

**WORKPLACE AND  
EMPLOYMENT LAW  
ALERT**

JULY 2006

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## **DISCRIMINATION: FLEXIBLE WORKING ARRANGEMENTS - MATERNITY LEAVE**

Employers today are frequently being asked to accommodate flexible working arrangements. This is particularly common when a female employee starts a family and has time away from the workplace wishing to return on reduced hours or a job share basis. Such proposals can cause difficulties for employers and employees alike.

The response of the employer is significant and needs to be carefully considered to avoid breaches of Anti-Discrimination legislation or indeed unlawful termination legislation.

Problems will arise for example, where a female worker is employed on a full-time basis before commencing maternity leave and as a result of the change in family circumstances wishes to combine the responsibility of motherhood with working.

In reality, women do remain the primary carers for dependent children and therefore women make up the majority of those seeking non-traditional roles at work. In attempts to balance these roles, women are seeking part-time employment.

### **The Law**

A worker employed continuously for a period of 12 months is entitled to 52 weeks unpaid maternity leave. After that period, the worker can return to their previous position and enjoy the same substantive rights and benefits.

What then are the employee's rights if they wish to return in a different capacity and what is the obligation on an employer to agree to such a request?

Section 7 of the Queensland *Anti-Discrimination Act 1991* prevents discrimination on the basis of family responsibilities.

The Commonwealth *Sex Discrimination Act 1984* at section 7A prohibits discrimination against an employee on the ground of family responsibilities where the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different.

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Family responsibilities means responsibilities of the employee to care for or support a dependent child or other immediate family member who is in need of care and support.

Recent cases illustrate the circumstances in which it is reasonable for an employer to refuse flexible arrangements for employees. The cases reveal an employer will not automatically have discriminated if they refuse to alter the status of previous positions. However, an employer cannot refuse the request because they wish to maintain the status quo and avoid the potential personal and domestic distractions that may accompany part-time employment.

### The Cases

In the case of ***Reddy -ats- International Cargo Express [2004] NSW ADT 218***, Mrs Reddy was employed on a full-time basis and took maternity leave. In addition to requesting an extension to her 52 weeks of leave, she requested working part-time hours upon her return to accommodate caring for her daughter. The company refused both requests and said as she was a full-time employee prior to her leave she was not entitled to work part-time upon her return to work.

The Court considered the reasonableness of Mrs Reddy's request and the employer's approach to the proposition. The employer maintained the proposition was unworkable because it would require an entire new regime of management within the company.

The evidence revealed that Mrs Reddy's request had never been properly considered and was based on assumptions and predictions. It was therefore held unreasonable it had been rejected.

Likewise, Mrs Bogle's employer, the Metropolitan Health Service (***Bogle -ats- Metropolitan Health Services Board 2000 EOC 93-069***) did not seriously consider her request to perform the job as a charge nurse working part-time and job sharing. Her employer advised it was impossible, the job had always been full-time. The West Australian Equal Opportunity Tribunal said management had to conduct a proper analysis or evaluation to consider the proposal. In the absence of that it was unreasonable.

In another case, the employee, Mrs Domitrovic was on leave and asked by her employer to return early. She agreed and worked one day per week for a six-month period. She was then forced to take further leave due to the ill health of her son.

Upon advising her employer she was available to resume work, she was informed her employment was no longer available. The employer argued she had returned to work from her leave on a casual basis only and they were not obliged to formally notify her of the end of her

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employment. The Commission held the interruption to her leave to work casually was not evidence she wanted to terminate her full-time employment. There had been no discussions with her about a change in status of her employment. As a result it was held she was terminated on the ground of family responsibilities and this was discriminatory. ***Domitrovic -ats- Smith Family Holding Pty Ltd (2006) 58 AILR 300 - 096 (18)***.

Mrs Jordan, heavily pregnant, requested a transfer to light duties in her position as a blood collector in a hospital some weeks prior to her planned maternity leave. Her employer looked for alternatives but determined none were available. In fact, the hospital said there was no written policy in place to deal with the request, there were no such vacancies, no money available and no legal obligation on them to accommodate the request.

The New South Wales Administrative Decisions Tribunal disagreed, saying that merely looking for other positions was not an adequate response to Mrs Jordan's request. The Tribunal held that the hospital did not give real consideration to alternatives other than forcing her to continue in her full duties role or use up her leave entitlements. They should have given serious consideration to full-time alternatives to her existing job. ***Jordan -ats- Northcoast Area Health Service (No 2) [2005] NSW 82 16 November 2005***

Similar facts to Reddy and Bogle, gave rise to a different conclusion for Ms Georgiadis in ***Georgiadis-ats-Powerlab Pty Ltd (2005) 56 AILR 100-360***. Ms Georgiadis was a full-time employee in Powerlab's Accounts and Services Department. Her attempts to work part-time after leave were refused. On appeal her employer was successful in proving it was reasonable she was made redundant after maternity leave because the company had made a business decision to reduce the number of staff without tertiary qualifications. The issues in favour of the employer was the company's size; it was a small company employing only 7 - 10 people and the employer decided to reduce its administrative personnel and to use someone with tertiary qualifications for the more accounting based administrative work. Its reluctance to entertain part-time staff was seen as reasonable given its size and the nature of the accounting work required to be undertaken.

The cases reveal it is not enough nor reasonable for employers to argue inconvenience or *its never been done before*. The message to employers is clear, they must fully and properly consider an employee's request for flexible working arrangements.

If there is no genuine employment available on a part-time basis, the employer will not be in breach of the Anti-Discrimination Legislation. ***Kelly -ats- TPG Internet Pty Ltd (2004) 54 AILR 100-157***. Here the respondent's workplace wasn't capable of flexibility, variations of

employment contracts could not be and had not been, made to cater for the changed circumstances of an employee. No evidence was established to prove there were any part-time employees at the level of employment the applicant wished to work.

#### CONCLUSION

Employers need to be vigilant in properly considering an employee's request for flexible working arrangements and are advised to give adequate reasons if the proposal is not accepted. Employers cannot reject such ideas because it has never been done before or it's a potential inconvenience. Reasonableness is the critical issue, it will be held reasonable if there is no genuine availability of flexible working arrangements and that may be determined, amongst other things, by the size and operational requirements of the workplace.

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