

Limited SDA protection for women on maternity leave

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THE RECENT DECISIONS OF Burchardt FM in *Iliff v Sterling Commerce (Australia) Pty Ltd*¹ and of Gordon J in the same case on appeal² illustrate the limited protection offered by the direct discrimination provisions of the *Sex Discrimination Act 1984* (Cth) (SDA) to women on maternity leave.

In particular, they demonstrate that, due to the application of the comparator and causation elements of the direct discrimination test, an employer's dismissal of a woman on maternity leave because it would prefer to employ her replacement will not necessarily constitute direct discrimination.

In such situations, women may need to frame the claim as a breach of contract or seek the protection offered by the *Workplace Relations Act 1996* (Cth) (WR Act) or seek to formulate a claim of indirect discrimination under the SDA.

Direct discrimination

The SDA prohibits direct discrimination on the grounds of pregnancy, described in s.7(1). It includes treating a woman less favourably because of a characteristic that appertains to women who are pregnant, "than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant". It is accepted that taking maternity leave is a characteristic that appertains generally to pregnant women under s.7(1)(b).³

To prove direct discrimination on the ground of pregnancy, a woman must show that: □ the act complained of was because of the taking of maternity leave (the causation test); and

□ she was treated less favourably (in circumstances that are the same or not materially different) from how the discriminator treats or would treat someone who is not pregnant (the comparator test).⁴

In *Iliff* the applicant failed to satisfy the court of either of these elements.

Iliff

Ms Iliff took maternity leave with the consent of her employers, Sterling Commerce, which temporarily employed another woman to carry out her role. Shortly before she was due to return, Sterling informed her that the company had been restructured and her position had been made redundant. Sterling further said that a new position had been created but

ent wanted her replacement to do the work instead because it considered her replacement a better employee for the job.⁶

In considering the comparator test, Burchardt FM adopted the reasoning of Allsop J in *Thomson v Orica*⁷ and held that the comparator was "a person who went on unpaid leave in December 2004 with an enforceable understanding that they were entitled to return to work, following the end of that leave in 2005".⁸

His Honour then went on to hold, applying the comparator test, that Sterling would have refused to reinstate Ms Iliff if she "had been on study leave, or if the person in her job had been a man on unpaid leave, even if such leave had involved, as maternity leave did, a right to return to work".⁹

er the maternity leave was a reason for the dismissal.

Comparator test

Gordon J rejected ground one of the cross-appeal. Her Honour held that the conclusion reached by Allsop J in *Thomson* was premised on a factual finding that the company in that case was prejudiced against women taking maternity leave. In contrast in *Iliff*, "there was nothing to suggest that the management at Sterling Commerce had a negative attitude towards maternity leave. On the contrary. His Honour found that Mr Vulcan had been supportive of Ms Iliff taking leave."¹⁰

Gordon J went on to conclude that Burchardt FM had not erred in reaching the conclusion he did in relation to the comparator test because "the evidence did not suggest that Sterling Commerce would have treated the comparator with an equivalent right to return to work any differently than it did Ms Iliff".¹¹ While this amounted to a finding that Sterling would act contrary to statute in the case of the comparator, her Honour held that, "it is clear that none of Ms Iliff's sex, maternity leave or family commitments was a reason underlying the company's poor conduct towards her. The reason for the company's poor conduct was driven by (and continues to be driven by) its own commercial interests."¹²

This decision confirms that to establish less favourable treatment a woman will need evidence of an employer's negative attitude towards maternity leave. In the absence of an indiscreet comment by an employer, such evidence may be difficult to obtain.

Causation test

In relation to the second ground, her Honour held that Burchardt FM's focus on the 'real' reason was impermissible.¹³ In this regard her Honour held: "The test of discrimination is not whether the discriminatory characteristic is the 'real reason' or the 'only

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that the company did not consider it a suitable alternative position to her current role.

Sterling offered to pay Ms Iliff a redundancy payment, conditional upon her signing a release confirming that she had no further claims against the company and had returned all company property. In the meantime, Sterling appointed her temporary replacement to the new position that had been created.

Decision at first instance

Burchardt FM held, notwithstanding that Ms Iliff would not have been dismissed if she had not gone on maternity leave, that did "not mean necessarily that the reason for her dismissal was the fact that she was on maternity leave".⁵

His Honour held that the respondent's dismissal of the applicant was not discriminatory under the SDA because the "real reason" she was dismissed was that the respondent

Breach of WR Act

His Honour did, however, find that Sterling had breached the SDA by making payment of Ms Iliff's redundancy payment conditional upon her signing a release in favour of the company, and had breached Schedules 1A and 14 of the WR Act.

Decision on appeal

Sterling appealed against the decision of Burchardt FM, and Ms Iliff cross-appealed.

