Mis 48/79 MD Print D9576

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

CONCILIATION AND ARBITRATION ACT 1904

In the matter of notifications of industrial disputes between

THE FEDERATED MISCELLANEOUS WORKERS UNION OF AUSTRALIA

and

A.C.T. EMPLOYERS FEDERATION

(C No. 3619 of 1978)

and

THE FEDERATED MISCELLANEOUS WORKERS UNION OF AUSTRALIA

and

AGFA-GEVAERT LIMITED and others

(C No. 3617 of 1978)

and

ASSOCIATION OF ARCHITECTS ENGINEERS SURVEYORS AND DRAUGHTSMEN OF AUSTRALIA

and

METAL TRADES INDUSTRY ASSOCIATION OF AUSTRALIA and others

(C No. 1244 of 1978)

and

THE AMALGAMATED METAL WORKERS AND SHIPWRIGHTS UNION

and

OIL INDUSTRY SECRETARIAT

(C No. 3761 of 1978)

in relation to maternity leave

And in the matter of an application by The Australian Boot Trade Employees Federation to vary

in relation to maternity leave

(C No. 1381 of 1978)

And in the matter of an application by the Electrical Trades Union of Australia and others to vary the

METAL INDUSTRY AWARD 1971 [191 C.A.R. 598]

in relation to maternity leave

(C No. 3544 of 1978)

MR JUSTICE COLDHAM
JUSTICE GAUDRON
MR DEPUTY PRESIDENT TAYLOR
MR COMMISSIONER MATTHEWS
COMMISSIONER COHEN MELBOURNE, 9 MARCH. 1979

DECISION

These matters which were referred to this Full Bench, pursuant to section 34 of the Act constitute various claims made by several unions for the grant of unpaid maternity leave. The case for the unions was presented by Mrs Marsh who propounded a common claim for, consideration as a test, case having general application throughout the private sector of industry.

The claim seeks, subject to the terms and conditions therein contained, the grant of unpaid maternity leave for a period of between 12 and 78 weeks to employees who become pregnant; such leave not to interrupt the continuity of employment and to count as service for all purposes of the employment relationship except for annual leave for which a period of 26 weeks' maternity leave is to count as service.

Leave to intervene in the proceedings was granted to the States of New South Wales, South Australia and Tasmania, the Union of Australian Women, the National Council of Women of Australia, the Women's Electoral Lobby, the Australian Federation of Business and Professional Women, A.C.T. Women's Union Committee, the Australian National Airlines Commission (T.A.A.) and Mrs Cornelius of the Cornelius group of companies. The Australian National Airlines Commission took no part in the proceedings, but all other interveners. although offering different suggestions on some of the details of the claim, supported the concept of unpaid maternity leave.

The claim was advanced principally by reference to the changed social and economic role of women within Australia and to their significant participation in, and contribution to, the Australian workforce. The argument was advanced against a comprehensive background of material relating to maternity leave entitlements available to women in other countries and within public sector employment in this country. The limited extent to which Federal awards and agreements already make provision for such leave was also put.

Considerable emphasis was placed on the provisions of Convention No. 103 of the International Labour Organization concerning maternity protection (revised 1952) and I.L.O. Recommendation No. 123 concerning the employment of women with family responsibilities. In the Equal Pay Cases, 1969, the Commission in considering international material advanced in support of the claim said:

> "*Though we realise that the various United Nations and I.L.O. declarations and conventions must carry significant weight in a general way, we must consider how, if they are to be applied, they can be fitted into our community*". [127 C.A.R. 1142 at p.1156]

The I.L.O. conventions under consideration in those cases (Nos. 100 and 111) were then, as is I.L.O. Convention 103 now, not ratified by Australia. We adopt this passage as to the manner in which we should approach similar material advanced in support of the present claim.

