FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Ms Hanina Rind

v

Australian Institute of Superannuation Trustees
(C2013/257)

COMMISSIONER LEWIN MELBOURNE, 31 MAY 2013

Constructive dismissal- parental leave- Enterprise Bargaining Agreement- right to request part time employment- request not to be unreasonably refused- employer refusal- assessment of refusal- reasonable or otherwise- refusal unreasonable- employee treating employment at an end- employee constructively dismissed

Introduction

[1] Ms Hanina Rind has made an Application pursuant to s.365 of *Fair Work Act 2009* (the Act). The Application is made in respect of the termination of the employment of Ms Rind with Australian Institute of Superannuation Trustees, a Company limited by guarantee, (the Company).

[2] The matter was heard on 20 May 2013 in Melbourne. At the hearing Ms Rind was represented by Ms Teffaha, a workplace relations consultant. The Company was represented by Mr Thomas Page of the Victorian Employers' Chamber of Commerce and Industry (VECCI), of which the Company is a member. When deciding to grant permission for Ms Rind to be represented by an agent, pursuant to s.596 of the Act, I considered that doing so would enable the matter to be dealt with more efficiently, having regard to certain jurisdictional issues which were raised by the Company and which are complex in nature.

[3] Evidence was heard from the Applicant, Ms Rind, and from a Representative of the Company, Ms Maryann Mannix-White, Executive Manager Business Operations & Company Secretary of the Company.

Jurisdictional Objection

[4] The Company objected to the Commission dealing with the Application because it submits that Ms Rind is not a person who has been dismissed from her employment with the Company.

[5] The provisions of s.365 are set out below:

365 Application for the FWC to deal with a dispute

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

[6] It will be observed that for Ms Rind's application to be made in accordance with the Act Ms Rind must be a person who has been dismissed.

[7] The Company submits that Ms Rind was not dismissed from her employment 'in accordance with the Act's definition'. The reference in this submission to the Act's 'definition' is a reference to s.386 of the Act which operates in respect of *Protection Against Unfair Dismissal*[1], which is a different statutory code to the G*eneral Protections*[2] provisions of the Act in respect of which Ms Rind's Application is made. I will return to this aspect of the Company's submissions in due course.

[8] The provisions of s.386 of the Act are set out below:

386 Meaning of *dismissed*

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been ***dismissed*** if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

> and the employment has terminated at the end of the training arrangement; or
>
> (c) the person was demoted in employment but:
>
> (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
>
> (ii) he or she remains employed with the employer that effected the demotion.
>
> (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

[9] Ms Rind submits that she was constructively dismissed because there has been 'a breach of the implied term of trust and confidence in the AIST Enterprise Agreement'[3]. It is necessary to disentangle three legal concepts within this submission. The first concerns the common law concept of constructive dismissal. The second concerns the common law concept of a term of mutual trust and confidence implied by law as part of a contract of employment. The third concerns the operation of employee entitlements in an Enterprise Agreement made pursuant to the Act on the contract of employment between Ms Rind and the Company and in relation to "constructive dismissal".

[10] Ms Rind was employed by the company in the position of Database/IT Systems Administrator. Ms Rind commenced her employment in August 2009. Ms Rind was employed on a full time basis and attended the workplace at Spring St Melbourne, Monday to Friday.

[11] In February 2009, to accommodate family responsibilities arising from the birth of her first child, Ms Rind and the Company agreed that she could perform her work from home on one day per week.

[12] Sometime thereafter Ms Rind became pregnant with a second child and proceeded on a period of parental leave. It was submitted by the Company that this period of parental leave would be comprised of a six week period in which payment was made, followed by a period of unpaid leave. In late 2012 Ms Rind began discussions with the Company to manage her return from this parental leave, the discussions included Ms Mannix- White.

Enterprise Agreement

[13] Ms Rind's employment was subject to an Enterprise Agreement approved by Fair Work Australia, namely the *Australian Institute of Superannuation Trustees Certified Agreement 2009* (the Enterprise Agreement), which was tendered by the Company. It was a term of the Agreement that the terms of the *Insurance Industry Award 1998* were expressly incorporated as terms of the Agreement.

[14] Clause 21 of the Agreement provides an entitlement to parental leave which included maternity leave. Clause 21.1.1 provides that employees are entitled to parental leave 'and to work part-time in connection with the birth or adoption of a child'.

[15] Clause 21.6 of the Agreement is in the following terms:

21.6 Right to Request

21.6.1 To assist the employee in reconciling work and parental responsibilities, an employee entitled to parental leave pursuant to the provisions of clause 21.4 may request Australian Institute of Superannuation Trustees to allow the employee:

(a) to extend the period of simultaneous unpaid parental leave provided for in clause 21.4 up to a maximum of 8 weeks;

(b) to extend the period of unpaid parental leave provided for in clause 21.4 by a further continuous period of leave not exceeding 12 months; and

(c) to return from a period of parental leave on a part-time basis until the child reaches school age.

