

ANDREW O'BRYAN

Partner

GALBALLY & O'BRYAN

BARRISTERS & SOLICITORS

259 William Street

MELBOURNE VIC 3000

Telephone: 03 9602 2533

Facsimile: 03 9670 3921

Email: agarner@galballyobryan.com.au

THE LEGAL CASE FOR ADDRESSING WORK / LIFE ISSUES

A. Introduction

I have been asked to talk about the risks to employers if they choose not to provide flexible progressive workplaces which promote a balance between work and family.

Those of you within human resource departments of employers are at the front line in terms of ensuring employment contracts, work and family policies and H R manuals promote and foster a balance between the often competing interests of employers and employees.

Presently, the issue has never been more relevant given there is a greater emphasis on work and life balance for both men and women. It is a fact there is now a significantly greater participation rate in the workforce by women and yet often they retain the role as primary caregiver in the rearing of children and care of their families.

So what types of workplace issues may require flexibility on the part of employers?

What types of workplace flexibility issues frequently arise?

- Return to work
- Part time / job share
- Working from home
- Inability to work extended hours

B. Legal Framework

I want to give you a brief overview of the relevant legislation in Victoria and Federally that may be relied upon by an employee making a claim against the employer who fails to provide a flexible workplace.

Both in Victoria and Federally anti-discrimination legislation assists to promote flexible workplaces (***Equal Opportunity Act (1995) Vic*** and ***Sex Discrimination Act (1984) Cth***).

It is unlawful to directly discriminate within employment where an employer treats an employee with a particular attribute (such as carer / family responsibilities / pregnancy) less favourably than another person without that attribute in the same or similar circumstances.

For example if an employer determined to promote and advance one employee over another employee because the employee being promoted doesn't have carer or family responsibilities such that the employer has a perception the employee will be more dedicated and harder working such a decision if of course it became known would constitute direct discrimination.

It is unlawful to indirectly discriminate within employment where an employer imposes a requirement or condition with which the employee is unable to comply because the employee possesses a particular attribute (for example again carer / family responsibilities / sex or pregnancy) and a higher proportion of persons without the attribute are able to comply and critically that the requirement is not reasonable.

For example the requirement may be to work extended hours or overtime. An employee with childcare responsibilities may be unable to comply with the requirement whereas employees without that attribute would be able to comply. The imposition of the requirement if not reasonable would constitute indirect discrimination.

The ***Workplace Relations Act (1996) Cth*** also provides a legislative framework to promote flexible workplaces.

It is unlawful to unfairly dismiss or force an employee to resign their employment. An example would be where a women returning from maternity leave is told there is no position available for her within the employer.

The *Workplace Relations Act* also makes termination of employment unlawful on the grounds of amongst others carer or family responsibilities, pregnancy or sex.

For example where an employer requires an employee to work night shift in lieu of day shift and the employee cannot comply with the requirement due to family or carer responsibilities and is dismissed or forced to resign a claim would be maintainable.

The issue of *maternity leave* and the Legal obligations imposed upon employers also warrants discussion.

In my experience maternity leave and the issue of return to work is the most fertile area for employee claims both under the *Workplace Relations Act* and Victorian and Federal anti-discrimination legislation.

Schedule 1A of the *Workplace Relations Act* entitles women to 12 months unpaid maternity leave subject to the employee having at least 12 months continuous service within the employer immediately prior to the maternity leave. On cessation of the maternity leave the employee is entitled to return to their previous position or if that position no longer exists a comparable position. Only if the previous position no longer exists and there is no comparable position would the employer be acting lawfully in offering an

employee a redundancy or alternatively the most comparable position available.

C. Cases

How has the legislative framework been applied in cases where employees have made claims against employers for alleged failures to provide flexible workplaces?

I will only address a select few of the recent cases which deal with the issues of return to work (usually post maternity leave), part time / job share and working from home.

I thought in opening our discussion regarding some of these cases it may be of benefit to do our own basic case study of a workplace flexibility issue.

Case study topic – Return to work from maternity leave

I want you to imagine you are acting in a role in Human Resources and the manager comes to you for advice. An employee is returning from maternity leave and the manager wishes to put her into a different position other than her pre-maternity leave position. What do you think are relevant factors in determining whether this would be lawful? How would you handle this scenario?

Relevant factors:-

- Is the pre-maternity leave position available?
- Is the proposed position in substance really comparable? (Duties, responsibilities, level of seniority).

What if the salary and grading / seniority of the position being offered is equal to the pre-maternity leave position?

