

# Return from Maternity Leave

## - Are Employers Obligated to Provide Flexible Working Conditions?

In short the answer would appear to be yes. In all but extenuating circumstances, failure to do so is likely to breach relevant state and/or federal anti discrimination legislation.

In New South Wales, the *Anti-Discrimination Amendment (Carers Responsibilities) Act 2000* has introduced into the NSW Anti-Discrimination Act, a requirement that employers provide access to flexible working conditions so that employees who are carers are able to fulfil their carer's responsibilities. The amendment prohibits discrimination in employment on the grounds of a person's status as a carer, with the usual "inherent requirement" and "justifiable hardship" exceptions.

However, where an employee may be in a position to perform the job with some difficulty, or less efficiency than a person without carer's responsibilities, an employer will not be able to rely on the inherent requirement defence in the absence of extenuating circumstances.

Similar legislation can be found at federal level and in most other states.

In Victoria in the case of *Schou -v- State of Victoria*, 177 of 1998 VCAT 20 April 2000 a parliamentary sub-editor approached her employer with a request to work part-time in order to address her competing needs as a parent. The Victorian Civil and Administrative Tribunal ("VCAT") found that a failure to put in place appropriate arrangements forced the editor to choose between responsibilities as a carer and as an employee. The Tribunal found that a high proportion of people who are not parents could comply with the Department's requirement that employees be present at work full-time and therefore the Department had indirectly discriminated against the editor in relation to her obligation as a parent/carer. The Department was ordered to pay \$161,307.40 in compensation.

Similarly, in *Bogle -v- Metropolitan Health Services Board*, (2000) EOC 93-069 the complainant, who was a dental nurse, sought to return to work after adoption leave in the same position but on a part-time, job share basis. The respondent denied this request and claimed the position could not be job shared. It was found that the requirement or condition to work full-time was not reasonable, and that management failed to properly evaluate the complainant's proposal to job share. Reinstatement was ordered and the

HUMAN  
RESOURCES  
GROUP  
BULLETIN

APRIL 2002

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# Return from Maternity Leave - continued

complainant was further awarded \$10,104.52 for past economic loss and \$2,500.00 for stress, humiliation and emotional upset.

The well known case of *Hickie -v- Hunt & Hunt* (1998) EOC 92-910 also highlighted that an employer will only be able to justify a requirement to work full-time as non-discriminatory in extraordinary circumstances. In finding that Hunt & Hunt engaged in unlawful discrimination, the Human Rights & Equal Opportunity Commission held that the firm's failure to accommodate Ms Hickie by adopting flexible workplace practices resulted in indirect sex discrimination as the requirement would inevitably disadvantage female legal practitioners, especially those who are, or who are aspiring to be partners.

Similarly in *Song -v- Ainsworth Game Technology Pty Ltd* (2002) FMCA 31 Federal Magistrate Raphael found an employer's unilateral change of an employee from full time to part time discriminatory and in breach of the *Sex Discrimination Act*, 1984. The employee was required to collect her son from preschool at 3pm each day and deliver him to day care. She was told she could no longer pick her son up at this time and a part time position was suggested to her. She offered to take her lunch break at 3pm but was refused and directed not to leave the workplace. Her full time employment was unilaterally changed to part time after she continued to collect her son. Magistrate Raphael ordered the employer to pay \$10,000 in general damages, \$244 per week from 20 January 2001 (over \$12,000) to compensate for loss of earnings and reinstatement to her full time position.

The NSW Anti-Discrimination Board has published a set of guidelines for employers to ensure that they are conforming with the carer's discrimination provisions in the state legislation. The guidelines include the following five steps:

1. Remove any direct discrimination based on carer's responsibilities. For example, it is direct discrimination to refuse to employ a person because he/she has carer's responsibilities;
2. Remove any indirect discrimination based on carer's responsibilities. For example, it is indirect discrimination for an employer to unreasonably require a carer to comply with the requirement or condition with which a substantially higher proportion of people, who do not have carer's responsibilities, are able to comply;
3. Provide flexible work arrangements wherever possible;
4. Ensure there is no harsh treatment against anyone with carer's responsibilities;
5. Check industrial awards and agreements to ensure they do not discriminate against carers.

Employers may also need to review the terms and conditions of employment contracts, and implement new workplace policies and practices, which make provision for carer's responsibilities.

# Superannuation Guarantee Charge - Earnings Base Revisited

There are have two recent Federal Court decisions which have significant implications for employers in determining the appropriate earnings base on which employer contributions under the *Superannuation Guarantee (Administration) Act 1992* ("SGC Act") are required to be calculated.

