Ashurst Australia
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Employment Alert

Baby's not coming back: Redundancies during parental leave

Poppy v Service to Youth Council Incorporated [2014] FCA 656

Stanley v Service to Youth Council Incorporated [2014] FCA 643

WHAT YOU NEED TO KNOW

- Two recent decisions of the Federal Court of Australia found that an employer did not discriminate against two of its employees by making them redundant while they were on parental leave.
- The employer was penalised for breaching the *Fair Work Act 2009* (Cth) by failing to respond in writing to each employee's request for flexible working arrangements within 21 days.
- Employers have an obligation to take all reasonable steps to consult with an employee on unpaid parental leave about any decisions that will have a significant effect on the employee.
- Employers also have an obligation under the *Fair Work Act* to return employees to their pre-parental leave position following parental leave, or if that position no longer exists, to an available position for which the employee is qualified and suited nearest in status and pay to their pre-parental leave position.

WHAT YOU NEED TO DO

- If a position held by an employee on parental leave is to be made redundant, consider whether the employee's parental leave had any impact on the decision and whether the same decision would have been made had the employee taken leave for a different reason. More favourable treatment is not required, but the employee must not be treated *less* favourably than comparator employees.
- If an employee's position becomes redundant while that employee is on unpaid parental leave, take *all reasonable steps* to inform the employee and discuss with the employee the effects of the decision, including ways that the decision may be mitigated or averted.
- Review your processes for responding to requests for flexible working arrangements to ensure that all requests are responded to in writing within 21 days, even if the request does not technically comply with the requirements in the *Fair Work Act*. If the request is refused, the written response must also include the reasons for the refusal.

No manager enjoys making positions redundant, let alone when the incumbent employee is on parental leave. Many employers treat pregnant employees and employees on parental leave as a "no go zone" during redundancy processes for fear of the legal risks. However, this approach can result in these groups of employees being treated more favourably than other employees, and is often not in the best interests of the organisation.

Two recent decisions of the Federal Court of Australia should provide some relief for employers in this contentious area.

Sex, pregnancy and family responsibilities discrimination

Poppy v Service to Youth Council Incorporated [2014] FCA 656 and *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 involved separate claims made by two employees against the same employer. Both employees had been retrenched while on parental leave (the retrenchments occurring two years apart). In both cases, the Federal Court found that the employer did not discriminate against the employees under the *Sex Discrimination Act 1984*.

In *Poppy,* the employee was a Marketing Manager and was on parental leave for four months. During her absence, her duties were either divided among her team members or outsourced. Towards the end of her leave period, she emailed her manager with a request as to her return to work date and flexible working arrangements upon her return. The employee was subsequently advised that a decision had been made that her position was no longer required.

In *Stanley,* the employee was a Facilities Manager who was on parental leave for 12 months. An advertisement was placed seeking a temporary replacement during the 12 month period, but no replacement was hired. Instead, the organisation restructured the way that work was done and the employee's work was absorbed by others. After requesting to return to work, the employee was informed that her position had become redundant.

In both cases, the employees were informed of the decision and had meetings with their managers to discuss possible alternative positions. The employer was unable to find alternative suitable positions for either employee and both employees were ultimately retrenched.

Retrenchment not discriminatory

In both cases, the Federal Court held that the redundancies were not discriminatory.

The Court accepted the evidence of the managers involved that the decisions were not based on the employees' sex, pregnancy or family responsibilities. Instead, in the case of *Poppy,* the decision was made because of a change in marketing strategy, because the employee's duties had been easily absorbed by other employees, and because of the cost savings which would result.

Similarly, in *Stanley,* the redundancy had come about because of organisational changes resulting from the departure of a senior manager, and because the employee's role had been absorbed by others in her department. The fact that the employer had initially advertised for a temporary replacement was significant in proving that prior to the restructure, the employer did intend for the employee to return to work after her parental leave.

In both cases, the employees' absence while on parental leave created the circumstance by which alternative arrangements could be tested and found satisfactory. However, this did not amount to discrimination. Justice White compared the employees' treatment to that of a hypothetical manager of similar seniority and experience who took the same period of leave and was entitled to return to work and request flexible working arrangements. His Honour found that the hypothetical employee would have been treated in the same way. Accordingly, there was no evidence that the employee was treated less favourably because her leave was related to pregnancy and family responsibilities.

The employees also claimed that they had been "targeted" after announcing their pregnancies, for example by no longer being invited to senior management meetings and by having car park access withdrawn. It was found that the employees were not discriminated against because in each instance, the employees were not treated differently to other employees in similar circumstances.

Adverse action

The discrimination claims were made under the federal *Sex Discrimination Act*. Under that Act, the employee bears the onus of proving that their employer's conduct was *because of* a prohibited reason, such as the employee's sex or pregnancy. In both cases, the employees were not able to provide evidence to prove this causative effect.

