

PREGNANCY AND RETURN TO WORK NATIONAL REVIEW

Legal Aid NSW submission to the Australian Human Rights Commission

February 2014

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW has significant experience in the area of discrimination law. The Civil Law Division has specialist human rights law and employment law practitioners, who work in the area of discrimination law on a daily basis. Generalist lawyers in the Civil Law Division are also involved in discrimination law work. Legal Aid NSW lawyers have considerable experience in matters involving discrimination against pregnant workers and workers seeking a return to work after parental leave. Grants of legal aid are available and have been regularly made for discrimination litigation in these type of matters, pursuant to Legal Aid NSW policy. Discrimination law advice and assistance is provided in civil law advice sessions and outreach services throughout New South Wales.

Introduction

Legal Aid NSW welcomes the national review to identify discrimination in relation to pregnancy and return to work. Despite protection from discrimination on the grounds of pregnancy and family/caring responsibilities under the *Sex Discrimination Act 1984* (Cth)

(SD Act), *Anti-Discrimination Act 1977* (NSW)(AD Act) and *Fair Work Act 2009* (Cth)(FW Act), Legal Aid NSW sees a significant number of civil law clients with claims of discrimination related to pregnancy and family/caring responsibilities.

Discrimination on the grounds of pregnancy and family/caring responsibilities can have devastating impacts on those who experience discrimination and on their families. Discrimination on the grounds of pregnancy and family/caring responsibilities frequently results in reduced employment opportunities, unfavourable working conditions and loss of employment.

Limitations in the legislative policy framework

Flexible working arrangements

A willingness to consider flexible working arrangements is a key indicator of a family friendly workplace. However, Legal Aid NSW notes that there is a limited legal right to request such arrangements.

Legal Aid NSW welcomed amendments to the FW Act National Employment Standards (NES) that broadened the categories of person who may request flexible working arrangements¹. However, Legal Aid NSW notes that there continues to be no remedy available if an employer unreasonably refuses a request for flexible working arrangements.²

Further, the protections afforded by the NES are not available to all workers who may be discriminated against on the grounds of their pregnancy and/or family/caring responsibilities. Legal Aid NSW notes the ability to request flexible work arrangements, the right to take unpaid parental leave and the right to return to work - do not apply to employees with less than 12 months service or who are not 'long term' casual employees.³ Legal Aid NSW emphasises the vulnerability of pregnant/parent workers in newly obtained employment to discrimination. It is not good public policy that such workers have fewer legal rights by the mere fact of a short period of employment. It is this type of discrimination which makes it difficult for some workers to gain a sure foothold in the workforce.

Legal Aid NSW also notes that the extension of the NES to non 'national system employees' does not apply to the right to request flexible working arrangements.⁴

The possibility of the introduction of positive duties into discrimination law has been considered for some time. In 2008 the Senate referred an inquiry into the effectiveness of the *Sex Discrimination Act 1984* in 'Eliminating Discrimination and Promoting Gender Equality' to its Standing Committee on Legal and Constitutional Affairs. The Committee

recommended a number of amendments to the SD Act, including amending the SD Act to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, so to accommodate family or carer responsibilities. It was recommended that the amendments be modeled on section 14A of the *Equal Opportunity Act 1995 (VIC)*⁵.

Legal Aid NSW notes that anti-discrimination legislation in Victoria and in the Northern Territory requires that employers do not unreasonably refuse to accommodate an employee's needs as a parent or carer.⁶

In its submission to the Commonwealth Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws, Legal Aid NSW supported the introduction of the concept of 'reasonable adjustment' applying to all protected attributes.⁷ Legal Aid NSW submits that the decision not to proceed with the consolidation of Commonwealth anti-discrimination laws represents a lost opportunity to simplify the law and increase protections from discrimination. Given the very limited right to request flexible working arrangements under the FW Act, Legal Aid NSW submits that a right to request *and obtain* flexible working arrangements should be available to all Australian workers and should be inserted into Federal and State anti-discrimination law.

Redundancy

Legal Aid believes that there is considerable tension between the right of employers to make an employee redundant in circumstances of genuine redundancy and the 'return to work guarantee'⁸. It is the legislative intention of the 'guarantee' to protect a return to work in an available equivalent position after parental leave in the event of a restructure. However, lawyers at Legal Aid NSW see many instances where redundancies are forced, without consultation, upon female workers absent from the workplace on parental leave. There are often circumstances which suggest that the redundancy is not genuine and that it is being implemented as a pretext for denying a return to work of a parent who will have ongoing family responsibilities.