The first case is a Full Federal Court decision in *Deputy Commissioner of Taxation -v- Australian Communication Exchange Ltd* [2001] FCA 1664 handed down on 28 November 2001. The case concerned the interpretation of an industrial award provision in Queensland in relation to the meaning of "ordinary time earnings" for casual employees. In finding for the Deputy Commissioner of Taxation and determining that the expression "ordinary time earnings" in the award included payment at the prescribed ordinary hourly rate for all hours worked by casual employees including hours outside the ordinary spread of hours, the Full Court overturned the decision of the primary judge, Justice Dowsett. He held the award should be interpreted to mean that earnings of casual employees in relation to time worked outside ordinary hours as described in the award (from 6:30am to 6:30pm, Monday to Friday and 6:30am to 12:30pm

on Saturdays and hours worked in excess of eight hours in any one day or 38 hours in any one week) are not ordinary time earnings within the meaning of the definition in the award. Accordingly, such earnings should not be included in the earnings base for the calculation of employer superannuation contributions because they were overtime payments.

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The implications of this decision for which leave has been sought to appeal to the High Court by the defendant employer, are significant for employers who employ casual labour. This is because the traditional view has been that hours for permanent or casual workers which fall outside the

period of ordinary hours as described in an award would be regarded as overtime payments. The decision of the Full Court, however, is based on a distinction between casual and permanent employees that because casual employees are paid by the

## Superannuation Guarantee Charge - Earnings Base Revisited (Continued)

hour, it is irrelevant as to when they actually work and that the superannuation guarantee charge contribution should be based on all hours worked but at the ordinary hourly rate rather than at any enhanced overtime rate.

In the second case handed down on 12 February 2002 being *Quest Personnel Temping Pty Limited -v- Commissioner of Taxation* [2002] FCA 85, Justice Grey of the Federal Court construed the meaning of the phrase "ordinary hours of work" used in the definition of "ordinary time earnings" in Section 6 of the SGC Act. In upholding the decision of the Administrative Appeals Tribunal in favour of the assessment by the Commissioner of Taxation against the applicant employer, he held that a construction in favour of the underlying object of the SGC Act to benefit employees should be followed.

In this case, the employees were skilled data entry operators in the Central Data Entry Bureau of the Victoria Police who were employed to work a minimum number of hours in 5 standard shifts per fortnight specified in the offer of employment. His Honour held that the ordinary time earnings

which were relevant for the calculation of employer superannuation contributions for the purposes of the SGC Act were based on the actual hours worked rather than a minimum number of hours in each standard shift. In coming to this decision, His Honour held that despite the use of the word "minimum" in the offer of employment, an employee was expected to be asked to work more than five standard shifts in a fortnight. Having regard to case law in relation to the meaning of "regular or standard hours", it was appropriate to incorporate hours in excess of minimum hours specified in the offer of employment in "ordinary hours of work" if those hours were the normal, regular, customary or usual hours for the particular employee.

Although these decisions have caused concern amongst human resource practitioners and their advisers, it seems to us that these decisions are intended to protect the rights of casual employees and may be seen as part of range of decisions of industrial tribunals and courts which have enhanced entitlements for casuals to long service leave, notice, redundancy and the right to make unfair dismissal claims.

# Unfair Contracts Jurisdiction Under Review - Proposed Amendments to Section 106

Section 106 of the Industrial Relations Act 1996 (NSW) ("the Act") empowers the Industrial Relations Commission (in Court Session) ("the Commission") to, among other things, vary or void a contract or arrangement under which a person performs work in an industry in New South Wales if it finds that the contract is unfair, harsh or unconscionable.

The relevant unfairness may arise from either the terms of the contract or arrangement itself, the surrounding circumstances and/or from the manner of performance or operation of the contract or arrangement. A necessary unfairness may also arise from the terms the contract does not contain. Therefore the Commission may consider, in addition to the employment contract, related arrangements from such a share option schemes and superannuation.

Towards the end of 2001 the New South Wales government introduced the draft Industrial Relations Amendments (Unfair Contracts) Bill 2001.

The introduction of the legislation has been postponed for the purpose of consultation and submissions to be made after receiving strong response to the draft bill.

Issues attracting most debate are the remuneration and compensation caps, the proposed restrictions on taking the employer's conduct into account and three month time limit for lodging claims.

The proposed amendments include:

- Excluding contracts that provide for annual remuneration exceeding \$250,000.00 or annual financial benefits of more than \$250,000.00 (for example: independent contractors).
- Limiting the Commission's powers to make orders for financial benefits payable as a

result of orders setting aside or varying a contract to \$125,000.00 in the case of employment contracts and \$250,000.00 in connection with other forms of contracts.

- Preventing rights under a share option scheme from being taken into account in ascertaining unfairness or assessing compensation.
- To enable the Commission to take into account the conduct of the parties (including whether or not the applicant took any action to mitigate loss) in assessing any award.
- To require an application to be made within 3 months after the termination of the contract.
- To ensure that an application cannot be made for an unfair contracts order if a claim has been made for unfair dismissal by a party to the contract, and
- To prevent an unfair contracts order being made to set aside, or vary, any term of a contract giving rights under a share option scheme.

The bill also removes a restriction that prevents an industrial court from ordering an employer to pay amounts payable under a contract of employment that remain unpaid if there is no industrial instrument that fits the minimum or amount of remuneration for the work done under the contract.

Current reports indicate that the NSW Industrial Relations Minister has made some changes to the proposed bill in response to the opposition in relation to the bill.