At the International Labour Conference 60th Session, 1975, the I.L.O. reported:

> *"Over the past decade the trend towards an increase in the number and proportion of married women in the workforce has been accentuated. In many countries over a third of all married women are economically active and married women make up over half of the female labour force. Ten years or so ago the increase was very largely made up of married women beyond the usual child-bearing years. More recently there has been an upturn in the employment of younger married women in a good many countries.*
>
> *A few examples will suffice to illustrate this trend.... In Australia, in May 1973, 62.5 per cent of the female workforce were married women as against 48 per cent in 1966 and only five per cent in 1947; . . ."*

In Australia the trend has been sustained. Of 2.3 million women in the labour force as at May 1978, 1.4 million were married. Married women represented 22.5% of the total labour force.

The increased participation of women in the Australian workforce has been recognised in a variety of ways which accept that female employees have special industrial interests. For example, in 1972 this Commission extended the concept of equal pay by prescribing equal pay for work of equal value; in 1974 the minimum wage was extended to female employees; in April 1978 the Commission granted an application to vary the Municipal Officers (Queensland) Consolidated Award, 1975 to provide that, in exercising the power to terminate employment an employer *"shall not make any distinction, exclusion or preference on the basis of sex, other than a distinction, exclusion or preference based on the inherent requirements of a particular job"* [203 C.A.R. 584]. The Commonwealth of Australia, following ratification of I.L.O. Convention 111, established State and National committees on discrimination in employment and occupation which work to eliminate, inter alia, discrimination based on sex. State legislation has been enacted in New South Wales, Victoria and South Australia to deal with problems of discrimination including discrimination in employment based on sex.

The present claim is essentially for job preservation during absence from work for maternity purposes. This Commission and employers generally have long recognised that individual needs of an employee may require absence from work in circumstances where considerations of equity and good conscience warrant that the job of an employee should remain available. Sick leave is such a situation; entitlement to leave on compassionate grounds is now recognised in many awards; entitlement to study leave is also recognised in some awards.

The claim, if granted, would recognise the special industrial interests of those female employees who elect to combine motherhood with continued participation in the workforce. The preservation of job security in the event of maternity might well facilitate career opportunities and encourage career aspirations amongst woman who have hitherto regarded termination of employment as an inevitable consequence of motherhood. The material tendered with respect to employment in the public services of the Commonwealth and of New South Wales suggests that a significant number of women who avail themselves of maternity leave entitlements terminate their employment shortly after returning to work. However, we consider that in the long term, maternity leave if granted, could enhance the employment prospects of women and at the same time secure the retention of skills and abilities which might otherwise be lost to industry.

Subject to a consideration of its likely impact on the private sector of industry, we think that the concept of unpaid maternity leave is one which this Commission could introduce generally into its awards. As we have indicated, the concept was supported by a number of women's organisations of diverse influence and representation and by three State governments. We have also noted the absence of any opposition from the Commonwealth and the remaining State governments.

The private employers represented by Mr Maddern resisted the claim, relying upon its economic impact and likely disruptive effects.

The claim advanced is for unpaid maternity leave and accordingly the main direct costs relate to the accrual of other entitlements,, including leave, during absence on maternity leave. For reasons which will be given later in this decision, we do not propose to permit the accrual of entitlements during absence on unpaid maternity leave. The direct costs therefore ought not to be significant.

The indirect costs relied upon by the employers chiefly concerned the training of replacement employees. In the absence of provision for maternity leave, most pregnant women terminate their employment and this usually involves the employer in training replacement employees. It is difficult therefore to conclude that maternity leave will generate a substantially higher order of training costs. Such additional costs as might attend the granting of the claim could not justify its rejection.

The granting of maternity leave will cause additional administrative and staff problems. However, the manner in which we propose to grant maternity leave will alleviate much of the dislocation foreshadowed by the employers in their argument against the claim as formulated and we do not consider that it will so add to administrative and staff problems as to warrant a refusal of the grant of leave.

Before discussing the claim in detail, it is appropriate to indicate the limited extent to which Federal awards at present deal with maternity leave. There appear to be 39 Federal awards and agreements containing maternity provisions. We were not informed of any arbitrated decision in relation thereto. These provisions differ in many respects from the form of leave we propose to grant. For example, within the vehicle manufacturing industry employees must terminate their employment, but if re-employed within nine months, prior service is to count for all purposes of the employment relationship. For air hostesses employed by the domestic airlines and Qantas, maternity leave without pay must commence no later than 28 weeks before expected confinement and the leave must not end earlier than six weeks or later than 10 weeks after the confinement.

