Working Mums: The Construction of Women Workers in the Banking Industry

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Drawing on the Australian banking industry as a case study, the paper argues that the provision of maternity leave and award protection for women returning from such leave has been used to construct women workers as transient “working mums”. The motherhood appellation underscores a deep ambivalence to women in the industry, both masking and justifying entrenched and gendered occupational segregation and a rising pay equity gap. In some instances equality of opportunity has been recast as “strictly identical” treatment, despite women’s difference. This occurs in an environment where legal prohibitions against discrimination are reduced to check lists in corporate risk management strategies in which minimising harm to the organisation is the centre of activity and concern.

INTRODUCTION

We have to recognise difference in the quest for equality, hence our emphasis on equitable treatment. Yet the place of differences within equality talk is fraught with problems, given the complexity of the circumstances which produce them. (Burton 1996, 154)

It is often assumed that we all mean the same thing when we talk about equality in the workplace and yet, as Clare Burton suggests, the concept of equality is highly contested. The formal model of equality uses the benchmark of sameness and is based on the assumption that inequality can be remedied by treating all persons in a strictly identical manner (Sheehy 1987,4-5). While such identical treatment may be modified to allow for biological exceptions such as pregnancy, it emphasises equality of access. A concept of formal equality underpins the proscription of direct discrimination in the Commonwealth Sex Discrimination Act 1984 (SDA) and most workplace equal employment opportunity policies. The prohibition on certain indirect discrimination and the advocacy of special measures set out in the SDA place somewhat more emphasis on equality of result and thus a more substantive equality. These legislative provisions and the Affirmative Action (Equal Opportunityfor Women) Act 1986 (AAA), recognise, on paper at least, the specific labour force disadvantages women may experience either because of social conditions or because of biological differences in respect to child bearing.
This paper presents research in progress, part of a larger project on how women’s workplace grievances are articulated and resolved in the banking industry, in the shadow of the law (Mnookin and Kornhauser 1979), specifically that of the Australian federal industrial relations and sex discrimination jurisdictions. The research draws on a case study of the Australian banking industry. It attempts to engage with the limitations of the law and, more importantly, with the way in which such limitations are created and how they operate within a changing social, political and economic context to maintain a gender divide in the workplace. Tribunal and court decisions in both jurisdictions and confidential conciliation files, held by the Human Rights and Equal Opportunity Commission (HREOC) in respect of complaints lodged from banking industry employees, contribute to this analysis. The analysis is complemented by material from interviews with relevant HREOC and Australian Industrial Relations Commission (AIRC) Commissioners and staff, human resource and industrial relations personnel in three major Australian banks, women who work or have worked in these banks and relevant officials in the Finance Sector Union (FSU).

The issue outlined in this paper is limited to that of motherhood as it is problematised in the workplace both by women workers and more particularly by management in the banking industry. With the diminution generally in both employer and government commitment to equal employment opportunity (Thornton 1998a, 88), the paper focuses on the way in which the understandings of what constitutes equality and discrimination increasingly reflect a formal concept of equality which emphasises strictly equal treatment. This is a retreat from an earlier acceptance, albeit limited, that women’s biological differences need to be accommodated in the workplace to achieve equal employment outcomes. I look in particular at the way in which the stereotyping of women as mothers, or potential mothers, reveals a deep ambivalence to women in the workplace, which is used to construct women workers as “different” and “other” despite their number in the banking industry. I argue also that agreement and award provisions in respect of maternity leave and the prohibition of discrimination on the grounds of pregnancy in the SDA, can be constructed as not only special treatment but favourable treatment, justifying different and arguably discriminatory treatment of working women.

LEGISLATIVE PROTECTIONS AND THE BANKING INDUSTRY

The provision of maternity leave in 1979 by the Australian Conciliation and Arbitration Commission (1979 AILR 88) provides for 52 weeks unpaid maternity leave and job preservation after return from such leave. The decision explicitly recognised the interests of those women who wished to combine motherhood with continued participation in the workforce and appeared to address one of the major barriers to women in the workforce. The presence of the SDA and the AAA have contributed to an acceptance, at least in the formal sense, that overtly discriminatory treatment has no place in the public arena of the workplace. Workplace discrimination on the grounds of an employee’s pregnancy or potential pregnancy is proscribed in s7(1) of the SDA, as is dismissing an employee on the grounds of family responsibilities in s7A. The SDA also makes clear, in s7D, that it is not discriminatory to undertake a special measure if it has the purpose of achieving
substantive equality between women who are pregnant or "potentially pregnant" and people who are not pregnant or "potentially pregnant". The SDA explicitly provides in s31 that granting a woman rights or privileges in connection with pregnancy or child birth is not discrimination against a man on the grounds of his sex.

