HARMERS
WORKPLACE LAWYERS

WORK INSIGHTS

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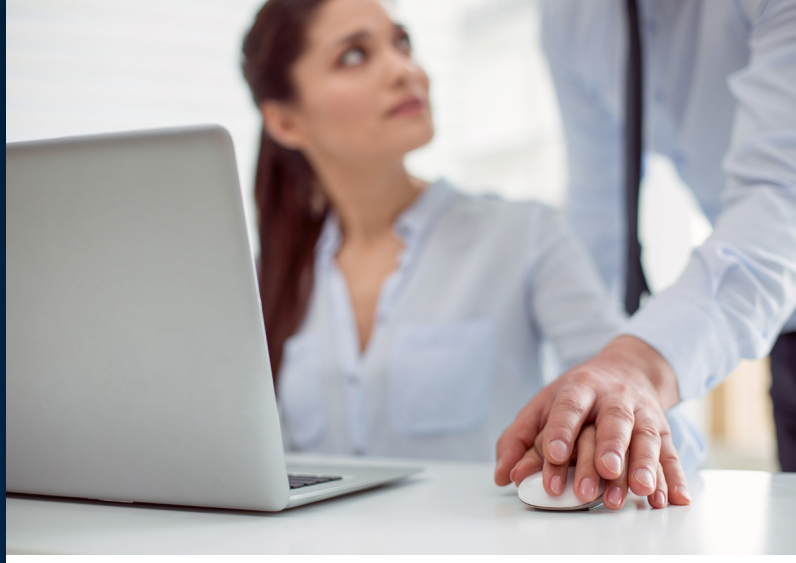

Editorial

Welcome to the Summer 2018 edition of *Work InSights*.

The first article in this edition explores two important issues in sexual harassment: the role of consent in determining whether conduct of a sexual nature is "unwelcome" as defined in the legislation; and the related concept of power imbalance, and how this is dealt with by the courts in sexual harassment cases.

The second article provides employers with practical guidance on how to conduct an investigation in response to allegations of sexual harassment in the workplace, and includes why investigations are required, who should conduct them, how to manage multiple complaints, the standard of proof for an investigation, and whether or not a matter should be reported to the authorities.

In the final article, we address employer obligations that apply to the early stages of parenthood - during an employee's pregnancy and period of parental leave.

We hope you find this edition of value.

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The role of power imbalance and consent in sexual harassment

Amy Zhang and Madeleine Boyd

Introduction

The issue of sexual harassment in the workplace is at the forefront of social awareness following the unprecedented number of celebrity scandals involving well-known actors and producers such as Kevin Spacey and Harvey Weinstein.

This article considers two important issues in respect to sexual harassment: firstly, the role of consent (and the need for overt conduct indicating non-consent) in determining whether conduct of a sexual nature is "unwelcome" as defined in the legislation; and, secondly, the related concept of power imbalance and how this has been considered by the courts in sexual harassment cases.

Consent in the sexual harassment context

The question of whether a relationship is consensual most often arises in criminal cases involving sexual assault. However, this concept is also relevant in sexual harassment cases in determining whether conduct is considered "unwelcome" as defined under the *Sex Discrimination Act 1984* (Cth) ("**Act**").

Section 28A(1) of the Act states that:

> *For the purposes of this Division, a person sexually harasses another person (the person harassed) if:*
>
> *a. the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
>
> *b. engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*
>
> *in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*

In order to determine whether conduct is considered "unwelcome", the court must apply a subjective test based on the victim's state of mind at the time of the conduct. What constitutes unwelcome conduct will depend on the facts and circumstances of each case.

The case law makes clear that a failure by the complainant to challenge each incident of unwelcome conduct does not unequivocally amount to acceptance of that conduct. It is well recognised by the Courts that a complainant may remain silent in the face of sexually unwelcome conduct for a number of legitimate reasons.

Indeed, seemingly consensual relationships in the workplace can involve unwelcome conduct and amount to sexual harassment. This may be because the employee consents to engage in the conduct only out of fear of reprisal or fear for job security (for example, in *Aldridge v Booth* (1988) 80 ALR 1, further below); or because within the relationship, the employee consented and welcomed certain acts, but not all (*Kraus v Menzies* [2012] FCA 3, below).