Some particular classes of employment, such as the air hostesses, may so distinguish themselves as to require quite different prescription from that we propose as a common form of maternity leave. Conversely, there may be other industries in which maternity provisions already exist where differences in prescription ought not to be maintained.

We now turn to a discussion of the claim and our conclusions thereon.

Eligibility for Maternity Leave

The claim is introduced in terms following:

> *"A female employee who becomes pregnant (whether before or after being employed by the respondent) shall, upon production of a certificate from a qualified medical practitioner stating the presumed data of her confinement, be entitled to a period of unpaid maternity leave..."*

As the essence of the claim for maternity leave is security and continuity of employment, we consider eligibility should be based upon 12 months' continuous service before proceeding on such leave.

In advancing the claim, Mrs Marsh expressly excluded casual and seasonal employees, but included part-time employees. Where an employee is on weekly or such longer hire as is prescribed by an award, we see no reason for making a distinction between those who work 40 ordinary hours per week and those who work such lesser number of hours as the award permits, subject always to the requirement of 12 months' service. Our order will therefore include part-time employees.

During the hearing, debate was directed to the possibility of exempting or excluding those who employ only a small number of persons, in line for example with the *Sex Discrimination Act* 1975 (S.A.) which does not apply to employers of less than five employees. There was no material before the Commission as to the likely or differential impact of the granting of unpaid maternity leave on small businesses. Such employers are not exempted from award or legislative requirements with respect to long service leave or other forms of leave. Moreover, any assumption that small businesses will find the granting of maternity leave more burdensome than it would be upon larger establishments is not necessarily correct. The employment relationship in small enterprises is often such that the administrative difficulties foreshadowed by the employers may well be of much less significance. Our order will apply to all employers.

Period of Leave and Commencement of Leave

The period of maternity leave claimed is expressed thus:

> *"The period of maternity leave shall be between 12 and 78 weeks and shall include a period of six weeks' compulsory leave to be taken immediately after confinement.*
>
> *However, where a qualified medical practitioner certifies that the employee is fit to return to work after the compulsory six weeks' leave after confinement, the employee may return to work notwithstanding that the period of maternity leave taken will be less than 12 weeks.*
>
> *The period of leave to be taken in the case of any employee shall be determined by the employee in consultation with her employer, the final decision being with the employee."*

Justification for the claimed period of leave was based upon the requirement for maximum flexibility so as to enable a woman to respond to the needs of pregnancy and motherhood. In particular it was argued that it would enable the bonding process between mother and child to proceed without impairment and facilitate breast feeding, if that should be the mother's choice.

Evidence was tendered as to the particular medical needs of women in the period immediately following childbirth. Those special needs are reflected in I.L.O. Convention No. 103 which in Article 3 provides that:

> *"The period of maternity leave shall be at least 12 weeks, and shall include a period of compulsory leave after confinement.*
>
> *The period of compulsory leave after confinement shall be prescribed by national laws or regulations, but shall in no case be less than six weeks; . . . ."*

The *Factories, Shops. and Industries Act* 1962 (N.S.W.) and the *Factories and Shops Act* 1963-1975 (W.A.) proscribe work in a factory by a woman during the six weeks immediately following confinement. The Western Australian Act also proscribes work during the six weeks immediately before confinement.

Having considered the material submitted in support of this part of the claim, and in particular the medical evidence of Professor Llewellyn-Jones, we consider that maternity leave should not exceed 52 weeks but should encompass a compulsory period of six weeks immediately following confinement. A maximum period of 52 weeks' leave, in our view, affords reasonable flexibility for the needs of mother and child and sufficient time for the mother to make a decision in relation to her further participation in the workforce.