In the industrial relations jurisdiction too, it is unlawful to terminate employment on the grounds of pregnancy. The AIRC has also been obliged under both the Industrial Relations Act 1988 (IRA) and the Workplace Relations Act 1996 (WRA) to ensure that new awards and agreements do not contain discriminatory provisions which, among other things, may discriminate against pregnant employees and those with family responsibilities. In making its decisions, the AIRC is also obliged to take account of the principles embodied in the SDA in relation to discrimination in employment.

The provision of paid maternity leave in the larger banks, typically for a period of six weeks after commencement of leave,6 has extended the recognition of the interests of many women workers. However banking is an industry of contradictions. It has witnessed the increasing employment of women who now make up more than 60% of the workforce (Australian Bureau of Statistics (ABS) 1996a). At the same time the male culture of the workplace remains intact if not unchallenged, with the banks both pivotal to, and in many ways symbolic of, the male power of the private sector. The larger Australian banks have a high profile as "good corporate citizens" in the area of work and family and through their filing of annual reports as required under the AAA,7 despite the continuing low numbers of women in senior management,8 and the gulf between policy and implementation of equal employment opportunity (Still 1997). There is also significant dissonance between the views of the women and men who work in banking in respect to both the role of organisational equal opportunity policies and whether they may in fact provide women with an unfair advantage (Still 1997,41-42). Finally, while low union membership is often associated with women's relatively poorer employment status (Charlesworth 1993), union membership in the banking industry is relatively high and women are now more likely to be union members than men.9

However, barriers to equality faced by women employed in the banking industry have remained constant over the last century, despite their shifting manifestations. The gender divide in banking employment has endured despite significant legislative change with the introduction in 1984 of the SDA and in 1986 of the AAA. It has also survived despite a significant overlap of the industrial relations and sex discrimination jurisdictions created by amendments to the SDA in 1992 that extended jurisdiction to industrial awards and agreements. Amendments to the IRA in 1993 extended legislative protection against sex discrimination in employment within the industrial relations jurisdiction. The potential of this overlap was celebrated at the time as providing individuals and unions with far greater scope to pursue claims of sex discrimination in pay and conditions than had been possible before under the IRA (Walpole 1994). However, at least within the banking industry, such potential has remained largely unrealised especially when measured against an increasing gender pay equity gap,10 and hostility to women's differences. Equality of opportunity in the workplace has been pared back to the "same treatment" with the blame for unequal outcomes left at the door of women's choices, as discussed below.
THE PROBLEMATISING OF MOTHERHOOD

Lots of higher up men can't cope with women who have children being in the workplace. They say things like "If you really care about your child - you'd be at home". (Branch Network Employee)

That women in the banking industry, particularly those with children, experience difficulties and hostility in the workplace is confirmed by data taken from complaints lodged under the SDA by both current and former banking industry employees. The file analysis indicates that from 1987 to 1997, a total of 74 complaints were made against 14 banks in the area of employment by individual complainants and by the FSU. The three main grounds of complaint were sex discrimination, sexual harassment, and pregnancy or family responsibility related or "motherhood" complaints, as I term them.

Most of the complaints on the grounds of "motherhood" concerned matters such as accessing maternity leave, treatment while pregnant, return after maternity leave to a "comparable position" and access to redundancy. These matters are arguably "industrial" as well as "discrimination" issues as they are expressly covered in banking industry awards and agreements. This jurisdictional overlap is also suggested by the number of complaints in which the complainant was represented by her union. Over the total period there were 29 motherhood complaints compared to 31 sexual harassment complaints. This indicates that complaints generated by the perceptions of the treatment of mothers and potential mothers in the workplace have been almost as frequent as complaints of sexual harassment. Indeed, in 1995, motherhood complaints accounted for well over half of all complaints lodged. This is much higher than would be expected when viewed in the context of all complaints made under the SDA.

Of the five banking industry cases decided by HREOC in the area of employment, three centred directly around issues of motherhood. Of these, only Finance Sector Union v Commonwealth Bank of Australia (Commerce Clearing House (CCH) 1997 92-889), the Commonwealth Bank case, was upheld by HREOC. However this was set aside on appeal to the Federal Court later in the same year and sent back to HREOC for re-hearing (CCH 1997 92-908). In a fourth case, Dunn-Dyer v ANZ Banking Group Limited (CCH 1997 92-897), in what was essentially a sex discrimination complaint, various attributes of motherhood formed the basis of discrimination as outlined below.