In *San v Dirluck Pty Ltd and Another* (2005) 222 ALR 91; [2005] FMCA 750, the Court accepted that 'sexual banter' was unwelcome even though the applicant did not directly tell the harasser that the behaviour was unwanted and despite the applicant having responded positively to some of the sexual banter. The Court observed that the applicant's engagement in the sexual banter was an attempt to alleviate the situation. Further, it was accepted that it was difficult for the applicant to expressly resist the harasser's advances because he was her direct manager at the time.

In the case of *Kraus v Menzie* [2012] FCA 3, which considered sexual harassment in the context of a consensual relationship, Mansfield J found that even though some of the conduct between the applicant and respondent was consensual, other conduct within the same relationship was found to be unwelcome and amounted to sexual harassment. Where the applicant did succeed in showing that the conduct was unwelcome, the Court took into account her silence in responding to text messages (other sexualised text messages were responded to by the applicant), and the fact that the sexual acts that were unwelcome were acts that would have been in view of the public.

As discussed above, the notion of consent in sexual harassment cases is dependent on the facts of each case. The Courts will consider a number of surrounding circumstances in order to determine whether the conduct in question is unwelcome, including the relationship between the parties and any relative power imbalance, which is discussed in more detail below.

Power imbalances

A power imbalance between the victim and the harasser is a common feature of sexual harassment cases. In many circumstances, the power imbalance between the parties impacts on the ability of the victim to resist or expressly indicate that the sexual conduct is unwelcome, and may perpetuate the harassment and/or exacerbate its impact on the victim.

Legislation

Although the Act does not expressly deal with the concept of power imbalance, it is a factor which the Courts can consider in sexual harassment cases under the Act.

Section 28A(1A) of the Act states that the following circumstances can be taken into account by the Courts when considering whether sexual harassment has occurred:

a. *the sex, age, gender, identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;*

b. *the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;*

c. *any disability of the person harassed;*

d. *any other relevant circumstance.*

Thus, under subparagraphs (b) and (d) (and potentially (a) in respect to age), a Court can consider the impact and relevance of any power imbalance.

Case Law

Unwelcome conduct

The most typical example of power imbalance in sexual harassment cases is where a junior staff member is subject to unwelcome advances or other conduct by their boss or a more senior staff member. The difference in relative authority of the harasser and the victim plays an important role on how the victim may react to the unwelcome conduct. This is recognised by the Courts and Tribunals when considering whether there has been sexual harassment.

For example, in *Elliot v Nanda* [1999] HREOCA 10, the applicant was a 17 year old medical receptionist of a rural medical centre who was sexually harassed by one of the doctors at the centre. The respondent harassed the applicant by talking about his sexual encounters and propositioning the applicant for sex, as well as through inappropriate touching. The Commission considered the disparity in the parties' age and level of seniority, the fact that the doctor was regarded as an important professional and a pillar of the local community, and the fact that the respondent was paying the applicant's wages, as factors explaining the applicant's lack of express indication that the conduct was unwelcome. The Commission ultimately found that the applicant had been sexually harassed, notwithstanding the lack of direct expression of non-consent to the harassing conduct.

In *Aldridge v Booth* (1988) 80 ALR 1; [1988] FCA 170, Spender J at [5] made the following observations on the concept of power imbalance (emphasis added):

> *"It is to be noted that it is not mere unwelcome conduct of a sexual nature which is proscribed: it is such conduct, coupled with reasonable grounds for belief that resistance to that conduct will result in disadvantage in connection with a person's employment or actual disadvantage.* ***The section [section 28 of the SDA] is concerned with the unlawful exploitation of a position of power and, in the context of unwelcome sexual requests or conduct, prohibits a kind of blackmail."***

In that case, the applicant had been subjected to unwelcome advances and unsolicited sexual intercourse by her manager in circumstances where she was effectively the sole employee in a cake shop and was required to work closely with her manager on a daily basis. The Equal Opportunity Commission and the Federal Court both found that whilst the applicant had seemingly consented to some of the sexual acts (she did so because she was concerned with maintaining her employment and was fearful that she would be fired if she did not consent to her employer's advances), it was found that the applicant had been subjected to unwelcome sexual harassment.

Damages

The power imbalance between parties is also a factor the Courts consider when determining the severity of the harassing conduct and the amount of damages that are to be awarded to the successful applicant in sexual harassment cases.

