must also be noted that the business model used in the majority of electrical contracting business is a mobile workforce. Each electrician is equipped with a commercial vehicle fitted out with relevant tools and supplies and represents a capital investment of some \$60,000. If the wage associated costs are included, such as wages, super, oncosts and tax the total investment can reach \$130,000.

While female employees are likely to utilise parental leave in the majority of cases, it is also true that, as society changes, more and more fathers are deciding to access some level of leave over and above traditional paternity leave.

Data

MEA has a dedicated workplace relations team who communicate with employers running electrical contracting businesses on a daily basis about a range of issues, including those relating to pregnancy, parental leave and return to work. Of the approximately 6000 workplace relations calls per year taken by MEA's workplace relations officers, approximately 20% relate to pregnancy and parental leave. The complexity of these issues also means that our workplace relations officers must dedicate significant amounts of time to assisting employers to finding solutions for the range of problems that arise.

For the most part, the nature of enquiries we receive on these topics centre on the mechanics of the relevant legislation. That is, employer obligations when a worker is pregnant, what employees are entitled to and the requirements upon their return to work. Given the physical nature of electrical work and the inherent safety risks, our workplace relations officers often field questions about female electricians working while pregnant and what it means to have access to a 'safe job' as required.

Challenges, leading practices and strategies

*What are the key **challenges** faced by business/organisations of your association or body in managing an employee who is pregnant, on parental leave or returning to work after parental leave?*

➤ Safe duties

As mentioned briefly above, a major challenge faced by electrical contracting businesses is the limited safe work options available for pregnant female electricians. This is particularly problematic for micro businesses that may only employ one or two electricians and perform the administrative side of the business themselves or engage a family member. The dilemma often arises that a pregnant woman is deemed to be unfit to climb into a roof space or climb a ladder in order to perform electrical work as early as two weeks after advising of her pregnancy. An employer is then put in the difficult position of not only having to find alternative duties that may not even exist in the business, but must also recruit and remunerate another electrician to

² Department of Employment, Job Outlook

<http://joboutlook.gov.au/occupation.aspx?search=alpha&tab=stats&cluster=&code=3411&graph=GE>

perform the electrical work for the period of time the pregnant employee is unable to perform her normal duties. Given the financial costs outlined above, this means that the employer must somehow cover the costs of two employees whilst maintaining sufficient financial return to cover the operational business costs such as a motor vehicle and relevant Information Technology (IT) resources. As an indicator, the van must now be approximately 30% more efficient.

A real life example of the challenges presented by these issues concerns a female electrician employed by an MEA member to undertake the installation of roof mount solar power systems.

Prior to halfway through the pregnancy, the employer received information from the pregnant employee's doctor that directed she should avoid working at heights or in confined spaces as well as limit lifting to less than 10kg. Upon consultation with MEA, the employer sought to obtain further details from the doctor about what were suitable duties and put together a list of tasks to be given to the doctor to sign off on as "safe duties".

Prior to the above process being completed, the employee presented another doctor's certificate when she was 20 weeks pregnant. The certificate was from a different doctor and stated that, given her employment as an electrician, it was recommended that she perform a strictly administrative role. This was advised given the nature of the work and the potential harm to the developing foetus. The assessment from the second medical practitioner appeared generic and did not request or explain or provide any details of what the employee was able to do.

Further correspondence with the first doctor indicated that the employee could undertake an onsite supervisory role which the employer implemented as safe duties combined with administrative duties. The concern for the employer being that, in the absence of supervisory and administrative duties being available, the business would need to pay "no safe job" leave in addition to finding another electrician to perform the work.

In this case, an added challenge was the difficulty experienced by the employer in obtaining a set date from this employee as to when she was going to start her parental leave.

➤ Return to work

Challenges also arise when an employee is looking to return to work after a period of parental leave. Small businesses tend to restructure as a result of an employee taking parental leave and then invariably discover that they no longer need the person to do the job in the same way as they previously did. While they may not be making the position redundant, though this is not uncommon, they will be dealing with an employee returning to work where there may be a perception that they have deliberately altered the working environment to disadvantage them. Many small businesses also fail to understand their obligation to keep in touch and consult with employees on parental leave where changes occur to the incumbent position.