21.6.2 Australian Institute of Superannuation Trustees shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or Australian Institute of Superannuation Trustees' business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

21.6.3 An employee's request and Australian Institute of Superannuation Trustees' decision made under 12.6.1 must be recorded in writing.

21.6.4 Where an employee wishes to request to return to work part-time under 21.6.1(c), such a request must be made as soon as possible, but no less than 7 weeks prior to the date upon which the employee is due to return to work from parental leave.

Return from unpaid maternity leave

[16] On 28 September 2012, Ms Rind meet with Maryann Mannix-White and Ms Kylie Jewell to discuss her return from unpaid parental leave. There was discussion of a gradually escalating return to work, commencing with two days per week in November to be followed by three days per week in December with a possible return to full time work in late January 2013.

[17] It was suggested by the Company that a return to work on a full time basis in late January 2013 was agreed at the meeting on 28 September 2012. Ms Rind's evidence does not confirm formal agreement on that aspect of the return to work arrangements. For reasons

which will become clearer below, I doubt whether or not this aspect of the discussion was settled conclusively at the meeting is critical to the determination of this matter. Nevertheless, I prefer the weight of Ms Rind's evidence that the discussion on this point was, inconclusive or provisional. It may well be that the Company's assumption that agreement was arrived at was genuine and not unreasonable in the circumstances but subjective. In any event, following that meeting a request was made by Ms Rind concerning her return to work under Clause 21.6 of the Agreement.

[18] On 6 October 2012, Ms Rind received a letter from the Company stating that she agreed to return to full time work with the Company on 21 January 2013.

[19] On 15 October 2012, Ms Rind indicated in an email that she had considered the proposal for a return to full time work in late January and indicated that she wished to work part time. Ms Rind explained the reasons for this, which were based upon her parental responsibilities. On what is before me there is no suggestion that these responsibilities were not genuine. The contents of that email from Ms Rind to the Company are set out below.

> Hi
>
> In light of our meeting a few weeks ago I thought I would come back on 5th November.
> As we said for 1 day a week and then 2 in December and 3 days in January.
> I have had a lot of thought about commencing full time at the end of January and to be honest I don't think I'm ready. Part time will suit me better until I am ready, she's still so small I don't think I would feel right to do that as yet.
> I am however open to suggestions for flexible arrangements where I could work from home.
> Im sure we can work something out.
>
> Thanks and see you soon
>
> Hanina Rind

[20] Ms Rind was requested to make a formal request accordingly and did so on 26 October 2012. The email formally requesting part time work is in the following terms:

> Date: 26th October 2012
>
> RE: Return to Work
>
> Dear Maryann,
>
> As I mentioned in my email dated 15 October 2012, I would like to return to work at the capacity of part time.
> As we said one day a week in November, two days a week in December and subsequently three days a week in January.
>
> As I also mentioned I would like to stay part time until I am ready to come back to work full time as I don't believe I am ready to commence work at a full time capacity.

I am open to suggestions for flexible working arrangements where I could work from home. This will help me transition back to work and also assist me with taking care of my daughter as well as my breastfeeding duties.

I am sure we can come to an amicable arrangement.

Thanks

Regards,
Hanina Rind

[21] On 29 October 2012, The Company refused Ms Rind's request in the following terms:

Dear Hanina (via Richard Webb)[4]

Further to our telephone meeting on Monday 29 October, 2012, as requested I have listed examples of the business requirements for a full time Data Administrator. I note that the position was advertised and filled as a full time position, and this requirement has not changed.

During the period of your parental leave AIST has put in place an outsourced provider to fulfil our Data/IT requirements. Having trialled this in a remote support contract role during this period for the operation of the iMIS system, AIST has formed the considered view it is vital to have someone full time and on site to administer the operation and development of the iMIS system for the following reasons:

1. The role was and is a full time role.

2. We require immediate action to troubleshoot technical issues as they arise. Down time waiting for issues to be resolved costs AIST in terms of productivity and staff time and ultimately effects our bottom line.

3. It has proven difficult for a number of staff to convey their technical concerns over email and this has caused a high level of frustration for staff. For the role to be effective we require the Data Administrator to be able to sit with staff to identify and rectify issues.

4. Staff require a dedicated resource to be able to effectively carry out their roles.

5. AIST has a number of major projects earmarked for 2013 these include Accreditation and an Upgrade of IMIS which will require liaison with a number of different departments in AIST, therefore the person will need to be accessible on site during business hours to work in our project teams. The coordination of these projects is vital to their success.

6. We have had a situation this year with the profile management project that was compromised due to not having dedicated resource on site.

7. Not having a dedicated internal resource has put pressure on a number of employees to take control of certain projects outside their knowledge and skill base. This is causing staff dissatisfaction to the point that AIST is concerned that if it is not rectified, key staff could be lost.

8. Not being able to schedule impromptu meetings when issues arise is frustrating to all staff.

9. Testing issues have been delayed due to timing of non availability of resources and remoteness had resulted in delays in deployment of projects.

10. Having no replacement staff for this role has delayed the development of specific projects such as Accreditation, IQA and Task Centre.