The employee banking culture is a very conservative one in which the culture of complaint is muted. Because both the employers and the Union emphasise in-house management or resolution, very few employee grievances go to legal forums outside the workplace; even fewer are determined at a hearing. Both Union officials and managers in the industry agree that there are few serious grievances taken up by bank employees in general, or women in particular, in comparison with other industries where the industrial culture is much more adversarial. One human resource manager estimated that only around 5% to 10% of any "employee rumblings" would ever become a formal complaint to management. While this may be due to historical factors such as the paternalism of the banks in dealing with employees (Game and Pringle 1983), the emergence of a risk management ethos within human resource management has also proved important.
Banks have a strong compliance culture in respect of financial regulation. The extensive internal procedures and processes, a set of rules if not practices, to deal with workplace grievances has also developed from credit quality and prudential concerns (Scarff and Carty 1993). Any anti-discrimination activity is typically seen in terms of the compliance strategies of the bank, and training emphasises that managers must ensure compliance with the relevant legislative requirements. The risk management ethos, which underpins human resource management practice in banking, demands the assessment of potential legislative breaches, and more importantly, their potential fallout, in developing grievance resolution procedures. This has been arguably responsible for the centralised and specific unfair dismissal and sexual harassment grievance resolution mechanisms set up in the larger banks.

A mark of success within the risk management paradigm is that grievances are kept in-house, or private and within the banking "family". A sign of failure is where grievances end up in outside forums in the public arena. Risk management places emphasis on reducing the risk to the organisation or removing the risk from the workplace even if this means failing to resolve the substance of the complaint. It also ensures a distancing of accountability, where risks can be legitimised by the fact their consequences are neither seen nor wanted (Beck 1992,33). Moreover, the concept of risk presupposes and is built on the concept of acceptable levels of risk (Beck 1992,64). When used in human resource management in banking, the focus is on a minimal, privatised resolution of employee grievances and making an assessment of the collateral damage if a complaint were to go public or to cause other harm to the organisation. Decisions are made about what is important, such as potential unfair dismissal claims, and what can be safely ignored, such as disputes about comparable positions on return from maternity leave. The risk management paradigm thus works directly against addressing any systemic discrimination in the workplace culture.

So what generates the motherhood complaints in the banking industry? Complaints from women in respect of accessing maternity leave and securing a comparable job on their return are not new (ANU/NBAC 1985-1988, Box 2, Z 508). However, the massive restructure which has been under way in banking since the late 1980s, and the apparent globalisation of banking, have created additional pressures on employees, particularly in retail or branch networks which are overwhelmingly staffed by women. As banks have sought to reduce labour costs, significant downsizing achieved through "spills" in all the major banks' retail networks has followed. While the official emphasis has been on treating all workers the "same," the on-going organisational and industry restructure has meant that nothing is the same for those returning from maternity leave. Women may find their full-time job has been turned into two part-time positions. They may find that their "comparable" position has been located at another branch, comprises different tasks and responsibilities or is to be undertaken at different hours. In the struggle to find a comparable position, women may be also be put in a relief role from which they will often resign.

The organisational downsizing in banking appears not only to have left the gender divide intact, but has erected additional barriers to women. The demand for access to
retrenchment and voluntary departure packages reported in the industry, and reflected in the HREOC conciliation complaints, suggests that at least some women would prefer to leave the workforce rather than resign themselves to the work on offer. Comparability between the previous job and the one available after maternity leave is reported to be an ongoing issue by the FSU and the AIRC and one which is resolved mainly on a case by case basis, despite its being an industry-wide phenomenon.

While some job protection is offered to women returning after maternity leave under most of the relevant banking industry awards and agreements, the extent of this protection is frequently at issue in conciliation hearings before the AIRC. However, very few of these matters are arbitrated or go to hearing. When they do, there is often a failure to understand the issues at stake or a reluctance to deal with potential issues of discrimination. In Commonwealth Bank Officers’ Association and Commonwealth Bank of Australia (AIRC 1994,221/1994 unreported) the AIRC dealt with a section 99 dispute about whether three women employed by the bank were placed, as provided for in the Commonwealth Bank Officer’s Award 1990 (AIRC Print J6280[C0290]), in a position of comparable status after they returned from maternity leave. Deputy President Maher found in each case that, notwithstanding a loss of shift loadings and access to flexible hours, there was a "reasonably fair comparison" in salaries, classification and positions both pre and post maternity leave and dismissed the application. This decision highlights the way in which the definition of comparable position has been narrowed down.