Legal Aid NSW observes that employees on parental leave are vulnerable during a genuine restructure, as their absence renders them less able to participate in redeployment discussions and advocate for and protect their interests. Legal Aid NSW submits that the FW Act and/or other relevant legislation should be reviewed and amended with the aim of resolving the tension, emphasising the paramount nature of the 'return to work guarantee'.

Case Studies

We have collated a number of case studies which exemplify the pregnancy and return to work discrimination we observe in advising, assisting and representing clients of Legal Aid NSW. We set them out below.

Case study 1

Our client worked in administrative position for an electrical contractor. She had been a long term employee of the respondent when she became pregnant with her third child. She took 18 weeks parental leave. Several weeks before her return to work, she approached the employer to discuss the arrangements for her return to work. The employer told her that there had been a downturn in business since she went on parental leave and it may no longer have work for her. She did not return to work.

Case study 2

Our client was employed by the respondent fruit market for four months. In her second month of employment, she informed the respondent of her pregnancy. The respondent told her that it would terminate her employment when she left work to have her baby. Approximately two months after advising the respondent of her pregnancy, her employment was terminated.

The respondent claimed that our client's employment was terminated because of her poor performance and not because of her pregnancy. Our client denied that her workplace performance was poor. She claimed that no performance issues were raised with her before she advised the respondent that she was pregnant. She claims that the respondent raised concerns about her taking sick leave. She claims that she took sick leave for illness related to her pregnancy and she provided the respondent with a doctor's certificate for each absence.

As our client had not been employed by the respondent for 6 months, she was not able to make an unfair dismissal claim. As she had not completed 12 months of service, she was not entitled to paid or unpaid parental leave and the return to work guarantee does not apply to her.

Case study 3

Our client has been employed by the respondent media outlet for approximately five years. She took 12 months maternity leave and sought to return to work. She asked to return to

work three days per week, working two days in the office and one day from home. Her employer refused her request to return to work for three days per week and is requiring that she return to work four days per week. Further, her employer refused to adjust her performance targets on a pro rata basis in accordance with her status as a part time employee. Before going on maternity leave, she had worked with a number of her employer's clients which allowed her to earn a high level of commission. Her employer refused to allow her to work with these clients if she returns to work on a part time basis.

Case study 4

Our client was employed in a factory on a full time basis. After she disclosed to her employer that she was pregnant, her supervisor made derogatory comments about her pregnancy.

Our client took a period of paid maternity leave. Whilst on maternity leave, she requested that she be permitted to reduce her hours of work upon her return to work. The employer refused this request and advised her that her job could only be done on a full time basis. She resigned from her employment as the employer refused to allow her to work on a part time basis. The employer demanded that she repay the amount that she had been paid whilst on maternity leave.

Case study 5

Our client had been employed by the respondent child care centre for about five years on a permanent part time basis. When she advised her employer that she was pregnant, the employer told her that she was now 'casual' and that she could only work two days per week. If additional hours were available, she would be offered extra hours. Sometime later, the employer hired a full time trainee and another worker resigned but she was not offered more hours. Within five months of informing her employer that she was pregnant, she was receiving no work at all from her employer.

Case study 6

Our client was employed as a team leader with the respondent insurance company. She worked four days per week in order to be able to care for her child. A new manager commenced working in her team and formed the view that her role could no longer be performed on a four days per week basis. She had worked for four days per week since the commencement of her employment. The employer informed her that she could either accept redundancy or redeployment to a lower level position. Our client claims that her role was not

genuinely redundant and her new manager did not want to have team leaders working on a part time basis.

Conclusion

The existing policy settings and future policy proposals, which provide for Government paid parental leave, make it likely that many more workers will take long periods of parental leave. Legal Aid NSW therefore believes it is imperative for strong anti-discrimination laws to operate, which effectively protect this group of workers and thereby support the social aims of paid parental leave.

Legal Aid NSW welcomes the opportunity to provide these comments and will be pleased to be involved in any further consultations. Should you require further information, please contact Bridget Akers, Solicitor, by telephone on (02) 4725 4609 or by email to bridget.akers@legalaid.nsw.gov.au.

¹ Fair Work Amendment Act 2013 (Cth), Schedule 1.

² *Fair Work Act 2009* (Cth)(FW Act), s 44(2)(FW Act).

³ FW Act, s 67.

⁴ FW Act, Part 6-3.

⁵ The Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, December 2008, [11.34].

⁶ *Equal Opportunity Act 2010* (Vic), ss 15, 17, 19, 32, *Anti-Discrimination Act* NT s 24.

⁷ Legal Aid NSW, *Consolidation of Anti-Discrimination Laws*, Submission on Behalf of Legal Aid NSW to the Commonwealth Attorney-General's Department, February 2012 [10].

⁸ See FW Act, s 84.