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About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry (VECCI). Your business does not need to be a VECCI member to engage our services.

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COURT ORDERS HEFTY PENALTY AGAINST EMPLOYER AND SENIOR EMPLOYEE FOR DISMISSAL THREAT

The Federal Magistrates Court recently held that an employer and its senior manager had breached freedom of association laws with respect to an employee who had been employed as a receptionist.

The employee had been employed on a casual basis from April 2007. The employee ascertained that she was being paid less than required by the relevant award and brought her concerns to the attention of her employer. In response, she was advised that she would be back paid if she was in fact receiving a lesser amount, however, she would need to resign or the employer would otherwise terminate her employment.

The employee resigned from her position and lodged a claim with the Workplace Ombudsman, who initiated court proceedings against the employer and manager.

The Court held that the employer and manager had breached section 792(1) (a) of the Workplace Relations Act 1996, which provides that employers are not to dismiss or threaten to dismiss an employee for a prohibited reason. In this case, the prohibited reasons were that the employee was entitled to a benefit under an award and that she had made an enquiry or complaint to the Workplace Ombudsman.

The Court further held that the conduct of the employer and the manager was 'an almost unconscionable abuse of power in the employer/employee relationship'. As a result, the Court awarded penalties of \$13,000 and \$2,700 against the employer and the manager respectively and ordered that compensation totaling \$5,482 be paid to the employee.

Although the Workplace Relations Act 1996 has been replaced by the Fair Work Act 2009, the Fair Work Act 2009 has not only retained these employee protections but has introduced a number of further protections. This case highlights to employers the importance of having a comprehensive understanding of these various employee protections before making any decision in response to an employee enquiry.

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REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS AND EMPLOYER OBLIGATIONS

In the current employment environment, much emphasis is being placed on achieving work/life balance, particularly in regards to balancing family responsibilities with employment obligations. Both federal and state legislation requires employers to consider the requests of employees as parents or carers to accommodate their responsibilities.

The National Employment Standards (NES), contained in the Fair Work Act 2009, came into operation on 1 January this year and introduced an employee entitlement to request flexible working arrangements that may include an alteration to working hours or the location of where work is undertaken.

The NES provide that employees who have completed at least 12 months of continuous employment with their employer and are parents or carers of children under school age or children under 18 years of age with a disability are able to request a change to their working arrangements. Casual employees may also make a request for flexible working arrangements but only if they have been employed on a regular and systematic basis with an expectation of ongoing employment. The employer must consider the request though may refuse the request on reasonable business grounds.

Where an employer is unable to accommodate the request of an employee seeking a flexible working arrangement, the employer and employee may discuss alternative arrangements to the request which suit the needs of both parties and implement these accordingly as in the example below.

Case example

John would like to start work at 10 am each day so that he is able to take his 4 year old daughter to pre-school. As such, he puts his request in writing to his employer. His employer considers the request but is unable to agree to the request because that would mean that John would not be able to attend an important management teleconference each morning. The employer and John however are able to come to an arrangement whereby John is able to attend the teleconference via phone hook up each morning and still be able to take his daughter to pre-school.

The concept of accommodating employees in regards to family responsibilities is also provided for in anti discrimination legislation. The Equal Opportunity Act 1995 (Vic) (the 'EEO Act') provides that an employer must not unreasonably refuse to accommodate the responsibilities that either a job applicant, an existing employee or a contract worker may have as a parent or carer. Under both the NES and EEO Act employers are required to consider a request and the circumstances surrounding the request including:

1. The employee's individual circumstances;
2. The nature of the employee's role;

3. The nature of the arrangements and the cost associated with accommodating the employee's responsibilities;
4. The size and nature of the workplace; and
5. The impact that the arrangement would have on the workplace.

Case example

An employee was employed with a carpet manufacturing company as a store person and was married with five children aged between 17 and 2, all living at home with him and his wife.

One of the employee's children became ill and he telephoned his employer to ask if he could take the day off from work. The employee had over the previous months asked to take days off from work for the same reason. On this particular occasion, however, the employer doubted the reason for the request and gave the employee an ultimatum stating that he had to choose between staying at work and fulfilling his commitment to this employer or abandoning his work and staying home to care for his child. The employee immediately resigned.

The employee instituted legal proceedings on the basis that he had been discriminated against by the employer on the grounds of his parental status and family responsibilities. The Tribunal found that the employee had had legitimate reasons in seeking to take the day off from work and found that he had been treated unfairly by his employer. As such, the Tribunal ordered that the employer pay the employee compensation in the amount of \$39, 325.

Employers do not have to automatically agree to a request and are not required to subjugate their own interests to the interests of the employee as parent or carer. However, it is important that employers genuinely consider each request by weighing up the above listed factors as well as taking into consideration any other relevant matters which arise in the particular circumstances. An employer found not to have genuinely considered a request may be found to have discriminated against an employee on the basis of their parental/carer's status and or/have breached the NES.