Further to this, on return to work an employee has the right to request flexible working arrangements from their employer. There are operational considerations that could form the basis for such a request to be refused, however other jurisdictional precedent such as anti-discrimination law set this bar at a high level while the *Fair Work Act* "reasonable grounds" criteria is almost of no value as a protection for employers. Small businesses usually find it very

challenging to come to terms with having to make a role part-time or introduce a job share type arrangement particularly taking into account the capital costs and work flow considerations mentioned above. In our many conversations with members on this issue, employers have become frustrated that their managerial prerogative has been taken away from them in these situations. Rightly or wrongly, this is a challenge for small businesses that already face a number of obstacles from all angles just to keep their businesses afloat.

➤ Employee misconceptions

Misconceptions by employees can also make the management of parental leave a challenge. For fathers or partners there is a belief that they become entitled to 'carers leave' at the time their child is born and shortly after. However, legislation does not classify child birth as a medical condition. As such, there is no entitlement to carers leave. Where an employer raises this with the employee it can often put them offside.

*What are some **leading practices and strategies** used by businesses/organisations to manage pregnancy, parental leave and return to work after parental leave in the workplace?*

From our experience, there are a number of fairly standard practices and strategies employed by businesses in managing pregnancy, parental leave and return to work. Some examples are listed below:

- Many employers respond to pregnancy by being more flexible with work time for medical appointments and allowing employees to "make up" any time lost. This usually results in employers missing out on productivity to some degree.
- Filling positions on a temporary basis while someone is on parental leave (internally or externally) is very common. However this is really only effective when the employee is definite and well prepared about their plan for after the pregnancy.
- Job share or part-time arrangements are common ways of managing requests for flexible working arrangements for employees returning to work. Again, this is really only effective when other electricians can be found who are willing to work part-time and where, geographically, arrangements can be made for handover of vehicles etc. Electricians however predominately only work full-time, with part-time arrangements being rare.

*Do some businesses/organisations face particular challenges and have particular needs because of their **size**, their **industry** or other factor?*

It is likely that each business and industry would to some extent believe that their circumstances are unique and warrant special consideration when it comes to these issues. However, ultimately the legislation is intended as a mechanism to protect mother and child from harm and discrimination. The needs of the particular industry or business are secondary considerations.

For industries requiring demanding physical work there are specific challenges. Transfer to a safe job, or payment where there may be no safe job, are often issues that can be industry specific problems. For the electrical industry, crawling around in roof spaces is often out of the

question towards the middle to latter stages of pregnancy and certain types of electromagnetic fields (EMF) could be dangerous from the very first day a pregnancy is discovered. Research conducted by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)³ indicates that overexposure to electromagnetic frequencies in early pregnancy may be associated with miscarriage. However, according to the ARPANSA Report, *Medical aspects of overexposures to electromagnetic fields*, the effects of overexposure later in pregnancy are not yet known. While it is certainly an understandable concern for pregnant women, it does highlight the need for further investigation into the effects of EMF exposure for particular occupations. The ARPANSA Report recommends that a pregnant woman who is concerned about the potential effects of EMF exposure “warrants proper medical management”. However, it is likely that, in many cases, medical practitioners are making decisions as to a pregnant woman’s suitability for work in the absence of a full understanding of the risks presented by EMF exposure. MEA is yet to see an example where a medical practitioner requests from an employer more information about the workplace and possible exposure to EMF. There is certainly the need for further education of general practitioners, employers and industry on the risks of EMF for particular occupations to ensure women are not unnecessarily resigned to “safe duties” in a workplace.

MEA would never advocate for any action that would compromise the health of an expectant mother and her baby and fully support the allocation of safe duties if a health risk is present. However, we would urge for further research to be conducted along with closer investigation by general practitioners before safe duties are deemed necessary.

Case study

*Can you share one or two **case studies** that illustrate the kind of challenges faced by businesses/organisations of your association or body and the practices and strategies adapted to address those challenges?*

The example detailed above under the heading *Challenges, leading practices and strategies* highlights some of the challenges faced by businesses in the electrotechnology industry. A second example can be seen in a situation experienced by a large electrical industry business.

