

FLEXIBILITY AT WORK - NEW RIGHTS/NEW RESPONSIBILITIES

On 1 September 2008 new laws commenced, under which Victorian employers must accommodate the family responsibilities of their employees. Additionally, from 1 January 2010, obligations are likely to apply Australia-wide regarding flexible work practices for parents.

These new duties extend the existing obligations under anti-discrimination laws. Employers have for some time been prohibited from discriminating against parents and carers. Now they will face explicit duties regarding alteration of working arrangements to suit employees with caring responsibilities.

In this edition of Employment Alert, we provide a summary of the legal requirements in this field, and we suggest some steps employers can take to fulfil their duties to employees with family responsibilities.

Anti-Discrimination Laws

Employers are prohibited from discriminating against employees on the grounds of the employee's parental status or status as a carer, under the *Victorian Equal Opportunity Act 1995*. This prohibition applies in relation to areas such as recruitment, dismissal, promotion and a more general category of "subjecting the employee to any other detriment".

Similar legislation applies or will soon apply in the other States and Territories. At a federal level, the *Sex Discrimination Act 1984* provides some protection to employees with family responsibilities.

Recent Discrimination Claim

In a decision on 11 August 2008, the Queensland Anti-Discrimination Tribunal found an employer had unlawfully discriminated against a father on the basis of family responsibilities.

Vernon Bishop was employed as a supervisor with Carpet Call (Qld) Pty Ltd. He requested urgent leave to taken his four year old daughter to hospital. His manager refused this request, even though Mr Bishop had accrued carer's leave, and said something like "it's either your job or your daughter". In response to this, Mr Bishop told the manager he could "shove" the job.

The Tribunal found that the employer discriminated against Mr Bishop, because he was treated less favourably than a person without the same family responsibilities would have been treated in similar circumstances.

Mr Bishop was awarded \$16,000 for lost income and \$17,500 for hurt, humiliation, embarrassment and the depressive illness he developed following these events.

Parent/Carer Responsibilities – Victorian Laws

The *Victorian Equal Opportunity Act 1995* has been amended to provide that employers must not unreasonably refuse to accommodate the responsibilities that a person has as a parent or carer, in relation to their work arrangements (including employment, subcontracting and partnership arrangements).

The amendments mean that workers will not be required to show that the standard working arrangements are unreasonable (as they may need to do in a discrimination claim). Rather, the focus of the new provisions is whether a refusal to alter those standard arrangements is unreasonable.

The term "responsibilities a person has a parent or carer" covers duties to people who are "wholly or substantially dependent" on the person for "ongoing care and attention". As well as children under 18, the category of dependants might extend to people such as:

- adult children with a temporary or permanent disability;
- elderly parents who are frail or ill;
- spouses and partners with a temporary or permanent disability;
- non-family members who are wholly or substantially dependent on the person.

Some ways in which an employer might accommodate an employee's family obligations include changing:

- working hours, shifts, breaks and overtime; or
- work arrangements such as meeting times, location of work and travel requirements.

If an employer unreasonably refuses to accommodate an employee's parent/carers obligations, the employee may lodge a complaint with the Victorian Equal Opportunity and Human Rights Commission ('the Commission'). Ultimately, the issues may be decided in an application to the Victorian Civil and Administration Tribunal ('VCAT').

In determining whether an employer's decision not to accommodate the employee's responsibilities was unreasonable, VCAT must consider "all relevant facts and circumstances", including:

- the nature of the employee's parent/carers responsibilities;

- the nature of the employee's role;
- the arrangements required to accommodate the responsibilities;
- the employer's financial circumstances;
- the size and nature of the workplace;
- the effect on the workplace/business of accommodating the responsibilities (impact on finances, efficiency, productivity, co-workers);
- the consequences for the employer and the employee of making the changes.

Although there are no formal processes in the legislation for employees and employers to follow, the Commission has issued Guidelines as to how the issues might be negotiated.

In evaluating requests for changes to working arrangements under these provisions, employers should:

- consider "all relevant facts and circumstances" (see above), so that the decision can be supported in the event it is challenged;
- follow a consultative process, as suggested in the Commission Guidelines;
- adhere to internal policies and processes.

Flexible Working Arrangements – Federal Laws

The Federal Government intends to enact legislation later this year, which will place an obligation on employers not to unreasonably refuse a request for flexible working arrangements. The obligation will form part of the National Employment Standards, which are planned to take effect from 1 January 2010 and will apply to all employees and employers covered by the *Workplace Relations Act 1996*.

The employee will be entitled to "request the employer for a change in working arrangements for the purpose of assisting the employee to care for the child". The request will be required to be in writing and include reasons.

The employer will be required to respond within 21 days, and will be permitted to refuse the request "only on reasonable business grounds", with any such refusal being required to include written reasons.

This will, however, be a much more limited obligation than the Victorian family responsibility provisions. It will apply only in relation to parents/carers of pre-school children. It will only cover employees who have completed 12 months of continuous service, and it will not give rights to prospective employees, contractors or partners in a firm. Furthermore, there is also no mechanism to appeal an employer's decision to refuse a request.

The Balancing Act

Employers may be faced with a difficult balancing act, in attempting to comply with these responsibilities. For example, they may need to consider:

- Occupational health and safety issues – How safe is the home office? How safe is it for an employee to work non-standard hours?
- The effect of one employee's work patterns on other employees – Will it result in additional stress? Will understaffing create hazards?
- The sensitivity of employees' personal information – How much does the employer need to know in order to accommodate caring duties?

Being Prepared

- Employers should be aware of their legal obligations when employees request non-standard working arrangements.
- Employers are not obliged to accept every request for flexible working arrangements, but they must not unreasonably refuse such a request.
- It is critical that employers actually consider each such request, and make a decision that can be justified as "reasonable".
- This should include going through each of the facts and circumstances listed (and any other relevant ones), and documenting the information and conclusion on each point.
- The process should also include consultation with the employee, prior to making a decision.
- A useful step for employers to take at this stage is to develop or amend company policies to include a process for handling requests for flexible working arrangements, and criteria for assessing such requests.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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