The Victorian Tribunal in *Tan v Xenos* [2008] VCAT 584 considered that the power imbalance between the parties in that case was relevant to calculating general damages. In this matter, the applicant was a registrar in her third year of training in neurosurgery. The respondent, Mr Xenos, was a neurosurgeon in the same hospital. Mr Xenos sexually harassed the applicant by touching her breasts, kissing her on the lips and pulling his erect penis out of his pants without her consent. Her Honour Judge Harbison considered that the significant power imbalance called for a significant award of general damages, and noted that not only was Mr Xenos senior to the applicant in position and age, he was in a great position of influence as to her qualification and future as a surgeon. The applicant's training assessments were compiled from the observations of all senior neurosurgeons, and Mr Xenos was held in great esteem by all of the other surgeons, and knew that the applicant needed a good performance review due to past performance issues.

Judge Harbison considered this, among other factors, in determining the amount of general damages the applicant was awarded (being $100,000).

In *Taylor v Sciberras* [2004] NSWADT 104, the Tribunal also expressly took into account the power imbalance when considering general damages to be awarded. In this case, Ms Taylor was employed by Mr Sciberras at his seafood business as a casual shop assistant. Ms Taylor was a single parent with two children under the age of 12. Ms Taylor was the main employee in the business from 2001 to her termination in 2002. The Tribunal ultimately took into consideration the power imbalance between the parties and specifically the fact that Mr Sciberras knew Ms Taylor was a single mother supporting her family and was financially dependent on her job. The Tribunal expressly noted that "it is important in these circumstances to consider the power relationship between the parties and the fear of possible reprisals".

In *Elliot v Nanda* [2001] FCA 418, Moore J expressly referred to the age disparity between the parties and the applicant's comparative vulnerability in determining the amount of general damages that should be awarded.

In *Collins v Smith* (Human Rights) [2015] VCAT 1992, the applicant, Mrs Collins, was forced to resign from her full-time position with the respondent, following four months of sexual harassment and victimisation by the owner and manager of the employer business. The Tribunal awarded Mrs Collins $180,000 in general damages; $20,000 in aggravated damages; $60,000 for past loss of net earnings and superannuation; $60,000 for future loss of net earnings and superannuation; and $12,280 for out of pocket expenses.

In considering the appropriate amount for damages to be awarded to the Applicant, Jenkins J accepted that the following circumstances, among others, 'significantly aggravated' the respondent's offending conduct:

a. *"The respondent was not only the employer but in a position to exercise and did exercise direct supervision of the applicant; [and]*

b. *The respondent was the person to whom any complaint of sexual harassment would ordinarily be made. Hence, the respondent's behaviour created an intolerable situation for the applicant in which to perform her work, where she had no independent party to whom she could complain."*

The Tribunal concluded that the applicant felt trapped and powerless to prevent the respondent's behaviour, particularly when she was financially dependent on her employment.

In light of the matters above, the Tribunal went to the extra-ordinary step of awarding $20,000 in aggravated damages (in addition to the significant general damages awarded) in recognition of the respondent's exploitation of the power imbalance between him and the applicant.

Lessons for employers

Given the significant damages payouts that have been awarded to date in sexual harassment matters, it is important for employers to be vigilant in taking all reasonable steps to prevent sexual harassment in the workplace. A failure to do so may result in employers being found to be vicariously liable for the sexually harassing conduct perpetrated by its employees, and employers may accordingly face significant awards for compensation.

The cases and issues discussed above highlight the need for employers to have comprehensive policies and codes of conduct setting out the parameters for acceptable workplace behaviour; and effective processes which protect employees from sexual harassment, ensure that senior staff are not exploiting power imbalances, and which provide an independent, confidential and reliable process for the raising of complaints of sexual harassment and victimisation.

Employers are also encouraged to provide regular training to their employees on what constitutes sexual harassment and how unwelcome sexual conduct is defined by the legislation and case law. These training sessions should ideally include sessions specifically tailored for senior staff, who may not appreciate that due to power imbalances in the workplace, the Courts can hold what is a seemingly consensual sexual relationship to be "unwelcome" for the purpose of the Act.

Investigations into sexual harassment

David Bates & Megan Prouatt

Introduction

Recent social media campaigns such as #MeToo and #TimesUp have once again brought the serious issue of workplace sexual harassment back into the spotlight. Where allegations of sexual harassment are raised in the workplace, employers need to act promptly and pro-actively. Indeed, a failure to take immediate and appropriate action may result in successful legal action and adverse publicity.

Conducting a thorough and impartial investigation into alleged inappropriate sexual behaviour in the workplace is inherently challenging due to the multiple, and often, competing factors invovled. In this article, we explore:

- why investigations into sexual harassment complaints are necessary;
- who should conduct investigations;
- the proper process which should be followed;
- how to effectively manage multiple complaints;
- the standard of proof which applies; and
- when an allegation should be reported to the authorities.

