Returning to Work After Pregnancy

By Greg Romeo, Solicitor, Kelly Workplace Lawyers

Having a child brings with it huge amounts of joy but also a huge amount of change. One thing that a parent or prospective parent won't want changed is the status and salary attached to their job. Unfortunately, navigating a return to work after pregnancy can be stressful and not all employers are aware of their obligations to help employees navigate the difficult transition back to the workplace. Returning to work is a right, not a favour given to you by your employer.

For this reason the Fair Work Act 2009 ("the Act") has a number of protections designed to cover parents of pre-school children. These are considered below.

Paid Parental leave (Paid Parental Leave Act 2010 (Cth)) and Unpaid Parental Leave (s 70 of the Act):

Primary carers of a newborn may claim up to 18 weeks of paid leave at the national minimum wage. This is a governmental scheme that can be supplemented by an employer-funded parental leave scheme (by amount and duration). Whether you can claim under an employer's scheme will

depend on any relevant enterprise agreement or contract, but both government and employer schemes can be claimed simultaneously.

Unpaid parental leave is available to employees who have at least 12 months of continuous service with the employer (which will include casuals if employment was on a regular and systematic basis). An eligible employee can take up to 24 months unpaid leave (which may be altered if two parents of the relationship are eligible).

The courts will ensure that an employee's right to take maternity leave will be protected. In a case we successfully ran in the Federal Court (*Sagona v Piccoli Investments*) our client, Ms Sagona, gave notice to her employers of her pregnancy and of her intention to take an extended period of maternity leave. Her employers responded negatively, suggesting that her period of maternity leave would negatively affect their own retirement plans. They also told her that her pregnancy would impact her working hours and her ability to generate income for the business, as it would not be a "good look" for a pregnant woman to run photo shoots. Shortly after announcing her pregnancy, Ms Sagona was presented her with a contract requiring her to meet sales targets, a failure of which would affect her pay and her ongoing employment. Ms Sagona refused to sign the contract and subsequently resigned her employment. The court found that the employers had in fact taken adverse action by injuring Ms Sagona in her employment for reasons that at least included her pregnancy. The court was not receptive to the argument by the employer that it had acted in this way due to safety concerns for Ms Sagona, suggesting that if the employer had legitimate concerns then it would have sought a medical certificate as to Ms Sagona's ability to perform her duties (which they had the power to do per s73 and s81 of the Act). Federal Circuit Court Judge Whelan said it was a "fundamental entitlement" of an employee to take parental leave to care for a child and not be prejudiced or disadvantaged for exercising that right in the workplace.

"I am satisfied that prevailing community standards demand recognition of the fundamental entitlement of an employee to take (parental) leave to care for their child or children, safe in the knowledge that their employment and

future will not be prejudiced because they have exercised their right to take (parental) leave, including to request flexible working arrangements," Judge Jones said.

Ms Sagona was awarded compensation of over $200,000.

Return to work guarantee (s84):

After an employee has ended their period of parental leave they are entitled to return to the position they held before they commence parental leave. If that position no longer exists (such as due to structural changes) the employee is entitled to be returned to an available position that best suits the employee's qualifications and is closest to the employee's pre-parental leave salary and status.

In *Ucchino v Acorp [2012] FMCA,* the court did not accept evidence that the employee's role had been changed upon return from parental leave solely because of performance concerns held by the employer. The court reasoned that had that been the case, the employer would have at least discussed their issues with the employee prior to making a decision to reduce her duties. Evidence of comments directed at the employee, including that her pregnancy "was hard" for the business were far more readily accepted.

Right to be informed of significant changes while on leave (s83):

While on unpaid parental leave, the employee is to be informed of, and given all reasonable opportunities to discuss, the effect of any significant changes as to status, pay or location of the employee's pre-parental position. In most circumstances this will occur where the business is planning a restructure that may lead to redundancies.

