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Practice Group(s):

*Labour, Employment
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Refusing Employee Requests to Work Part-time: Potential Risks for Employers

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On 31 May 2013, in its decision in *Rind v Australian Institute of Superannuation Trustees*, the Australian Fair Work Commission (FWC) found that an employer constructively dismissed an employee by unreasonably refusing her request to work part-time.

The case highlights the growing importance of flexible working arrangements in Australia and the need for employers to make reasonable efforts to accommodate requests for such alternative working arrangements.

These issues are particularly pertinent with the recent approval of changes to the *Fair Work Act 2009* (FW Act) extending the circumstances in which employees have the right to request flexible working arrangements. As of 1 January 2014, the right to request flexible working arrangements will be afforded to employees:

- with caring responsibilities
- who are parents of, or responsible for the care of, a child who is of school-age or younger
- who have a disability
- who are 55-plus years old or
- experiencing domestic violence or providing support to immediate family or household members experiencing domestic violence.

The FW Act will explicitly state that employees returning from parental leave have a right to request part-time work with such requests only able to be refused on reasonable business grounds.

Background

This case involved a jurisdictional objection to a general protections claim brought by Ms Hanina Rind against the Australian Institute of Superannuation Trustees (AIST) in respect of the termination of her employment. The AIST challenged Ms Rind's application arguing that it had not terminated Ms Rind's employment. Ms Rind argued she was constructively dismissed because there had been a breach of the implied term of trust and confidence as a result of the AIST's unreasonable refusal to accommodate her request to work part-time.

Ms Rind began full-time work with the AIST in August 2009 as a database/IT systems administrator. Following the birth of her first child in February 2010, the AIST agreed that she could work from home one day a week.

The AIST Certified Agreement 2009 (Agreement), which applied to Ms Rind's employment, relevantly provided a right to request to work part-time until a child reached school age. The AIST was only entitled to refuse such a request on objective business grounds.

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While on unpaid parental leave following the birth of her second child, Ms Rind received a letter from the AIST requesting that she return to full-time work from 21 January 2013. Ms Rind then requested that she be able to work three days per week to accommodate her increased parental responsibilities.

In rejecting the request, the AIST stated that it had formed the view that a full-time on-site administrator was vital, with the part-time off-site arrangement trialled in her absence proving difficult and frustrating for staff. In further negotiations, the AIST agreed to explore the possibility of Ms Rind returning to work part-time, on the condition that it was able to find a suitable candidate to share her role. The parties failed to reach agreement, and Ms Rind did not return to work.

The Decision

The FWC Commissioner stated that in order to determine whether Ms Rind was constructively dismissed, he needed to determine whether the AIST's conduct amounted to an unreasonable refusal of Ms Rind's request.

In finding in favour of Ms Rind, Commissioner Lewin found that while the AIST had made several attempts to negotiate Ms Rind's return to work, its proposals were either conditional on finding a suitable employee to job share, or involved attendance at work on five days of the week.

He found the AIST's approach could be considered a refusal of Ms Rind's proposal. That refusal was unreasonable, particularly given that since Ms Rind's termination, the AIST had continued to use the part-time off site provider engaged during her parental leave and had made no attempt to employ another full-time administrator. This unreasonable refusal amounted to a refusal by the AIST to perform its obligations under the Agreement.

Commissioner Lewin went on to find that Ms Rind's "parental circumstances fundamentally affected her capacity to work" and not having her request to work part time unreasonably refused was vital to the viability of her ongoing employment. Ms Rind was therefore justified in treating her employment as at an end given the conduct of the AIST was sufficiently inconsistent with the continuation of the employment relationship.

In coming to this conclusion, Commissioner Lewin stated that "while an opportunity for part-time work on return from parental leave might not long ago have been considered a fortunate privilege, in my judgement, contemporary circumstances require a different view". He found that the seriousness of the AIST's conduct "should be viewed from the contemporary vantage point, which affords considerable importance to the ability of women to give birth to children without foreclosing their employment due to the consequences of family formation".

The matter was dismissed and relisted for a conference before the FWC to continue Ms Rind's general protections claim.

Lessons for Employers

While the FWC decision was based on a specific clause in an enterprise agreement, the FWC's reasoning is readily applicable to the interpretation of requests for flexible working arrangements under the National Employment Standards in the FW Act.

Employers should be aware of the potential for employees to bring general protections claims to enforce their right to request flexible working arrangements, particularly given the finding that an unreasonable refusal can amount to constructive dismissal.

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Employers need to reasonably assess requests for flexible working arrangements and ensure that any refusal is on "reasonable business grounds". The forthcoming changes to the FW Act will give greater guidance on the meaning of this phrase. As of 1 January 2014 the FW Act will define "reasonable business grounds" to include the following circumstances:

- the new working arrangements requested by the employee would be too costly for the employer
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee
- the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity, and/or
- the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

Employers need to ensure that any reasons provided to support a refusal are backed up by clear and documented evidence of reasonable business grounds.

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