The compulsory period of six weeks immediately following confinement accords with the medical evidence of Professor Llewellyn-Jones who identified that period as involving the most significant physical, emotional and psychological stresses for the mother. Although our decision does not correspond with the Western Australian legislation, the claim presented by the unions also diverges therefrom insofar as the only precise period of compulsory leave claimed is for the six weeks immediately following confinement.

In considering the period of leave, we are not persuaded that the welfare of the mother and her child should be the only relevant considerations. The medical evidence suggests that at least in some occupations, the efficiency and capacity of a female worker may be impaired in the weeks immediately preceding confinement. Furthermore, if an employee gives notice of her intention to commence maternity leave close to the presumed date of her confinement, the date of commencement of replacement staff may have to be varied if the presumed date does not correspond with the actual date of confinement. Therefore we think it reasonable that an employer should have the right, by not less than 14 days' notice in writing, to advance the commencement of maternity leave by requiring it to commence within the six weeks immediately prior to the presumed date of confinement. This will provide a degree of certainty and flexibility in the employment of replacement staff.

It will be necessary to make prescription as follows:

(a) An employee shall, not less than 10 weeks prior to the presumed date of confinement, give notice in writing to her employer stating the presumed date of confinement.

(b) An employee shall give not less than four weeks' notice in writing to her employer of the date upon which she proposes to commence maternity leave, stating the period of leave to be taken.

(c) An employer, by not less than 14 days' notice in writing to the employee, may require her to commence maternity leave at any time within six weeks immediately prior to her presumed date of confinement.

(d) An employee shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with (b) hereof if such failure is occasioned by the confinement occurring earlier than the presumed date.

The claim seeks to limit the commencement of maternity leave to 20 weeks prior to the presumed date of confinement unless in the opinion of a medical practitioner it should commence earlier. We see no reason why, within the limits set for the period of leave and the giving of notice, an employee should not select the date on which leave shall commence.

Transfer to a Safe Job

A right is claimed for a pregnant employee to transfer to a safe job in the following terms:

> *"Where in the opinion of a qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall have, where practicable, the right to transfer to a safe job, without a reduction in pay or other benefits, for the duration of the pregnancy."*

We can foresee possible difficulties in vesting in an employee the right *"where practicable"* to transfer to a safe job. For administrative and industrial reasons, we consider that the clause should be expressed not as giving a right to an employee but as reposing a discretion in the employer with respect to the transfer, in form following:

> *". . . the employee shall, if the employer deems it practicable, be transferred to a safe job..."*

We would expect that in implementing the clause proposed, an employer would give due consideration to the rights and expectations of other employees in his establishment who might be affected by any proposed transfer.

The availability of alternative employment may be satisfied where a job for which the employee is qualified exists, albeit at a lower rate of pay. In those circumstances the alternative employment should be undertaken by the employee at the rate and on the conditions which attach to that job.

Lest it be thought that a transfer might oblige the employee to defer the taking of leave until the pregnancy terminates, we consider it advisable to substitute for the phrase *"for the duration of the pregnancy"* the phrase *"until the commencement of maternity leave"*.

Variation of Period of Leave

The claim seeks the right for an employee absent on maternity leave to extend or reduce the period of leave by notice to her employer.

In our view this part of the claim should be modified to take account of the convenience of the employer and any replacement staff. Any right to vary maternity leave should be limited in the following manner:

(a) Provided the addition does not extend the maternity leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days notice in writing, stating the period by which the leave is to be lengthened.

(b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days' notice in writing, stating the period by which the leave is to be shortened.

Cancellation of Leave

Provision is sought with respect to the cancellation of leave as follows:

> *"Where the pregnancy of a female employee terminates other than by the birth of a living child, the balance of the maternity leave to which the employee is entitled under this clause shall . .. be cancelled."*

It is appreciated that where a pregnancy terminates otherwise than by the birth of a living child, it may well be advisable for the employee to resume work as soon as possible. However, it may be that if the employee has already proceeded on leave, arrangements will have been made as to replacement staff. We consider it necessary therefore to distinguish between the situations where leave has been applied for but has not commenced, and where the employee has proceeded on leave. In the former situation we think the leave should be cancelled in accordance with the claim. In the latter situation, we think the employee should have the right to resume work at such time within a period not exceeding four weeks from the date of notice in writing to the employer as the employer nominates.