It's worth noting at the outset that the fundamental principles discussed below equally apply to investigations conducted into other types of inappropriate workplace behaviour, such as discrimination, bullying and other innappropriate workplace behaviour

Why are investigations required?

Not every allegation of inappropriate behaviour will require the employer to immediately commence a formal investigation. Instead, a number of questions will need to be considered by the employer in determining whether to engage in an informal or formal investigation process, including:

1. Is the issue really an interpersonal dispute between two colleagues which would be best dealt with via conciliation, mediation or a grievance dispute procedure?
2. Is the issue really about workplace rules or practices?
3. Is the issue one that relates to the workplace at all?

4. Is the complaint trivial, frivolous, far-fetched or otherwise not worthy of formal consideration?
5. Is the complaint vexatious, without merit, or designed solely to inconvenience or annoy another person or the employer?
6. How long ago did the alleged conduct occur?
7. Is there a risk of widespread or repeated conduct if the alleged conduct is not properly addressed?
8. Is there a risk to the reputation of the business?
9. Is there a wider public interest in the matters which have been raised?
10. Is it one of a series of complaints about the same person or the same type of conduct?

Employers should be aware of the significant risks which may arise if a decision is made not to formally investigate. Indeed, if the matter leads to litigation, the employer's failure to take all reasonable steps to prevent the inappropriate conduct by one of its employees will be a significant issue. Additionally, the employer's failure to investigate may itself be considered a further breach by the employer of their legal obligations.

It is, of course, also important to consider the effect a decision not to investigate may have on the employees themselves. If the original complaint was justified, a decision not to investigate may cause the complainant further significant distress. Furthermore, a perpetrator who believes he or she has "gotten away with it" may feel emboldened, thereby increasing the risk of recurrence.

For these reasons, we generally recommend that any allegation of sexual harassment be investigated, even when the complainant requests that their complaint remain informal.

Who should conduct the investigation?

Employers generally have the option of conducting the investigations themselves (i.e. an 'internal investigation') or engaging a professional external investigator. Internal investigations are often far more cost-effective, and the investigator is likely to be familiar with how the business operates, the relevant policies and processes, and the culture of the business.

On the other hand, an external investigator is likely to be – and importantly, is seen to be - impartial, and they will have particular expertise in conducting investigations and writing reports. This may become critical if the matter ultimately proceeds to a court or tribunal and the outcome turns on the quality of the investigation. For this reason, we generally recommend employers engage an external investigator when allegations of sexual harassment are made.

Where an employer engages their usual lawyers to conduct an investigation, care must be taken to ensure a conflict of interest does not then arise. For example, if an employer's lawyers investigate the complaint and legal proceedings subsequently arise, the lawyers may be unable to act for the employer due to their apparent conflict. There is also a risk that legal professional privilege over previous advice given to the employer will be lost in circumstances where the employer's lawyers are actively involved in the investigation itself. Employers should, therefore, raise these issues with their lawyers at the earliest opportunity so that appropriate steps can be taken to limit any risks.

How should the investigation be conducted?

All investigations must be thorough, fair and impartial. The consequences of a flawed investigation can be very serious. Clearly, where sexual harassment has been alleged, an improperly-conducted investigation has the potential to be harmful to both the complainant and the alleged perpetrator, and significantly disrupt the workplace. Furthermore, the poor quality of the investigation may itself then become a point of vulnerability for the employer in later legal proceedings. Investigators, whether internal or external, must therefore be very careful to conduct the investigation properly.

Before any investigation even begins, the investigator should always carefully consider the following questions:

1. Are there any policies or guidelines that apply to the situation?
2. Have there been any similar incidents in the past? If so, how were they handled?
3. Should any interim protective actions (such as a paid leave of absence) be taken?
4. Is there any potential for the complainant or others in the workplace to be exposed to violence by the alleged perpetrator?

Once these questions have been fully-considered, the investigator should then take the following steps:

Clarify

Clarify with the greatest degree of particularity as possible the allegations that are being made.

Plan carefully

Carefully consider how the investigation will be conducted. Identify all the key witnesses, as well as all of the people who will be affected by the investigation process. It is important to consider practical and logistical details as well, such as the location of interviews and the order in which any witnesses will be interviewed. Investigators should also plan and document the questions they intend to ask each witness.