While the equity concerns of working women have been reduced in many instances to the work/family problem (Burton 1997,6), the issue of motherhood, both actual and potential, is undoubtedly experienced as a problem by many women in the banking industry. However, my concern in this paper is the way in which motherhood, real and potential, and its attributes are increasingly constructed as a problem for the workplace by managers who make comments such as "the big issue for the branch network is having lots of working mums who have outside commitments" (Human Resource Manager).

Workplace demographic data, which indicate that many women working in the finance industry are mothers, also show that many of the men working alongside them are fathers. Banks have specifically recruited "mature" women to work on a part time basis, hoping to draw on their skills and experience with the increasing emphasis on customer service roles in the 1990s (Junor, Barlow and Patterson 1993,65-66). However the problematising of women employees as mothers recreates the divide between the private world of family and the public world of work within the workplace. This means that the origin of the difficulties women face, and sometimes express in their workplaces, is seen in their choosing to maintain private or outside lives and is therefore created by women themselves. Bearing and rearing children is no longer seen as a social responsibility and certainly not the responsibility of employers, despite dependence on the "reproduction economy" for their supply of workers and for the sale of many of their products (Acker 1998,200). One of the most significant barriers to women in banking is thus placed squarely outside the employers' realms of influence and the way in which work is structured by the banks.
The choices women may or may not make occur within strictly delineated constraints created and maintained by the divide between the private family world and the public world of work which is structured around the male full time worker or the "benchmark man" (Thornton 1990). Women who enter the world of paid work can never hope to be the "ideal worker" (Williams 1996). In banking that ideal worker is one who can work a minimum of 40 hours (often more) per week, has no career interruptions, can work overtime, can travel and can be transferred. However, women in the industry who work long hours and eschew having children are still stereotyped as current or future "working mums with outside commitments"; the stigma of motherhood extended to all women workers. For example, Leonie Still’s work highlights the "you'll only get pregnant and leave" assertion which persists even when women are clearly "past it" (Still 1997,57).

One of the consequences of the attribution of actual or potential "outside" commitments to women is the perception that women therefore lack interest in working the long hours and being committed to the additional work necessary to ensure access to promotion and careers. That is, their commitment to family is seen as incompatible with commitment to their work in a way which it is not for men. The perception that women, because of their current or potential family care responsibilities, have different interests and rights in the world of work also offers an attractive excuse to explain the gender segregation in banking as a personal, private (and proper) choice of female employees. However evidence both in the banking industry and more generally suggests that while women may accommodate existing patterns of labour market segregation, rather than challenge them, they do not accept the consequences of such segregation (Junor, Barlow and Patterson 1993; Burton 1996).

The gendered workplace organisation which has characterised bank employment means women are concentrated in clerical positions, in part time work and in the retail branch network. Part time workers can be expected to do relief work and work a variety of hours in a variety of locations which in practice can make the work/family balance more difficult. The "choices" these women make consign them to jobs and locations which are more vulnerable and less secure. The perception of part time work and the fact that women work in lower grade roles allows senior male management to continue viewing women workers as transient and uncommitted. The turnover of women at senior levels is also ascribed to the choices women make. In commenting on the loss of "some very visible women" at Westpac, which had attracted criticism of the bank, the then Managing Director of Westpac, Bob Joss, stated that "we must respect the choices women make about their careers and their families" (Joss 1998). That such choices are constrained ones, often made in the face of an inflexible and hostile workplace was not, at least publicly, acknowledged.

While the banking industry has worked to assist women manage their "private" juggle between work and family with maternity leave and career breaks, it is within the context of the demands of a world of work where accessing work and family policies further underlines the gender divide. The low status and part time work undertaken overwhelmingly by women in the banking industry, confine many of these women to a ghetto of "working mums", which reaffirms the view of women as peripheral to the real
business of the banking industry workplace. Moreover, utilising family friendly policies such as maternity leave, even where paid, and career breaks, means women are unable to work as ideal workers; and the wages that they receive and their job security when they access such leave are further compromised (Williams 1989, 833-834). Indeed, accessing maternity leave in a time of industry wide employment restructure has meant women may also have their conditions of work compromised as highlighted in the Commonwealth Bank Officers’ Association and Commonwealth Bank of Australia (1994) decision discussed above and the Commonwealth Bank case (1997) discussed below.

Several senior bank officials interviewed suggested that beyond the barriers faced because of motherhood, women themselves often erected significant barriers to a career in the banks by lacking the confidence, qualifications or ambition to pursue promotion, as well as having a different attitude to, and expectations of, work.