Some awards prescribed fortnightly or monthly hire. In those cases consideration may need to be given as to whether the four week period should be extended.

Special Leave

A further claim is made for circumstances where a pregnancy terminates other than by the birth of a living child.

The claim is set out in the following terms:

> *"Where, not earlier than 28 weeks before the presumed date of confinement, the pregnancy of a female employee terminates other than by the birth of a living child, the employee shall be entitled to a period of special unpaid leave (in addition to any paid leave entitlements) which in the opinion of a qualified medical practitioner is necessary in the particular circumstances for the proper recovery of the employee . . ."*

Although the claim is in terms of special leave, the concept of sick leave intrudes into our conclusions to the extent that it warrants discussion in this part of our decision. This is not to suggest that all terminations of pregnancy after 28 weeks should attract sick leave entitlements. However, there may be circumstances where such termination is accompanied by illness.

As hereinafter appears, we have decided that paid sick leave benefits should not be available to an employee during her absence on maternity leave. Because of this and having regard to our decision relating to cancellation of leave, it is unnecessary for provision to be made where an employee has already proceeded on leave.

Where an employee has not proceeded on maternity leave but the pregnancy terminates after 28 weeks, other than by the birth of a living child, then special provision should be made as follows:

Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks, other than by the birth of a living child, then -

(i) she shall be entitled to such period of unpaid leave (to be known as Special Maternity Leave) as a medical practitioner certifies as necessary before her return to work, or

(ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a medical practitioner certifies as necessary before her return to work.

Maternity Leave and Other Leave Entitlements

The claim is in the following terms:

"Maternity leave shall be in addition to other leave provided under this award or under any other award, agreement or legislation relating to an employee, and an employee taking maternity leave may immediately before or after or during that leave, take any other leave to which she is then entitled. In particular, the compulsory periods of leave specified . . . may be taken as unpaid leave under this clause, as any other leave to which the employee is entitled or as a combination of both."

Although the claim is for unpaid maternity leave, we consider that it is fair that in lieu of or in conjunction with her period of maternity leave an employee should be entitled, if she so desires, to utilise any long service leave or annual leave standing to her credit. However, we are of the view that the total period of leave taken on account of maternity should not exceed 52 weeks and, except in the instance of special maternity leave hereinafter set out, should be taken in one continuous period.

As to sick leave, we do not consider that any illness occurring during unpaid maternity leave should attract either paid sick leave or an extension of the total period of leave for maternity purposes beyond 52 weeks. However, some awards provide in respect of, for example, annual leave that in the event of illness such leave may be extended by the period of paid sick leave. We do not propose to interfere with those provisions where paid leave is taken in conjunction with maternity leave.

We have earlier indicated that where pregnancy terminates after 28 weeks other than by the birth of a living child, special maternity leave may be taken as well as sick leave for illness associated with such termination.

Although we do not intend that normal pregnancy and confinement should be regarded as an illness entitling an employee to sick leave, it is possible that a pregnancy may be attended by illness which may or may not be related to the pregnancy. If the employee has not proceeded on maternity leave, an illness not related to the pregnancy should be subject to the ordinary award provisions. If the illness be related to the pregnancy, then we are of the view that the employee should be entitled to the same provisions as to special maternity leave or use of paid sick leave as we have determined for an employee whose pregnancy terminates after 28 weeks other than by the birth of a living child.

We stress that in the special provisions we have made for the use of paid sick leave and/or the granting of special maternity leave, the total period of leave for maternity purposes shall not exceed 52 weeks. It is only in the special circumstances mentioned in this section that we would countenance the splitting of leave taken for maternity purposes.