Act quickly

While an investigation should never be rushed, it is equally important that it is not unduly delayed. Witnesses' memories will inevitably fade, computers will be replaced, and documents may be altered or deleted. Any or all of these will materially impact the overall quality of an investigation.

Observe proper process and rules of natural justice

Procedural fairness is essential for the validity of the investigation itself, and will also provide comfort to employees during what will inevitably be a very distressing time by demonstrating the process being followed is both fair and reasonable.

The investigator should obtain all relevant information from the best available sources, consider all possible explanations, and specifically consider information that may be favourable or unfavourable to each affected person. Procedural fairness also requires allegations be put to people promptly, and that they be provided with a proper opportunity to respond. Interviewees should also be allowed to have a support person present at all times.

Interviewing the witnesses

All witnesses should be interviewed, with accurate records kept of both questions and responses. Best practice is usually to interview the complainant first, then other witnesses, and finally the person who has been accused. That way, all unfavourable allegations can be put to the person who is the subject of the complaint.

It is important to assure interviewees that no conclusions have been reached, that there will be no reprisals for raising any issues, and that all discussions will be kept strictly confidential.

When interviewing the complainant, it is critical to obtain as much detail as possible. While it is important to give the complainant the opportunity to tell his or her story in their own words, in the interests of fairness, it is also important to test the complainant's story by asking probing questions such as 'where and when did this happen?' and 'who else was present?'. It is also important to obtain any documentary evidence, if there is any, such as SMS and email exchanges.

It is essential to keep proper records of interviews, and to be aware of what constitutes evidence. If interviews are based on evidence that is actually inadmissible in a court or tribunal (such as a secret recording), the investigation is much more likely to be the subject of challenge.

Managing two or more complaints

Unfortunately, it is not uncommon for an alleged perpetrator to file their own complaint. For example, if an employee complains that he or she has been sexually harassed by a co-worker, that co-worker may in turn allege the complainant has made up the allegation in order to damage the co-worker's career and reputation.

In these situations, the same facts and the same witnesses may be involved, and it is tempting to minimise time and costs by conducting a combined investigation. However, such combined investigations are inherently problematic and should be avoided wherever possible. Instead, care must be taken to ensure that each complaint is treated separately, with independent reports produced at the conclusion of each respective investigation. (see *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177).

The standard of proof

The relevant standard of proof in a workplace investigation is 'on the balance of probabilities'. This means the investigator must determine whether, based on all the evidence which is gathered during the investigation, it is more probable than not that the alleged sexual harassment occurred. This standard of proof should be compared and contrasted with the higher, criminal standard of 'beyond reasonable doubt'.

In the often-cited High Court case of *Briginshaw v Briginshaw* (1938) 60 CLR 336, the Court recognised that the more serious the ramifications of a finding, the more substantial the evidence which is needed to make that finding. However, this does not change the "standard of proof" itself.

Does the matter need to be reported?

In New South Wales, pursuant to section 316 of the *Crimes Act 1900* (NSW), it is an offence not to report conduct that constitutes a serious indictable offence. This could include sexual misconduct. It is, therefore, very important to obtain legal advice in relation to your obligations to report alleged sexual harassment so that employers are clear on what they are obligated at law to report to the police.

Conclusion

As the above makes clear, it is vital employers handle complaints and investigations in a planned and comprehensive manner so as to minimise legal risk, but also to avoid disruption to the business. To this end, we highly recommend having comprehensive polices in place clearly setting out what steps should be taken when faced with allegations of sexual harassment.

Pregnancy and parental leave

Sandra Marks & Victoria Karraz

Introduction

In 2014, the Australian Human Rights Commission found that 50% of working mothers experience discrimination in the workplace at some point during pregnancy, maternity leave or return to work.[1] Of the mothers that reported discrimination, about half of the reports related to pay conditions and duties; and more than a third related to actual or threatened redundancy, dismissal or contract termination.

These concerning statistics highlight the difficulties experienced by employers when navigating their various legal obligations with respect to employee pregnancy and parental leave. These obligations, which vary at each stage in the process of parenthood, arise from a range of legislation, industrial instruments and contractual arrangements.

In this article, we will be addressing the obligations that apply to the early stages of parenthood - during an employee's pregnancy and period of parental leave.

Who can request parental leave?