In *Turnbull v Symantec (Australia) Pty Ltd* [2013] FCCA 1771, the subject of our 18 November 2013 Employment Alert, the employee made a similar claim against her employer under section 351 of the *Fair Work Act*. Under that provision, the onus rested on the employer to show that the employee's retrenchment was not due to her taking parental leave. Whilst noting that had the employee not taken parental leave it may not have become apparent that her tasks could be re-allocated, the Court ultimately found the reasons for the retrenchment did not include the employee's taking of parental leave.

Viewed together, the decisions in *Poppy, Stanley and Turnbull* appear to show a consistent line of decision-making across the jurisdictions dealing with retrenchment decisions during parental leave. However, each case turns on its own facts and the evidence put before the court.

Other duties during parental leave

The other claims made by the employees in both cases serve as a timely reminder of the requirements under the *Fair Work Act* during parental leave.

Request for flexible working arrangements

Section 65 of the Act provides some employees, including parents and carers, with the right to request a change in working arrangements. An employer must provide a written response to the request within 21 days stating whether the request is granted or refused. If the request is refused, the written response must also include the reasons for the refusal.

In both cases, the employer had failed to respond to each employee's request for flexible working arrangements within 21 days.

In *Poppy,* the employee was informed in writing within 27 days of her request of the proposed redundancy. Although the letter did not directly respond to the request, the Court held that it implied that the request was refused and was therefore a written response. The delay was minor, inadvertent, and caused by the consideration that was being given to the retrenchment. A penalty of $2,500 was imposed.

In *Stanley,* the employer failed to provide any response within 21 days of the employee's request, and only advised her of the proposed termination over a month after the request. The court imposed a penalty of $4,000 on the employer for the breach.

In both cases, Justice White also held that although the employees' written requests did not include reasons for their requests and therefore did not strictly comply with the requirements of section 65, they were still valid requests. Employers should therefore be mindful of not taking a technical and legalistic approach to employee requests, and identify and respond to such requests in writing within 21 days.

Consultation during unpaid parental leave

Both employees claimed that the employer had breached section 83 of the Act, which requires an employer who makes a decision which will have a significant effect on the status, pay or location of an employee who is on unpaid parental leave to take all reasonable steps to give the employee information about the effect of the decision and an opportunity to discuss that effect.

The employer was found not to have breached section 83. His Honour found that section 83 imposes an obligation on an employer only when a decision has been made, and the obligation is to discuss the *effect* of the decision on the employee, rather than the rationale or substance of the decision. An employer must engage in genuine discussion with the affected employee of ways by which the effect of the decision may be mitigated or averted, but this does not require a reversal of the decision.

Under section 83, an employer must take *all* reasonable steps to provide information and discuss the effect of the decision with the employee. This is a stringent obligation which, in both cases, the employer fulfilled by meeting with the employees to discuss the proposed redundancies, considering alternative positions, and inviting the employees to suggest any alternatives to redundancy.

Return to work guarantee

Section 84 of the Act provides that on ending unpaid parental leave, an employee is entitled to return to their pre-leave position, or if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to their pre-leave position.

In both cases, the employees' retrenchment occurred *before* the end of their unpaid parental leave. Because terminating the employment during the parental leave necessarily ended the parental leave, His Honour construed the obligations under section 84 as being enlivened as at the date of termination.

The employer was found not to have breached section 84 in both cases. Justice White emphasised the requirement in section 84 to return an employee to an *available* position and stated that a position is only "available" if it is, or will be, open to be filled by the employee, and not currently filled by another permanent employee.

Implications for employers

These decisions provide important guidance for employers on how to effectively manage, and not avoid, the contentious topic of redundancy of an employee whilst on parental leave. In particular, the decisions show that redundancies during parental leave may not be discriminatory where they are due to genuine operational requirements such as those highlighted in both cases.

Our Employment Alert dated 18 November 2013 also discusses some of the considerations for employers when managing this issue.

MAKING THE CASE: Insights from Geoff Giudice

An employee made redundant during parental leave who believes they have been treated unlawfully may have a range of options available to them. The two cases discussed in this Alert concerned employees who were made redundant during parental leave and took action under the *Sex Discrimination Act*. There were other potential applications available under the *Fair Work Act* based on adverse action, and the unfair dismissal provisions. Whichever course is taken, attention will focus on whether the redundancies were genuine or a convenient device.

For employers, possibly the most difficult application to combat would be one based on adverse action where the onus is on the employer to prove that it was not motivated by a discriminatory reason. An action based on breach of the return to work guarantee might also be available, although the remedy for a successful applicant would be a monetary penalty rather than reinstatement. The return to work guarantee provides that if the employee's pre-parental leave position no longer exists the employee is entitled to return to an available position for which the employee is qualified and suited, nearest in status and pay to the pre-parental leave position.

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