Our order will include provision for paid sick leave for illness related to the pregnancy and suffered by an employee before she commences maternity leave. With respect to other leave entitlements, we will provide as follows:

Provided the aggregate of leave does not exceed 52 weeks:

(a) an employee may, in lieu of or in conjunction with maternity leave, take any annual leave or long service leave or any part thereof to which she is then entitled.

(b) Paid sick leave shall not be available to an employee during her absence on maternity leave.

Effect of Maternity Leave on Employment

As previously stated, the claim with respect to maternity leave includes a request that such leave shall not interrupt the continuity of employment and shall count as service for all purposes of the employment relationship except as to annual leave for which a maximum of 26 weeks maternity leave shall count as service. The claim seeks only unpaid maternity leave. We confirm that where other paid leave is taken for maternity purposes, the normal award provisions relating thereto shall prevail.

The concept of maternity leave necessarily involves an acceptance that the employment relationship should not be severed by reason of the fact that an employee absents herself for maternity purposes. For this reason we accede to this part of the claim insofar as it relates to continuity of employment during maternity leave.

However, the claim for accrual of further rights during absence on unpaid maternity leave would extend the concept to equate that absence with actual service for all award purposes. We do not consider that an employee should accrue such entitlements whilst absent on unpaid maternity leave, because any such accrual might well be seen to confer an advantage over those who remain to perform work for the employer. It would also be a burden upon the employer.

During the proceedings the parties were invited to give specific consideration to the impact of the claim upon State legislation relating to long service leave. Although we are of the view that unpaid maternity leave should not count as service for the accrual of other benefits or leave including long service leave, we are aware of the possibility that some State legislation might provide, or might hereafter be amended to provide, that absence on maternity leave should be counted as service for long service leave entitlements. We do not see it as part of our present function to fetter the right of State legislatures and for that reason we have decided that the claim should be granted in the form hereunder:

"Notwithstanding any award or other provision to the contrary absence on maternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement".

This provision includes the preservation of seniority as claimed but not its accumulation.

Ante-Natal and Post-Natal Care

Whilst we fully accept the evidence of Professor Llewellyn-Jones as to the need for proper ante-natal and post-natal care, we do not propose to accede to the claim in this respect.

Our proposals are flexible enough to enable an employee to secure proper ante-natal and post-natal care. We consider that employers in the private sector ought not to be burdened by the situation described by Professor Llewellyn-Jones *"that hospital clinics tend to operate during normal working hours, and many doctors close their doors soon after five o'clock in the evening".*

Termination of Employment During Maternity Leave

The claim is that an employee taking maternity leave may terminate her employment at any time by giving at least two weeks' notice in writing. Although we acknowledge that courtesy would require an employee to give as much notice as possible of her intention to terminate her employment, we see no reason why provision with respect to notice of termination whilst on maternity leave should differ in any respect from relevant award provisions.

The unions further seek that *"an employer shall not give notice of dismissal to an employee during her period of maternity leave or where such notice would expire during or immediately after the leave period".* We consider that such a restriction would not only be unduly onerous upon the employer, but might well give to an employee absent on maternity leave an unfair advantage over other employees. For example, in a programme of retrenchment, it could unfairly advance the employment prospects of the absent employee over those with longer service who are still at work. In the case of employment for a fixed term such a provision might operate to extend the employment relationship beyond the original period of the contract. Moreover, prior misconduct discovered during absence on maternity leave could justify dismissal. For those reasons, and others which appear later, we propose that our award should provide that:

"An employer shall not terminate the employment of an employee on the ground of her pregnancy or of her absence on maternity leave."

Return to Work After Maternity Leave

The claim seeks that an employee give at least two weeks' notice to her employer of the day on which she intends to resume work and that *"the employee shall be reinstated in her former position or, where that position is no longer in existence, in a comparable position and shall receive the same pay, wage, salary or other payment and other benefits as she would have received had she not taken maternity leave."*

We have already made provisions relating to notice of the period of leave to be taken. However, that period can be as long as 12 months and therefore we consider that we should provide that an employee confirm her intention to return to work by written notice to the employer, given at least four weeks prior to the expiration of her leave. This will give due regard to the interests of replacement employees.