Most employers are covered by the Fair Work Act[2] which entitles employees with 12 months continuous service to 12 months of

An employer may have obligations pertaining to pregnant employees under the following:

Key Obligations	
Statutory	
Fair Work Act 2009 (Cth) ("Fair Work Act")	Sets minimum entitlements regarding parental leave. Also, prohibits employers from taking adverse action because: • an employee exercises a workplace right such as requesting parental leave; or • because of the person's sex or pregnancy.
State Work Health and Safety Legislation	Requires employers to ensure the health and safety of their employees, while they are engaged in work, as far as is reasonably practicable.
Federal and State Anti-discrimination Legislation	Protects employees from discrimination because of their status as a person with a disability, family responsibilities, children or because they are pregnant. May also oblige an employer to make reasonable adjustments if an employee suffers from a disability such as a pregnancy related illness.
Non-Statutory	
Applicable Enterprise Agreements or Awards	May provide covered employees with parental leave entitlements in addition to those provided by the Fair Work Act.
Individual agreements between the employer and employee (e.g. employment contracts)	May provide greater entitlements to the employee than those prescribed by statute, an award or an enterprise agreement.
Workplace Policies	May provide greater entitlements to the employee or impose additional obligations on the employee/employer.

1 Australian Human Rights Commission: National Review on Discrimination related to Pregnancy, Parental Leave and Return to Work 2014.

2 Note that State legislation, such as the *Industrial Relations Act 1996* (NSW), also prescribe parental leave entitlements for employees not covered by the *Fair Work Act*. The article addresses the entitlements of employees covered by the *Fair Work Act*.

unpaid parental leave when the employee gives birth, or their spouse or de facto spouse gives birth, or they adopt a child. In the case of an adoption, the new parents will only be eligible to receive 12 months parental leave if the child is 16 years old or younger, is not already a child of a spouse or de-facto spouse of the employee and has not already lived with them continuously for 6 months or more.

Casual employees are also entitled to parental leave if they have been working on a systematic and regular basis for at least 12 months and, but for the birth or placement of the adopted child, would have a reasonable expectation that they would continue to do so.

What steps are required to be taken if an employee requests parental leave?

In order to activate their entitlement to parental leave, an employee must notify the employer of their intention to take leave in writing at least 10 weeks before its commencement, or as soon as practicable (for example, if the employee unexpectedly needs to commence the leave earlier than anticipated due to health issues or early labour). The notice must specify the start and end date of the intended leave.

Prior to the commencement of the leave, and after the employer is on notice of the pregnancy, the employer should ensure:

- the health and safety of the pregnant employee, as far as is reasonably practicable;
- that reasonable adjustments are made to assist a pregnant employee if they develop any disability because of the pregnancy;
- that the employee is not treated less favourably than their colleagues because they have requested, or are taking, parental leave, or are pregnant;
- that the employee is not subject to adverse action (including a reduction in their hours without a valid reason, denial of their access to training or opportunities for promotion, transferring them to an alternative location without a valid reason, threatening to dismiss them, dismissing them, removing any benefit already enjoyed by the employee without legitimate reason, or otherwise discriminating against them) because they have requested, or are taking, parental leave, or are pregnant; and
- that no unreasonable requirement is imposed on the employee that will cause them a disadvantage because they have requested, or are taking, parental leave, or are pregnant.

CASE STUDY: *Sagona v R&C Piccoli Investments Pty Ltd & Ors*

Ms Sagona was a photographer who worked in a small family business. After providing notice that she was pregnant, Ms Sagona was:

- directed to work additional hours to meet new unreasonable sales targets;
- told that she could not continue to meet customers and take photographs, because having a pregnant woman taking photographs was not a 'professional look' and would make the company look bad for 'making her work';
- directed to take annual leave and long service leave; and
- refused her request to work part-time upon return from maternity leave with no evidence that the request was refused on reasonable business grounds.

The Court found that the employer was in breach of the general protections provisions of the Fair Work Act and ordered the employer to pay $174,097 in damages and penalties totalling $61,000, .

Safety requirements – taking care of a pregnant employee

One area of statutory obligation that can be difficult for employers to navigate is their ongoing obligations under the work, health and safety legislation to ensure the safety of pregnant employees, as far as is reasonably practicable.

General safety concerns

If there is a concern that a pregnant employee's position may be unsafe for her or her child, or that she is unfit to work in her present state, the employer should request medical evidence regarding:

- whether she is fit to work in her position in her current condition;
- whether the work engaged in by the employee may be injurious to her health and/or the health of the child; and
- if there are health and safety issues identified, what (if any) changes are recommended to enable her to continue working safely.

