

## CCI WorkplaceBytes

### Hard But Necessary Decisions

There is nothing quite like a corporate restructure to rattle the cage of an employee who for good reasons may perceive their interests are threatened. Informed about their rights under the Fair Work Act or anti-discrimination legislation they are better positioned these days to seek to challenge such decision making in the Courts. However employers will be better positioned to successfully defend these types of proceedings by ensuring rational business reasons and good practice underpin a decision to restructure.

Take the marketing manager who has been with your organisation for a couple of years, has performed well and is ambitious to progress her role in a growing business.

In the lead up to commencing maternity leave the Company decides to restructure the marketing department and to do away with the position of marketing manager. The Company has come to the realisation that its business is changing and its traditional approach to marketing also needs to change. A focus on tendering for work now demands quality direct communications with those that invite tenders.

The manager indicates that she wishes to return to her position post leave working two days at home and three days at work. The mentoring from her own manager ceases at this time as does her involvement in senior management meetings. While disgruntled the manager accepts a new role as manager marketing and events.

While there is nothing that is particularly unusual about these circumstances the ingredients for further friction are active.

While the manager is on maternity leave, the contractor engaged to fill part of that role performs well. The Company then decides that there will be cost savings if it outsources some of the duties and reallocates the balance of duties to other employees. This is likely to result in the position of manager marketing and events becoming redundant.

Conscious that the Fair Work Act creates an obligation on the Company to consult with the maternity leave manager about the impact this decision is likely to have for her position, it convenes a meeting with her to discuss possible retrenchment and any alternative roles. It organises a second meeting to allow time for both parties to consider alternatives and whether the Company will proceed with the redundancy of her role.

Ultimately the manager accepts her retrenchment but under protest asserting that she has been discriminated against having been targeted for both taking leave and then being retrenched.

Then off to the Federal Court we go with the manager alleging breaches of various National Employment Standard entitlements under the Fair Work Act and of the Sex Discrimination Act due to her pregnancy, gender and family responsibilities.

Will the manager be able to establish less than favourable treatment when compared to how the Company would treat with a hypothetical manager of similar seniority on leave for reasons other than maternity leave?

The onus is on the manager to prove her case by producing evidence of the discrimination. The Court finds that there is insufficient evidence of her being targeted for the reasons that she asserts. Instead the Company successfully establishes that there were sound logical reasons for withdrawing the mentoring support and her involvement in senior management meetings.

With respect to her retrenchment, the Company establishes that it was reasonable and justifiable. It was able to produce evidence of numerous reviews of positions and job descriptions over a 3 month period prior to her taking leave. However the Company is not able to produce a detailed analysis of the envisaged cost savings from the outsourcing part of her role. There is also a lack of contemporaneous notes of the management review meetings leading up to the decision to make the manager's position redundant.

Despite these deficiencies, the Court finds that the Manager has failed to establish any discrimination. The retrenchment was due to the change in marketing approach which was to be delivered by the outsourcing and internal reallocation of duties. While the absence on leave had created the opportunity for the Company to test alternative arrangements including the engagement of the contractor this was not discriminatory conduct.

However has the Company failed to comply with its obligation to consult with the manager while on leave about her potential retrenchment? It is found to have met this obligation.

But how about the return to work guarantee which entitles a maternity leave employee to return to their pre leave position or ,if it no longer exists, to another available position? At the date of retrenchment it is found that the Company had no available roles that the manager wished to take up after her leave period ended.

Surely there are can be no further allegations to be made but wait there is – the Company failed to respond in writing within 21 days as required by the Fair Work Act to her request for a change in location of where she was to work upon her return from leave. It had responded but two days late!

After three days in Court a fine of \$2500 is imposed for failing to respond within time to her request for flexible work arrangements. You leave the Court feeling no doubt like employer did recently in *Poppy v Service to Youth Council Incorporated* [2014] FCA. Relieved that the Company has basically acted appropriately and reassured that it is able to continue to make the structural changes required.

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