
Human Rights Commission – Pregnancy Discrimination Review Submission January 2014

Our comments below is in response to the specific questions asked as a guide in respect to managing pregnancy, parental leave and return to work.

The kind of issues our clients seek in relation to pregnancy, parental leave and return to work.

The queries we have had from clients have primarily been around the business' and the employee's obligations and entitlements in relation to parental leave. With this advice we provide the obligations and entitlements to not only around the parental leave but also flexibility when returning to work. We provide advice as to the benefits in being flexible and keeping in touch with employees while they are on leave so they understand more than just the legalities in relation to parental leave and that of overall employee relations and therefore value to the business.

We have also been asked to advise in relation to termination of employees who are either pregnant or on parental leave. The queries have related to termination for both performance issues and redundancy. We find that employers are well aware of the additional risks (e.g. potential discrimination claims) associated with terminating such an employee but as a result, feel that they cannot effect redundancies or address performance issues for fear of a claim.

Key challenges faced by businesses managing pregnancy, parental leave and return to work.

The first issue faced by our clients is understanding their obligations and entitlements for themselves and the employee, to ensure they handle the parental leave in the correct manner according to legislation.

However, the real challenge for some our clients is managing the leave. The smaller the client the more difficult it can be to have existing employees cover for employees taking leave and replacing employees can be difficult depending on the role and the skills required. The unknown is the other challenge, not knowing whether the employee will actually return to work and in what capacity, regardless of the intentions. The unknown factor makes it difficult for businesses trying to determine how best manage the leave in the short term and for the long term however appreciate this is to no one's fault, simply the situation.

What we do find also is that whilst it may be more difficult for smaller businesses to manage they seem to be the most willing to be flexible and appreciate the importance of retaining their staff. This is also seen from the employee of the smaller organisation, being more open and flexible themselves, showing their loyalty and appreciating the business is supporting them rather than expecting it.

Key leading strategies and practices seen in managing pregnancy, parental leave and return to work.

We can't say that we have seen anything particularly different in any workplace.

This may be because the benefits and therefore incentives are not known, thought about and / or communicated too much. There appears to be a large disparity between those that work in the public and private sectors in terms of paid parental leave and the provision of flexible working arrangements.

Do some businesses or industries have particular challenges because of their size or industry?

In terms of other factors it seems to come down to a general willingness by the organisation to recognise the continued value of pregnant women or those returning from parental leave. Other than avoiding discrimination, unfair dismissal or other legislative breaches, there is no particular incentive for employers to support those returning to work after parental leave as they don't understand the value. Curiously, it is smaller employers who appear more accommodating and eager to retain trained and experienced workers. Larger employers seem to find it easy to avoid obligations in terms of providing flexible working arrangement on the basis of business requirements maybe as they have extensive resources such as IR teams, legal counsel etc. to ensure that they can make it very hard for an individual employee to dispute their rationale.

The economy does play a role in the way employers view employees returning to work following parental leave. Prior to the global financial crisis, when business was strong and unemployment was low, employers were much more likely to offer flexible working arrangements or part-time work. Opportunities for flexible/part-time work appear to be very limited at this time.

There also appears to be a great disparity between the public and private sector, in terms of the provision of paid maternity leave (beyond government funded component) and part-time or flexible work arrangements. Private enterprise employers seem to find it particularly difficult to manage the parental leave and return to work of those employees in professional, managerial or executive roles. Employees in these roles frequently resign rather than return to work following parental leave due to an inability to return to full time employment.

A specific example that shows the challenges faced by businesses.

An employee in retail organisation was advised unable to work nights due to pregnancy.

- Employer's process involved OH&S department considering all requests for changes to work situation due to medical incapacity to ensure appropriateness, consistency and fairness in decision making.
- Position was a management position but required prolonged standing, with a small amount of physical/manual handling.
- Upon employers request employee provided letter from doctor advising that employee became particularly fatigued in evenings due to thyroid condition and would be more suited to day shift.
- Employer agreed for employee not to have to work late shifts due to the above issue.

- HR/OH&S team kept in touch with employee during remainder of pregnancy in order to monitor employees comfort at work.

Information and Support

Clients regularly ask us about how to manage pregnancy, parental leave and return to work. However, typically clients will have sought information online (e.g. FWO website) to gain some information before coming to us.

Whilst we are not aware of any gaps in the information itself, as with many other aspects of employment law and employee relations, there is a gap in the process of educating employers who are often too busy focussing on their core businesses and who lack the resources to educate themselves. This is particularly an issue for small businesses who do not have their own HR manager. Often there is a general understanding of obligations but no appreciation of the detail regarding matters such as notice requirements, keeping in touch, flexible work arrangements on return to work, etc.

There is also limited information that really highlights the value of retaining employees with parental responsibilities, other than for compliance purposes. If more employers could understand the benefits of retaining employees with parental responsibilities, they might be more likely to be more supportive.

Challenges for businesses implementing the law

The main challenge remains understanding employee rights and employer obligations; that is, employers aren't necessarily implementing the laws because they either aren't aware of them or don't understand them. For example, whilst most employers understand that pregnant employees are generally entitled to parental leave, they do not appreciate the detail such as notice requirements, keeping in touch, flexible working arrangements on return to work, obligations in relation to replacement workers, etc.

In addition, the reverse onus of proof which exists in relation to employment related discrimination (under both the Fair Work Act and the Qld Anti-Discrimination Act) means that employers feel unable to deal with legitimate redundancy and performance management situations for fear of prosecution or claims.

Recommendations for the National Review Report

Whilst we believe in, understand the benefits and even advocate for flexibility in the workplace regardless of the reasons why, there is always the fear that when there is a legislative change to the benefit of the employee that employers at least initially see it as negative and therefore unconsciously discriminate against predominately women of child bearing age.

We also see organisational change occurring in the workplace which can be when employees are absent from work on parental leave. As some businesses may not be good at keeping in touch with employees they can often be forgotten about when it comes to communication & consultation, consideration for promotions or other changes and as a result create poor employee relations, possible discrimination (regardless of intent or not) and lack of discharging their legal obligations. Again, however, this is about managing your people – on leave or not.

From the legal perspective, we would like to see the removal of the reverse onus of proof in relation to discrimination claims for small businesses would place small business employers and employees on more of a level playing field. This would result in the protection from discrimination remaining whilst freeing small business employers to make decisions in the best interest of their business without fear of prosecution or claims.

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