If the employee refuses to provide evidence in response to such a request, and the employer has no express entitlement under the employee's employment contract or any applicable industrial instrument to compel the provision of such evidence or attendance for a medical assessment, then legal advice should be obtained before proceeding further. An examination will be necessary of the contractual entitlements of the employee, any potential discrimination issues and the work health and safety obligations of the employer and employee.

If an employee develops a pregnancy related illness that would constitute a disability (such as Hyperemesis Gravidarum, being a severe form of morning sickness), the employer will be obliged to make reasonable adjustments to her employment to ensure she is not disadvantaged at work. This may include allowing her to take more frequent toilet breaks or providing her with a chair to sit on if she is working on a shop floor.

Safety concerns during the 6 weeks prior to birth

Where a pregnant employee who is entitled to unpaid parental leave continues to work during the 6 weeks before the expected birth, the employer may ask the employee to provide a medical certificate confirming:

a. whether the employee is fit for work; and

b. if so, whether it is inadvisable for the employee to continue in her present position during a stated period because of illness or risks arising out of her pregnancy; or hazards connected with the position.

If the medical certificate is not provided within seven days, the employer has the right to direct the employee to take unpaid leave prior to the birth of the child.

If the medical opinion is that the pregnant employee is fit for work, but not in her present position, the employer is required to move the employee to a 'safe job' if an appropriate position is available (as discussed below), or if no safe job is available, the employee is entitled to paid 'no safe job leave' for the remainder of the period for which her health is at risk (as discussed below).

Safe job transfer

A pregnant employee who is entitled to unpaid leave and has provided the required parental leave notice/evidence is entitled to be transferred to a safe job (if an appropriate one is available), if she supplies reasonable evidence that she is fit for work, but it is not advisable for her to continue in her present position due to an illness or risk arising out of the pregnancy or a hazard connected with her position. If an employee provides such notice, the employer has a right to require a medical certificate confirming that this is so.

If the employee is transferred to a safe job, she is entitled to receive the same pay rate, hours of work and other entitlements provided in her usual job, although her work hours can be changed by agreement. The

employee will remain in the safe job for the duration of the period of the health risk that has been identified, or until she goes on parental leave, whichever is earlier.

No safe job leave

If there is no appropriate safe job available, a pregnant employee who is entitled to unpaid leave and has provided the required parental leave notice/evidence is entitled to take paid "no safe job leave" for the risk period. An employee who is on such leave is entitled to receive their base rate of pay for their ordinary hours of work in the risk period.

Unpaid special maternity leave

Female employees who satisfy the 12 month unpaid leave requirements are entitled to a period of unpaid special maternity leave if they are not fit for work because of a pregnancy related illness or in the unfortunate case that a pregnancy ends in any way other than by the live birth of their child within 28 weeks of the expected birth date.

This entitlement is subject to the provision of notice to the employer, as soon as is practicable. The employer may also require the employee to provide evidence, such as a medical certificate, that the leave is being taken for a prescribed reason.

A female employee's entitlement to 12 months of unpaid parental leave is reduced by any period of unpaid special maternity leave that she has taken.

Making changes that could be adverse or discriminatory to the employee

If an employer is required to change the employment conditions of a pregnant employee due to safety, or any other reason, it is important to adequately document the decision-making and change process to confirm that the change is for a lawful reason and that a fair and lawful process has been followed.

Further, any change that the employer wishes to impose within the company at large should not have the effect of indirectly disadvantaging any pregnant employee, unless the requirement is reasonable and legitimate.

A significant change in a pregnant employee's conditions of employment, if not conducted correctly, may constitute a constructive dismissal and/or breach of contract and/or adverse action in breach of s340 or 351 of the Fair Work Act and/or or unlawful discrimination. As such, employers that may need to make substantial changes to a pregnant employee's conditions of employment should ideally obtain legal advice before commencing the process.

CASE STUDY: *Melissa Morgan v Heritage Motels and Restaurants*

Ms Morgan was a Manager of a motel. When 18 weeks pregnant, she collapsed while at home. She contacted her employer to inform them that she would be required to take sick leave. Despite pressing that her conditions of employment were not impacting negatively on her health, her Manager said 'this isn't a job for a pregnant person. I would hate for you to have a miscarriage here so I think you should finish up' and her employment was terminated.

The Fair Work Commission concluded that her employment was unfairly terminated and she was awarded $6,101 in compensation.

When can parental leave begin?