What if the pre-maternity leave position was being carried out by another employee who was performing as well or better and the employer was minded to maintain the status quo for continuity?

What if the manager had lost his temper or voiced displeasure when the employee had told him about her pregnancy and the taking of maternity leave?

Would the employee's work performance prior to taking maternity leave be relevant as to whether she should be given back her old position?

These were some of the issues which arose in the case of ***Thomson v Orica Australia Pty Ltd (2002) Federal Court of Australia.***

Facts

This was a case about a long term female employee who went on maternity leave.

Prior to taking maternity leave she was an account manager.

Another employee filled her position temporarily.

When she was due to return her manager advised her she would be returning to a different position.

The new position no longer had any direct personal sales contact with clients and was about two thirds phone contact and her reporting line changed.

Her salary and the grading of her position remained the same.

Thomson made a claim in the Federal Court of direct discrimination on the basis of sex and pregnancy.

Decision

Her claim was successful.

The Judge considered the same salary and grading of the position offered to her was not enough. It was not a comparable position as in substance it was a demotion in terms of her duties and responsibilities.

The fact her pre-maternity leave position still existed and was being carried out by another employee was also relevant.

The attitude of the manager when being informed by the employee of her pregnancy and intention to take maternity leave in being hostile and negative was also relevant.

Evidence of any issues relating to the employee's work performance pre-maternity leave in the position would be required before this could be relied upon by the employer as to why it was reasonable the employee not resume in her position.

Hickie v Hunt & Hunt (1998) Human Rights and Equal Opportunity Commission

Facts

Hickie was a partner of a law firm who went on maternity leave.

She wanted to return on a part time basis.

The employer decided not to renew her partnership and pressured her to return to full time work.

Hickie made a claim to HREOC of indirect discrimination on the basis of sex.

Decision

Her claim was successful and she was awarded \$95,000.00 compensation.

The Commission found that the condition that Hickie return to work on a full time basis to maintain her partnership could not be complied with because of her family responsibilities and was not reasonable.

Bogle v Metropolitan Health Service Board (2000) WA Equal Opportunity Tribunal

Facts

Bogle was a dental clinic charge nurse who after taking maternity leave also sought to return to work on a part time basis.

The hospital refused and offered her a demotion with less hours.

Decision

She successfully made a claim of indirect discrimination on the basis of family responsibilities in the Western Australian Equal Opportunity Tribunal.

The Tribunal considered that the lack of continuity and increase in staff costs resulting in two part time employees sharing the position were outweighed by the positives of providing a flexible workplace such as retaining experienced staff.

Bogle was reinstated to her position on a part time basis and awarded \$12,600.00 compensation.

State of Victoria v Schou (2004) Supreme Court, Court of Appeal (Vic)

Facts

Schou was a subeditor for the Victorian Parliament.

Her youngest child suffered from bouts of illness. It was agreed that Schou should work from home on Thursdays and Fridays.

In order to do this her employer was to install a modem line between her house and work. It failed to do so and ultimately Schou resigned.

Schou made a complaint of indirect discrimination on the basis of family responsibilities at the Victorian Civil and Administrative Tribunal.

The Tribunal awarded her compensation of approximately \$160,000.00.

This was appealed and the case returned again to the Tribunal and was then appealed again.

Decision

Ultimately the Supreme Court Court of Appeal dismissed her claim.

It considered it was reasonable for an employer to require an employee to work from the workplace rather than adopting the Tribunal's finding that the employer was not acting reasonably in not allowing Schou to work from home on a short temporary basis.

D. Consequences for Business

To conclude I want to have a brief discussion about the pros and cons for business in providing flexible workplace practices.

First, lets look at businesses which do provide flexibility.

Can you suggest some of the pros and cons for these businesses?

Pros

- Avoid litigation
- Balanced workplace
- Greater retention rates of employees
- Greater staff morale
- Potentially greater productivity
- Less absenteeism
- Employer / Company reputation

Cons

- Potentially greater overheads
- More staff training and administration
- Potentially less continuity of workflow and with clients / customers

Secondly I want to look at some of the legal consequences of failing to provide workplace flexibility.

What are some of the consequences?

- Awards of damages
- Costs of defending claim
- Employee's legal costs
- Reinstatement of employees
- Publicity
- Business / Company morale

In conclusion over the past 5 years there has been significant developments in the legal authorities in applying the law which promotes flexibility within the workplace.

This will continue and it is therefore paramount for Human Resource departments within companies and businesses to consider requests for flexible work practices thoroughly and adopt appropriate policies to avoid some of the negative consequences we have discussed.

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