In another case we ran in the Federal Circuit Court (*Heraud v Roy Morgan Research*), our client Ms. Heraud was employed by Roy Morgan Research (a market research company) before she took maternity leave in September of 2013 for 40 weeks. During this period, Roy Morgan Research faced a downturn in major clients while having to deal with new competition in the

industry. As a consequence, her employer embarked on a restructuring program to alleviate financial pressures. While on leave, Ms. Heraud was notified that redeployment options would be available for her. Ms. Heraud attempted to find one of these 'available' positions to fill but due to a lack of communication from management during her time off, found that comparable positions had all been taken. An option that was proposed would remove Ms. Heraud from her role as National Customer Operations Director (A managerial position) to a Face-to Face Field team position. One month later, but before she was due to return from maternity leave, Ms. Heraud's employment was terminated on the grounds of redundancy. In its ruling, the Court found that the employer had engaged in adverse action against Ms Heraud including by not consulting with her during her period of pregnancy. In arriving at that decision, the court considered that neither the Director nor General Manager at the time was called to provide evidence as to why termination had occurred or why no consultation with Ms. Heraud took place. While it is not unlawful to make an employee redundant whilst they are on parental leave, Roy Morgan Research had simply failed to evidence an alternative reason behind Ms. Herauds' termination.

Sick leave (s 96):

Pregnant employees continue to have access to their sick leave with the effect that sick leave can be taken if it happens that a pregnancy-related injury or illness affects the individual.

Special Maternity Leave (s 80):

Pregnant employees can take unpaid special leave if the pregnancy caused an illness or if the pregnancy ended prematurely because of a stillbirth, miscarriage or termination (12 weeks or longer). Leave taken in the case of the latter continues until the employee is 'fit for work' and special leave does not affect the employees right to unpaid parental leave generally.

Safe Job or no safe job leave (s 81):

Where a pregnant employee (casuals and those not entitled to unpaid parental leave included) can work but cant perform their normal job because

it would be unsafe in relation to her pregnancy, then the employee can request a safe job for a duration deemed appropriate. An employee moved to a safe job may be given less intensive work or agree on a reduction of hours, but otherwise is entitled to the same pay rate and hours of work previously received. If no safe job is available then the leave is available as 'no safe job leave' which is paid for those entitled to unpaid parental leave but unpaid for those who are not.

Flexible Working arrangements (s 65):

An employee who has worked with the employer for at least 12 months can request a change in hours, patterns or location of work if they are a parent or carer of a child under school age. Employers can only refuse such requests if reasonable business grounds exist in which to do so.

In *Heraud v Roy Morgan Research* Ms Heraud was provided details of a number of alternative roles after she was advised that her pre-maternity leave position would be made redundant. As it was unclear to Ms Heraud which of these positions would allow for part-time work she submitted a formal request for flexible work arrangements. Very shortly after making this request the employer withdrew the redeployment positions from consideration and terminated Ms Heraud's employment. The court accepted that the employer had created an expectation that Ms Heraud would be offered one of the redeployment positions and then injured Ms Heraud in her employment when it removed these positions.

Where evidence by the employer is sufficient, it is still left to the discretion of the court whether to accept the employer's reason as being genuine. In *Brayford v MAXXIA Pty Ltd* for example, an employee altered his hours by a flexible working arrangement at a call center job after the birth of his son. Despite the more flexible hours, the employee demonstrated a decline in performance and punctuality, which the employee blamed on sleep issues borne by his sons teething. Over a course of a month, the employer provided warnings and opportunity for improvement. When performance and punctuality continued to decline, the employer terminated the employee. The court held that even though the company knew of the employee's family responsibilities, the real and genuine reason for dismissal

was performance and not because of the employees' family responsibilities as was claimed by him. In support of this conclusion, the court relayed the fact that the employer had a strong paper trail of issued warnings; making express mention of their concern with the employee's performance that never improved.

Discrimination:

The Act has a 'catch-all' section that prevents adverse action being taken against an employee based on a defined attribute which include ' *family or carer's responsibilities, or pregnancy'*. Claims of this type are rare and limited to overt cases of discrimination that can be easily identified. In addition to the Fair Work Act, Victoria provides protection against discrimination via the Equal Opportunity Act (2010). This will prevent a situation where the employer treats, or proposes to treat, a pregnant employee unfavorably because of the pregnancy or where the employer imposes, or proposes to impose, a condition or requirement that is likely to unreasonably disadvantage the pregnant employee. It is irrelevant whether the employer is aware of the unfavorable treatment, only that the true reason is indeed discriminatory. Likewise, the pregnancy need not be the sole or dominant reason for the unfavorable treatment; it need only be a substantial reason.

Further advice

If you wish to discuss the above further, then please contact Greg Romeo on (03) 9639 6003.