In this example, an employee requested a part-time arrangement on her return to work following a period of parental leave. Under the *Fair Work Act changes* that commenced 1 July 2013, an employee has the right to return to their previous position (s84) and the right to request flexible work arrangements (s65). Prior to 1 July 2013, the flexible working arrangements were limited to set circumstances such as school age attainment. This is now no longer the case. In this particular situation, the following issues needed to be considered by both the business owner and the returning employee:

- How long the flexible work arrangement is being entered into for;
- Is the flexible working arrangement temporary or permanent change to the employment relationship / status; and

³ ARPANSA, *Medical aspects of overexposures to electromagnetic fields*, http://www.arpansa.gov.au/pubs/rps/rps3_hocking.pdf

- Did the approval of the request for flexible working arrangements immediately and permanently alter the employment arrangements.

The strategy adopted by the employer in this particular scenario was to “wait and see”, with the expectation that the business may be able to absorb the employee into another full-time vacancy at a later time should it be required. Given the lack of clarity about the above issues, a small business could be faced with a situation of having to terminate an employee (the relief employee) for no reason other than the incumbent has decided to change their circumstances and wants their full-time position back. Alternatively, it may be a situation where the relieving employee is filling a maternity leave relief position for an indeterminate period of time waiting for the maternity leave employee to make a decision. The National Employment Standards offer no clear protection to an employer in this regard with even less protection provided through relevant State and Territory anti-discrimination laws.

This example highlights the challenges and unknowns faced by employers in managing an employee returning from parental leave. It also demonstrates the need for clearer, more detailed guidance from government bodies on these issues to ensure both employer and employee receive the support they need and a reduction in the red tape and multijurisdictional regulation that causes confusion for employers.

The Fair Work Ombudsman’s (FWO) own publications hint at these complexities given that they refer to state and territory based anti-discrimination laws and precedent. The FWO’s information indicates the employer’s right of refusal under the *Fair Work Act* is not a civil penalty however may attract penalties and fines under other jurisdiction’s requirements.

Information and support

Where do your members go for information, training or support in relation to managing pregnancy, parental leave and return to work in the workplace?

Given that our members rely on MEA to provide targeted advice on the issues that directly concern them, they will more often than not contact us directly for information and support. It is also true that if we are helping a member it is more than just to give them an understanding of their obligations but rather to assist in the management of a situation. Examples of this are mentioned above.

Our workplace relations team would not often refer a member to the FWO, apart from referencing the relevant FWO fact sheets. In fact, those members who do contact the FWO directly report that the advice they receive is cursory at best and can be inconsistent.

Are there any gaps in the information available to businesses/organisations?

In terms of legislative compliance the facts sheets and guides available from the FWO are accurate and reliable. However, the general verbal advice provided is inconsistent and can cause further confusion. From our and our members experience, the problem for the FWO is not necessarily the quality of the information provided but a lack of time taken to ask the right questions to get to the right answers. Many employers do not understand the right questions to ask to get relevant information that will assist them and satisfy their compliance requirements.

Laws and policies

What challenges do businesses/organisations face in implementing laws relating to pregnancy, parental leave and return to work? Are there any gaps in the existing legal framework?

One issue faced by businesses concerns the question of when an employee should return to work after giving birth. The previous framework had a minimum timeframe of six weeks before a mother could return to work after the birth of her child. However, exceptions could be made. Under the new framework there are no limits on the timeframes and it is up to the employer to be skilled enough in management to determine the suitability of the employee returning to work within a short period of time after the birth. While this may not be a common occurrence, it is still a gap in the existing legal framework that can be problematic for employers. We would highlight the example that an employee who has restrictions placed on them prior to child birth and then undergoes a caesarean birth may well have a period of 6 weeks where they are unable to drive and as such are unable to complete the inherent requirements of the position. In the interests of the mother's health we would recommend that the previous 6 week period post birth restriction be reintroduced or some other mechanism whereby the employee produces a medical clearance from the treating Obstetrician (not general practitioner) as to their fitness for work.

There is also a need for further legal guidance on the relationship between a flexible arrangement and the preceding employment contract.

Recommendations for the National Review Report

What sorts of outcomes or recommendations would you like to see from this National Review?

As discussed in the above case study, it would be recommended for an employer to have clear protection, or a framework, where the employee's employment status and intention is clarified regarding their original position once they have made a request for a flexible working arrangement.

Conclusion

As a key industry stakeholder, MEA would be eager to be involved in any consultations that may occur to better inform the Pregnancy and Return to Work National Review.

Regards,



Jason O'Dwyer
General Manager – Workforce Policy