A pregnant employee can commence parental leave any time from 6 weeks prior to the date of birth of the child, up to the birth of the child. An adopting parent can commence leave on the placement date. Their spouse or de facto partner must start their leave no later than 12 months after the date of birth or adoption of the child, and no later than the cessation of the first parent's leave.

What happens while an employee is on leave?

Keeping in touch days

Employees are required to take parental leave in one single continuous period, however, they are able to attend work for 'keep in touch days'. The employer and employee must both consent to these days and any request should be made in writing. The keep in touch days must be taken more than 14 days after the date of birth and are intended to facilitate the return of the employee to the workplace after their parental leave.

The employee can only take up to 10 keep in touch days within 12 months and the employer must pay the employee as per normal for these days.

Replacement employees

If an employer chooses to hire an employee to work in the position of an employee on parental leave, the employer is required to notify the replacement employee that:

- the engagement is temporary;
- the employee on leave has a right to return at the end of their leave; and
- the employee may return earlier if they cease to be the primary carer of the child, or where the pregnancy ends other than by the birth of a living child, or the child dies after birth.

Requesting further leave

Some employees may seek less than the 12 months of parental leave. In such cases, the employee is not obliged to take the whole 12 months. However, if, in nearing the end of their leave, the employee decides they want to continue on parental leave until the end of the 12 months, they can give notice in writing at least four weeks prior to the planned end date of their leave. The employer must then allow the employee to take the full 12 months.

If an employee who has taken the whole 12 months of parental leave wishes to extend their parental leave for a further 12 months or less, they may request to do so in writing at least four weeks prior to the end of their leave. This request can be refused on reasonable business grounds, however, the employer must discuss the request with the employee and provide a response, that includes the reasons for their decision, within 21 days.

Redundancies and restructuring while employee is on parental leave

An employee returning from parental leave has a right to return to their former position or to a comparable position in status and pay. However, this does not override the employer's right to make the employee's position redundant due to a genuine business restructure, provided that parental leave or pregnancy is not directly or indirectly a reason for the selection of the position for redundancy. In such circumstances, the employer has an obligation to consult with the employee about the proposed redundancy while they are on leave and before its implementation. It is essential in such cases that the employer document the rationale and process adopted in respect of the redundancy, ideally after obtaining legal advice. A failure to do so can leave the employer vulnerable to adverse action and/or discrimination claims by the redundant employee.

Conclusion

There are various events that may occur during an employee's work life that require additional legal and human resource attention from an employer, and pregnancy and the taking of parental leave is one of these. It is a 'red flag' period during which close attention is required to an employee's legal rights and the employer's legal obligations, which may sometimes appear to compete. In order to minimise the risk of legal claims related to pregnancy and parental leave, employers need to focus on cautious, considered and well documented actions that factor in the potential value of communication and consultation with affected employees. If in doubt, legal advice should always be obtained in advance.

About us

Harmers Workplace Lawyers ("**Harmers**") focuses on innovative, high quality problem solving and a preventive approach to law across all areas of employment and industrial law. While having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed. Harmers has represented many of Australia's leading corporations, senior executives and media personalities as well as having run some of Australia's leading cases in employment and discrimination areas.

Harmers is a multi-award winning employment law firm. Recent awards include: the 2017 Lawyers Weekly "*Workplace Relations and Employment Team of the Year*"; the 2017 Lawyers Weekly Women in Law Awards "*Boutique Diversity Firm of the Year*"; the Human Resources Director magazine's HR Service Provider Awards 2017 "*Gold medal for Employment law" and 2018 "Silver medal for Employment Law".* Harmers also won the 2015, 2016 & 2017 Australasian Law Awards for "*Employment Law Specialist Firm of the Year*" (ten times the award recipient from 2006 to 2017); as well as receiving several global awards for "Employment/Industrial Law Firm of the Year - Australia" (2011 - 2018).

Harmers is the Australian member firm for L&E Global, an alliance specialising in providing counsel on cross-border labour and employment law issues with 25 international practices across 5 continents and 1500 + attorneys worldwide. L&E Global brings together premier national labour and employment law firm boutiques – as one firm – with a unified fee-for-all services approach, across borders and throughout the world. L&E Global won The European Lawyer 2016 *"Global Network of the Year";* and is ranked by Chambers Global in the *"Band 1 - Global – Wide Employment Law Network"* Category (2013 - 2017) and as an "*Elite*" Law Firm Network (2018).

If you would like more information regarding Harmers, or would like to discuss any aspect of this newsletter, please contact one of our experienced professionals.

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