The Bank is still trying to understand why, when it does provide equality of opportunity, that this equality of opportunity is not taken up. (Senior Human Resource Manager)

At the general classification level in bank branches, the lack of enthusiasm for the change from a service to a sales culture, which many women see as emotionally incompatible and "dead end" with few career prospects outside the branch network, has also been cited as a failure of the women currently working in the industry (see also Still 1997,62-63). This difference perspective, that is the view that not only are women biologically different from men, but they have different roles, interests and rights flowing from that difference, was argued by a number of female human resource personnel, with one stating:

Women are still the primary care givers. There are costs and benefits in life and an organisation cannot fix that. I made a choice not to have children. You can't have it all. (Human Resource Manager)

However, as highlighted in the Dunn-Dyer case discussed below, even those women who do not have children, do not necessarily "have it all".

Some real resistance to equal opportunity and family friendly policies is beginning to emerge in the banking industry. Several senior bank officials interviewed were concerned that too much focus had been placed on trying to assist women manage their "private" or "outside" commitments, arguing that in the future changes in the work organisation of banking could not continue to accommodate such special treatment, "there is a view in the bank that we are paying twice for our family friendly policies" (Human Resource Manager).

Concern about the equity of "family friendly" policies has not only been expressed by the banks. The FSU reported that in enterprise bargaining negotiations with one major bank, paid maternity leave was presented by the bank as part of the total remuneration pie. This became a divisive issue among members, some of whom argued that it discriminated against those who would not access maternity leave. Despite the fact that maternity leave was introduced in recognition of the interests of those who wished to combine motherhood with continued participation in the workforce, it has increasingly become constructed as "unequal treatment" undercutting the original intent of its
provisions by making it impossible for women to conform to the ideal worker norm or participate equally in the workplace. This further contributes to women being seen as problematic in the banking workplace, and despite their number, women become marked as "other" with their identity constructed reductively in terms of motherhood (Thornton 1996, 230-231).

MOTHERHOOD: STEREOTYPES AND GUARANTEES

In August 1992, Susan Dunn-Dyer, a senior Money Market Services manager in the ANZ's Treasury Department, was made redundant by the Bank. Whilst married, Ms Dunn-Dyer did not have children. She lodged a complaint with HREOC and after unsuccessful conciliation, the complaint was referred to hearing and ultimately decided in August 1997 (1997 EOC 92-897). Ms Dunn-Dyer had alleged sex discrimination in that the atmosphere at the workplace was generally hostile to women; that she was passed over for promotion to State Treasurer; that she was treated disrespectfully by her supervisors; that restrictions were placed on her access to training and support for further study; and finally, that she was made redundant. HREOC found that it was unable to be satisfied as to the general hostile atmosphere, that failing to promote Ms Dunn-Dyer was a "legitimate position to take" (at 77,364), and that her supervisor had "legitimate managerial biases" in his dealing with her (at 77,367). However, HREOC did find her supervisors' use of the terms such as "mother hen", "mother's club" and "the nursery", to describe Ms Dunn-Dyer and her department were not only derogatory but also reflected their strongly held views about women. Because these characterisations of Ms Dunn-Dyer were based on the fact she was a woman, their assessments of her managerial and other skills were in error (at 77,376). It was on this basis that denying and limiting access to training and organisational support was held to be discriminatory as was the ultimate redundancy. Ms Dunn-Dyer was awarded $135,000 both in respect of general damages and economic loss in respect to lost salary.

The ripple effect of the motherhood stereotypes outlined above are thus extended in the Dunn-Dyer case to women who have no children and who are capable of meeting all the requirements of the "ideal worker" save for their gender. This case highlights how pervasive the association of women in the workplace is with the norm of family care and how even those women without children are identified and indeed dismissed in the workplace by attributed family responsibilities in the way a male worker is not.

In the Commonwealth Bank case, the support provided women workers because of their actual child bearing and family responsibilities was at issue as was the weighing of this support against the right of a major commercial enterprise to restructure in the manner it saw fit. In January 1994, the FSU lodged a complaint with HREOC against the Commonwealth Bank on behalf of more than 100 members and former members who had been on maternity or career break leave at the time of a major reorganisation and downsizing that led to a spill of all positions in the retail network in 1993 and 1994. After conciliation failed, the matter was referred to hearing and ultimately decided in March 1997 (EOC 92-889). The Union claimed indirect discrimination firstly in the failure of the bank to grant these women the opportunity to express interest in voluntary
retrenchment and secondly in the inability of these women to comply with the conditions attached to participation in the spill and fill. These conditions included the requirement that an employee who had obtained a position in the new structure be able to take up duties within 4 weeks of the formal announcement of successful appoints to spill positions.