The second aspect of the claim poses problems in the event that the position of the employee is no longer in existence. For instance the business may have closed down and clearly there could then be no question of re-employment. If the position has ceased to exist for any other reason, the question of employment in another position arises. We consider that in general, she should be employed in another position. In that section of this decision dealing with transfer to a safe job, we have expressed the view that the employee's entitlement should be at the rate of pay which attaches to the job to be performed. For similar reasons we consider that if after maternity leave the original position is no longer in existence, but there are other positions available which the employee is capable and qualified to perform, she should be entitled to a position as nearly comparable in status and salary to that of her former position. This of course would not affect any award right of the employer to terminate her services at any time for reasons not associated with her pregnancy or absence on maternity leave e.g. a general cutting back of staff or the closing down of a section of his business.

Subject to the foregoing, an employee shall be entitled to her former position.

No Discrimination by Reason of Pregnancy

The unions also seek that:

> *"The possible or actual pregnancy of a woman shall not be a ground for which an employer may refuse employment to a woman or dismiss or take action disadvantageous to a woman already employed."*

This claim clearly extends beyond the actual employment relationship.

Assuming the validity of an award provision in the terms sought, which is a matter upon which this Bench would need to be satisfied by further argument, its effectiveness would depend substantially upon the procedures for enforcement of a right thereby conferred upon a person not a party to the award. Without commenting upon the legal niceties which are involved, we express some doubt as to whether there are resources under the Act sufficient to supervise the implementation of such a provision. In varying the Municipal Officers (Queensland) Consolidated Award, 1975 to proscribe discrimination against married women inherent in a policy of termination of employment upon marriage, the Commission stated;

> *"In view of the special expertise of the Committees on Discrimination in Employment and Occupation, we consider it desirable that in the event that a dispute should arise as to whether or not a termination offends the provision to be inserted in the Award, such dispute should be referred in accordance with the procedures of those Committees to the Queensland Committee, and if necessary to the National Committee for resolution."* [203 C.A.R. 584]

We also are of the view that consideration of possible discriminatory practices should be left to the discrimination committees and the various State authorities established for that purpose.

The latter part of the claim seeks to prevent an employer from dismissing or taking *"action disadvantageous to a woman already employed"*. We have earlier indicated that any award made with respect to maternity leave should provide against dismissal, on the ground of pregnancy or absence on maternity leave. Once an award has been made in accordance with this decision, section 5 of the Act will operate to prevent an employer from dismissing a female employee, or injuring her in her employment, or altering her position to her prejudice, by reason of the circumstance that the employee is entitled to the benefit of award provisions with respect to maternity leave. We therefore consider that further proscription in the manner sought by the claim is unnecessary.

Replacement Employees

The final part of the claim refers to replacement employees in the following terms:

> *"Before an employer engages a person specifically to replace an employee taking maternity or special leave or an employee who has been transferred to a safe job . . . the employer shall full inform the person of the temporary nature of the employment offered and of the conditions relating to the leave being taken by, or the transfer to a safe job of, the employee who is being replaced"*.

With the qualification that the claim as worded might be construed to enlarge the rights of a pregnant employee to be transferred to a safe job, we accept that the provisions contained in the claim are reasonable and necessarily incidental to an award for maternity leave. It should not be thought that transfer to a safe job will automatically be rendered practicable by the engagement of a replacement employee. There may well be cases where a transfer will be practicable with or without the engagement of replacement staffs similarly there may be cases where the need to engage replacement staff will of itself render a transfer impracticable. For these reasons we propose that this part of the claim be granted in the form following:

> *"Before an employer engages a person to replace an employee exercising her rights under this order, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced."*

Order

We propose that provision for maternity leave in accordance with this decision should be inserted in the awards relevant to the matters before this Bench. A draft of the prescription we propose is handed down with this decision and will be settled by the Registrar in Melbourne at 10.30 a.m. on Friday, 23 March 1979.

The orders shall have effect from Monday, 2 April 1979 and shall remain in force for 12 months.

Printed by authority of the Commonwealth Government Printer