Relevantly, Ms Iliff argued that Burchardt FM erred because:

- when applying the comparator test his Honour should have reached the same conclusion that Allsop J did in *Thomson*, namely that the respondent would not have treated the comparator in the same way; and
- his Honour incorrectly focussed on identifying the 'real' reason for the dismissal rather than considering wheth-

reason' for the conduct, but whether it is 'a reason' for the conduct."¹⁴

Nonetheless, her Honour held that Burchardt FM's error would not have altered the outcome as she was satisfied that Sterling would have treated the comparator in the same way.¹⁵

Conclusion

The decision in *Iliff* demonstrates that there are two reasons that the direct pregnancy discrimination provisions in the SDA offer women on maternity leave limited protection.

The first arises from the manner in which the comparator was formulated by Allsop J in *Thomson*. The second arises from the causation test of direct discrimination requiring consideration of the actual reasons for the conduct rather than being a 'but for' test.

Comparator

Belinda Smith has been critical of the comparator formulated by Allsop J in *Thomson* and applied by Burchardt FM in *Iliff* because it requires the comparison to be with someone on leave.¹⁶ In doing this she says: "the court was allowing the employer to use the taking of leave as a basis for decision-making and to ignore the reasons for taking leave. No distinction was made between maternity leave and any other sort of leave, despite the acknowledged connection between materni-

ty and pregnancy (a protected trait and traditional source of disadvantage)."¹⁷

The formulation of the comparator therefore permits employers to treat a woman less favourably because she is on leave, which appears to be contrary to the intention of the legislation. It also fails to recognise that maternity leave should not be treated in the same way as other forms of leave and should be given special protection.¹⁸

Causation

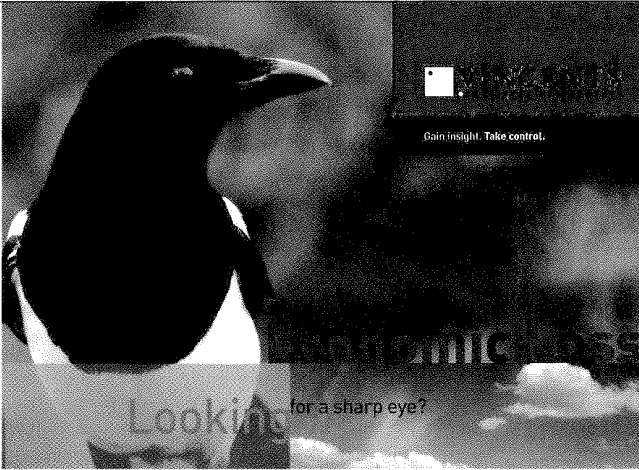
The decision in *Iliff* illustrates that a further limitation in the protection offered by the SDA is the formulation of the causation test. As the test requires consideration of the actual reasons for the employer's conduct, it means that even if taking maternity leave is causative of a decision to dismiss a woman, in the sense that but for her taking the leave she would not have been dismissed, this will not amount to direct discrimination.

Given the difficulties posed by the comparator and causation tests, the direct pregnancy discrimination provisions of the SDA only go a limited way to addressing the workplace disadvantage that women experience as the result of pregnancy.¹⁹ Women on maternity leave may, however, still consider the provisions of the WR Act and the indirect discrimination provisions of the SDA as providing possible avenues of redress. □

ENDNOTES

1. [2007] FMCA 1960.
2. *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.
3. *Thomson v Orica* [2002] FCA 939, [165].
4. *Thomson v Orica* [2002] FCA 939, [118]. See also the decision of Gummow, Hayne and Heydon JJ in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 162 [231] and Belinda Smith, "From Wardley to Purvis - How far has Australian anti-discrimination law come in 30 years?" (2008) 21 *Australian Journal of Labour Law* 3, 8.
5. [2007] FMCA 1960 [118].
6. *Ibid* [127].
7. [2002] FCA 939.
8. [2007] FMCA 1960, [122].
9. *Ibid* [133].
10. [2008] FCA 702 [45].
11. *Ibid*.
12. *Ibid*, [46].

13. *Ibid* [49]. This seems to be somewhat inconsistent with the views expressed in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 by McHugh and Kirby JJ at 144, [166] and Gleeson CJ at 102, [13].
14. [2008] FCA 702, [48].
15. *Ibid* [49].
16. "From Wardley to Purvis - How far has Australian anti-discrimination law come in 30 years?" (2008) 21 *Australian Journal of Labour Law* 3, 20.
17. *Ibid*.
18. International Labour Office, Equality in employment and occupation, Report III (Part 4B) (1999) 42.
19. See HREOC's submissions to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave, [123]-[158] at www.humanrights.gov.au/legal/submissions/2008/20080602_productivity.html. □



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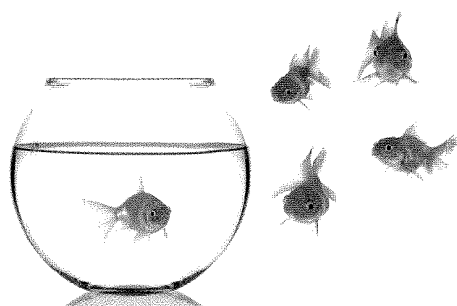
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