HREOC found that the complaint of indirect discrimination was made out in that the opportunity to obtain a position in the new structure and the opportunity to apply for a voluntary departure package were benefits to which women on maternity and career break leave had limited or no access. The Bank appealed the HREOC decision and the full Federal Court set HREOC's finding aside in November 1997, accepting the Bank's argument that HREOC had failed to take into account what was a "guarantee" given to staff on extended leave, such as maternity leave and career breaks, of a comparable job when considering the "reasonableness" of both the position and retrenchment requirements (EOC 92-908). This is despite the HREOC finding that the scale of the restructure meant there was "not the ordinary guarantee of suitable or comparable work being available upon their return" (EOC 92-889,77,230) and that the threat facing these women was "that they would be returning to a poor choice of employment in a Bank for which they no longer wished to work" (at 77,232).

Apart from the specific outcomes, the Commonwealth Bank case is interesting in that both at HREOC and in the Federal Court, the Bank argued that the specific benefits provided to the women in question should be balanced against any disadvantage experienced by them. That is, the treatment of staff on extended leave ought not be viewed in isolation but in the context of the package of entitlements provided by the Bank, which included the right to a period of paid maternity leave, the right of a guaranteed job on resumption from maternity leave and to career break leave. In the Federal Court decision this led to the indirectly discriminatory treatment of women workers being effectively recast as "special" and indeed "favourable" treatment, betraying an utter incomprehension by the Federal Court as to the reality of that gendered workplace as indicated in the remarks of Davies J.:

(T)he reorganisation which occurred, the spill of positions, the dismissal of 25 per cent of the employees at the Bank and the appointment of the remaining 75 per cent of the Bank's employees to new positions, was a reorganisation which had no effect upon the employees on long leave, including the members of the class, for they did not hold any of the positions which were abolished and their rights to return to work were maintained (EOC 92-908,78,073).

Justice Davies appears to suggest that because those on extended leave did not have positions which could be made redundant, they were somehow in a better position via the "guarantee" of a comparable position on their return than those who lost their positions and had a chance to apply for new positions or, if unsuccessful, have access to a redundancy package. In a workplace where both HREOC and the Federal Court accepted that retrenchment was a "benefit" and with the history of industrial dispute about what constitutes positions of comparable status, such a guarantee is a hollow one.

The treatment of motherhood and potential motherhood in the workplace, particularly in respect of maternity leave, sharply highlights the equal treatment/special treatment
tension. In the Federal Court appeal of the Commonwealth Bank case, comparisons between those on extended leave and those at work, was used by the Bank not only to mask the gendered basis of the complaint but also to allow the special treatment accorded to mothers in the workforce to be weighed up against any indirectly discriminatory impact of wholesale restructuring. That is, the maternity leave and family friendly provisions accessed by women generally were used both to explain and justify this different treatment in the restructure. Further, these women's difference in not being in the workplace at the time of the restructure was used to justify their different treatment. At the same time, the fact that women and men on extended leave were denied access to the benefits offered to those in positions at the workplace was used by the bank to argue sex equal rather than different treatment. However, because women were more likely to be on extended leave, as a result at least in part of the provision of paid maternity leave and access to career breaks, such "equal treatment" was indirectly discriminatory.

As well as the inadequacies of the SDA's indirect discrimination provisions, the Commonwealth Bank case illustrates how constructing the equality issue as a choice between equal treatment or different treatment can be manipulated to defend the status quo (Bacchi 1992, 94). That is, if women want equal treatment they must be able to assimilate to the male norm and remain within the workforce without interruption, or, if they want their difference from the male norm recognised, they must accept the consequences of that difference in being treated differently. The Commonwealth Bank case also highlights the precariousness of any real understanding of the impact of workplace policies on women on maternity leave or career break leave. While paid maternity leave and family friendly policies have been instituted in most of the major banks, the reality is that women on maternity or career break leave do not have a position while on such leave and while the perception is that such workers are treated equally or indeed favourably, as argued by the Commonwealth Bank, the fact of their difference means they are treated less equally and less favourably. Indeed the refusal of some women to be grateful and quietly pay the (unspoken) price of "special" treatment such as paid maternity leave, by accepting the lack of a "position" and any consequent rights, has led a number of senior bank personnel to speculate if the "equality thing" has not gone too far.

CONCLUSION

While eschewing the North American legal wrangles over pregnancy and non pregnant persons (Graycar and Morgan 1990,44-5), the commonsense acceptance of the different but equal treatment of pregnant women within the workplace has become rather more contingent in a time of increasing unemployment, restructuring and, in the banking industry, job insecurity, increased work pressure and significant short staffing. While pregnancy has been variously constructed as an impairment and a disability in both the Australian industrial relations and the sex discrimination jurisdictions, maternity leave has been accepted, at least at the outset, as necessary to ensure women had full and effective access to the workforce. This "difference" approach has been undercut to a large extent by an increasing workplace perception that such leave confers an advantage
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...on those who access it. The limited paid maternity leave available in the major banks has, I believe, increased the perception of unfairness and supported the return to the "same treatment" approach to pregnancy in the workplace. This is despite the fact such paid leave was introduced by most of the major banks primarily to encourage women to return to work after maternity leave, in order to reduce turnover costs and the drain of skill and experience from the organisation.

