

Employment Update

"Family Provisions test case: what does it mean for employers?"

15 August 2005

In what may be its last test case decision before its role and functions are greatly minimised by foreshadowed federal legislation, the Australian Industrial Relations Commission has handed down a decision that advances further the incremental trend towards facilitative award provisions to assist employees with their family responsibilities.

A Headline making decision

On 8 August 2005, after conducting a prolonged hearing that commenced in July 2003 and took over 20 days hearing time, the Commission determined that an employee entitled to parental leave may, for the purpose of assisting the employee balance work and family responsibilities, request his or her employer to allow the employee to:

n extend the period of simultaneous unpaid parental leave provided for in the relevant award up to a maximum of 8 week;

n extend the period of unpaid parental leave provided for in the award to a maximum of 24 months, and

n return from a period of parental leave on a part-time basis until the child reaches school age.

Employers are required to consider any such request and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds. These grounds are related to the effect on the workplace or the employer's business (such grounds include cost, lack of adequate replacement staff, loss of efficiency and impact on customer service).

In its decision, the Commission rejected most of the claims by the various parties (including those of the Australian Council of Trade Unions and various employer organisations) and commented that:

"Issues relating to the reconciliation of work and family responsibilities generally should be further considered in conciliation. We think it appropriate to observe that many of the proposals are excessively detailed and in aggregate would add unnecessary verbiage to awards. A simpler approach is needed."

Unsurprisingly, the Commission did not believe that a prescriptive drafting approach was conducive to workplace flexibility, and hopes that message will be taken into account in any future cases on this subject (providing there are any of course).

Principal initiative - employee's right to request change

The principal initiative in the decision, the granting of an employee's right to request additional parental leave and a return to part-time work (until the child is of school age) was based upon submissions from the various state and territory governments.

These proposals were in turn based upon the United Kingdom's approach - namely ss 80F and 80G of the *Employment Rights Act 1996* (UK). It is interesting that the commission and state governments should have recourse to United Kingdom legislation on this subject, just as state governments modelled their current occupational health and safety legislation on that first enacted in the United Kingdom following the Robens Inquiry.

The Commission's decision also implemented a number of other changes to awards, essentially by consent of the parties, but these were very much secondary to the above mentioned initiative.

The most significant other ruling by the Commission is that an employer must communicate with an employee on parental leave, any changes that will affect the status or responsibility of the position the employee held prior to taking parental leave as well as discuss any significant effects these changes will have upon the employee's former position.

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