The very "difference" embodied in maternity leave has served to underscore the distinction between men and women in the workplace, where attributes of actual and potential motherhood are used to construct women as "different", even in a female dominated industry such as banking. I have argued that within the shadow of the law in the banking industry workplace equality and discrimination are contested concepts. Despite legislation that espouses equality between men and women (SDA: sec 3) and in spite of anti-discrimination and industrial protection which recognises the "biological differences" of women, equality can be read down to mean strictly equal treatment.

It is not the specific legislative provisions themselves that have changed. Most of the references to discrimination in the IRA have been incorporated into the Workplace Relations Act 1996 and the SDA has been strengthened in respect to indirect discrimination and the inclusion of dismissal because of family responsibilities as a ground of discrimination. However, both the enactment of the SDA and the growing recognition of women as legitimate industrial subjects within the industrial relations jurisdiction occurred within the context of a social justice rhetoric of equity and government and employer focus on equal opportunity outcomes. This particular social and political environment has been on the wane since the early 1990s with the increasing primacy of economic rationalism and the consequent valorising of the rights of the employer/manager in the employment relationship (Thornton 1998b).

Within the context of increasing managerial discretion, the deregulation of wages and general employment conditions (ACCIRT 1998), and in the banking industry at least, with the emphasis on risk management, equal employment opportunity for women is today carefully weighed against any potential "disadvantage" to the organisation and to the men working within it. While the increasing non-responsibility of organisations for their employees is attributed to inevitable economic forces, the responsibility for the consequences of workplace restructure and change is laid at the feet of those most affected by such change (Acker 1998, 201). Not only have the market orientation and the privatisation of the economy reduced the pressure on employers to pursue equality in the workplace, but the Federal government, which has a vital role in promoting gender equality, has been remarkably silent in the face of increasing evidence on the gendered impact of workplace deregulation.

The failure to understand and much less address substantive equality has in many cases, such as pregnancy, effectively reduced the equal treatment of women in the workplace to the strictly identical treatment outlined in the introduction. This both contributes to and effectively masks a profound hostility to, and systemic discrimination against, women. The apparently contradictory replacement of organisational commitment to equal employment opportunity, which emphasises sameness, by a commitment to
managing diversity with its emphasis on "difference" has arguably facilitated this transition. At the same time, the very difference embodied in maternity leave, and not offset by the introduction of paternity and parental leave, has served to underscore the distinction between men and women in the workplace, contributing to the stereotyping of female employees as "working mums" without the consequent appellation of male employees as "working dads". This is at least partly due to the fact that maternity leave presents a challenge to the fraternal order of both the workplace and the home (Cockburn 1991,94). Together with the other attributes of motherhood generally ascribed to women in the paid workforce, this difference from the norm of the ideal worker not only makes equal treatment apparently impossible and unreasonable, but also serves to allow a construction of discriminatory treatment as equal and fair.

NOTES

1 This paper was presented at the Sixth Annual Gender Studies Conference, University of Newcastle, Central Coast Campus, 4 June 1999. The paper is based on PhD research funded by an APA(l) in which the Human Rights and Equal Opportunity Commission is the industry partner. I am grateful to Professor Margaret Thornton for reading and commenting on an earlier draft of this paper. Any errors or omissions are of course my own.

2 Conciliation files were made available by the Human Rights and Equal Opportunity Commission (HREOC) and the State and discrimination bodies administering the SDA on HREOC's behalf under a confidentiality agreement with HREOC. Data from the files were collected using a proforma which was based substantially on a questionnaire developed and used by Rosemary Hunter and Alice Leonard in their study The Outcomes of Conciliation in Sex Discrimination Cases. (Hunter and Leonard 1995) Additional data collected related mainly to the employment profile of complainants and specific industrial issues raised in and by the complaint.

3 Case cited in Federated Miscellaneous Workers Union of Australia & Ors v ACT Employers Federation & Ors (1979 Australian Industrial Law Review (AILR) 88).

4 It should be noted that the right to unpaid maternity leave is restricted to those women who work on a part time or full time basis and who have had a year's continuous service prior to taking leave. This does not provide any job protection to the increasing number of women working in intermittent and non standard forms of employment. It is estimated that approximately 40% of working women are not entitled to such leave (National Women's Justice Coalition 1999).

5 Subsection 14(2) of the SDA specifically provides that it is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, pregnancy or potential pregnancy:

(a) in the terms or conditions of employment that the employer affords the employee;
(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
(c) by dismissing the employee; or
(d) by subjecting the employee to any other detriment.
As a former public sector agency, the Commonwealth Bank still provides 12 weeks paid leave. Westpac, the National Australia Bank and the ANZ all provide 6 weeks paid leave with the latter two banks only paying for the last 3 weeks of leave after the woman has returned to work and remained in the workplace for a designated period.

For example, Westpac won a Portfolio Affirmative Action Award in 1990 and was commended by the Affirmative Action Agency in 1993 for training women to move into management. In 1992, the National Australia Bank also won an award for putting policies into place to increase the retention of employees after maternity leave. Most of the major Australian banks have been regularly recognised by the Agency as 'best practice' organisations on the basis of high ratings of their annual reports.

Data from Affirmative Action Agency reports and the Finance Sector Union indicate that the percentage of women located in senior management positions in the ANZ, the Commonwealth Bank, the National Australia Bank and Westpac only rose from 2.1% in 1990/91 to 5.9% in 1995/96.

Finance Sector Union membership statistics indicate women working in the banking industry constituted 66% of the Union's banking membership in 1996.

Unpublished ABS data indicates that the pay equity gap between total full time average weekly earnings for men and women in the finance industry increased from 31.2% in 1991 to 35.1% in 1996 (ABS 1991a and 1996b). This exceeds the quantum and differs from the trend in the gender pay equity gap for all full time employees of 21.0% in 1991 and 20.6% in 1996 (ABS 1991b and 1996c).

Interviews were conducted by the author with managers and female employees from three major banks in Melbourne and Sydney between 1997 and 1999. Confidentiality in respect to the identification of banks and employees was a condition of the interviews.

For example in the 1995/96 year, sexual harassment complaints outnumbered complaints of pregnancy and family responsibility by more than five to one. While theses data relate to all complaints and are not disaggregated for employment, employment as an area of complaint comprised 83% of all complaints made under the SDA in 1995/96. (HREOC 1996,90).

These were O'Grady v Challenge Bank Limited (1994 HREOC No. 93/00. unreported), Gibbs v Commonwealth Bank of Australia (CCH 1996 92-877), and Finance Sector Union v Commonwealth Bank of Australia (CCH 1997 92-889).

In Organ v State Bank of NSW (1996 IRCA NI 4843 of 1995 Unreported), the Industrial Relations Court of Australia (IRCA) found that Ms Organ was unlawfully terminated because she was denied procedural fairness in not being consulted in respect to her forced redundancy. The IRCA appeared reluctant to address the second limb of her application which went to discrimination on the grounds of family responsibilities, finding that there was no evidence of actual discriminatory policies or procedures. This is despite the fact Tomlinson JR notes that the applicant was the only senior woman account executive employed by the bank and that "(t)aking into account the re-structuring and the Profit Enhancement Programme from the affirmative action and equal opportunity point of view, and noting the lack of senior female executives employed by the respondent generally, it is perhaps unfortunate that the respondent saw fit to retrench the applicant in that it failed to be more accommodating and sensitive in light of modern business practices."
15 1996 ABS census data indicates that 51% of women in the banking industry are couples or single parents with dependant children as are 49% of men working in the industry. (ABS 1996).

16 Similar issues were canvassed in the litigation in the US Sears Roebuck Case (EEOC v Sears, Roebuck and Co. [1986] 628. F Supp. 1264; [1988] 839 F 2d 302 (7th Circuit)), where women as a class were held to lack interest in sales jobs.

17 There was also a second limb of the FSU complaint which went to the alleged direct discrimination against those women who were refused access to the voluntary retrenchment process because they were on the verge of taking extended leave for child care or child birth reasons. This complaint was dismissed by HREOC.

18 Pursuant to s7B of the SDA, matters to be taken into account in determining whether a condition, requirement or practice that may be indirectly discriminatory is reasonable include the nature and extent of the disadvantage, the feasibility of overcoming or mitigating the disadvantage and whether the disadvantage is proportionate to the result sought by the imposition of the condition, requirement or practice. Because of the period in which discrimination was alleged by the FSU, the Union was obliged to establish the lack of reasonableness of the redundancy and position requirements. After amendments to the SDA, via the Sex Discrimination Amendment Act 1995, the onus of proving whether a requirement or condition is reasonable now lies with the respondent.

WORKSCITED


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of Australia.


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