This role is an internal customer service role and is pivotal to the ongoing development and success of AIST and as such requires a dedicated full time on site resource to maximise the output of work required to support the areas of AIST.

We have had first hand experience about the frustrations of reducing this role to a part time off site capacity and it has clearly not worked for the business. There was never any discussion that this role could or would become part time.

To assist in the transition to return to work full time, as per Clause 21.6.1 you may apply in writing for consideration of an additional 8 weeks unpaid parental leave.

Kind regards

Maryann

[22] Having regard to the right to request part time employment prescribed by Clause 21.6.1(c) it is necessary to consider, in light of the evidence, whether or not the refusal of Ms Rind's request for part time employment was based on reasonable grounds related to the effect on the workplace or AIST's business. This is so because it was the effective continuing refusal to permit Ms Rind to return to work on the part time basis which caused the employment to come to an end. When doing so, it will be appropriate to consider the grounds which might be considered as reasonable grounds for the Company to have refused Ms Rind's request, as set out in the final sentence of Clause 21.6.2 of the Agreement. It is noted that those grounds are not exhaustive of what might be considered reasonable grounds for the purposes of Clause 21.6.2 of the Agreement.

[23] There is no doubt that the request to work part time was recorded in writing as required by Clause 21.6.3 of the Agreement and was made no less than seven weeks prior to the date on which Ms Rind was due to return to work from unpaid parental leave. Moreover, I consider that, in the circumstances, the request can be characterised as having been made "as soon as possible", for the purposes of Clause 26.3.4 of the Agreement.

[24] Between the Company's refusal of Ms Rind's request and the final communication between Ms Rind and the Company concerning the end of the employment relationship attempts at various arrangements were made for Ms Rind to return to work, unsuccessfully. However, Ms Rind's request of 26 October 2013 to work part time was not granted in the

course of those attempts. All proposals of the Company were either equalling attendance of five days of the week or otherwise conditional in nature.

[25] At this point, it is appropriate to observe and in due course consider the provisions of the Agreement for the settlement of disputes over the application of the terms of the Agreement, for reasons which will become clearer.

[26] The Dispute Settlement Procedure to the Agreement is set out below;

32. DISPUTE RESOLUTION PROCEDURE

32.1.1 If a dispute arises about:

(a) this agreement;

(b) the NES (including subsections 65(5) [request for flexible working arrangement] or 76(4)[extending the period of parental leave]); or

(c) any other work-related matter (including a dispute about whether workplace rights have been breached); the parties to the dispute will attempt to resolve the dispute at the workplace level by discussions between the employee or employees and the relevant supervisors and / or management.

32.1.2 As soon as is practicable after the dispute or claim has arisen, the employee will take the matter up with their immediate manager affording them reasonable opportunity to remedy the dispute or claim.

32.1.3 Where the attempt at settlement has failed, or where the dispute or claim is of such a nature that a direct discussion between the employee and their immediate manager would be inappropriate, the employee will immediately take the matter up with their next level manager.

32.1.4 If the matter remains unresolved in so far as either party is concerned, the Chief Executive Officer will be notified and will attempt to resolve the dispute or claim.

32.1.5 Where steps 32.1.2 to 32.1.4 have failed to resolve the matter or where the dispute or claim is of such a nature that a direct discussion between the employee and their Manager and/or the Chief Executive Officer would be inappropriate, the employee may notify a duly authorised representative of the Finance Sector Union or other employee nominated representative who, if the representative considers that there is some substance to the dispute or claim, will take the matter up directly with Australian Institute of Superannuation Trustees;

32.1.6 Notwithstanding step 32.1.5, an employee who is a Finance Sector Union member may contact the Union office or workplace Union representative for representation at any stage of the procedure;

32.2 If the matter cannot be resolved at the workplace level, a party or their representative may refer the dispute to Fair Work Australia for resolution using any of its powers (including powers under section 739(4)). This includes the power to arbitrate any dispute.

32.3 Union members are entitled to be represented by their union at any stage of this process. Non-members are entitled to be represented by any representative of their choice. Australian Institute of Superannuation Trustees shall recognise the representative for all purposes involved with the resolution of the dispute.

32.4 The parties to the dispute and their representatives must act in good faith in relation to the dispute.

32.5 Without prejudice to either party, all work will continue in accordance with the status quo as it existed prior to the dispute while the matters in dispute are being dealt with in accordance with this clause.

32.6 The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

32.7 None of the above procedures shall restrict a party to a dispute (or their representative) from referring a dispute to Fair Work Australia for resolution at any stage.

32.8 A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

[27] Ms Rind attempted to resolve the dispute concerning her request to return to work part time in accordance with the terms of the Enterprise Agreement by dealing with Ms Mannix-White who, on the evidence before me, would seem to be her immediate manager, and in my judgement, between October 2012 and January 2013 provided Ms Mannix-White with a reasonable opportunity to deal with the dispute. On the evidence before me, the matter was notified to the Acting Chief Executive Officer, Ms Tanya Reynolds, by Ms Mannix-White. Ms Rind also obtained representation from the Finance Sector Union who dealt with Ms Mannix-White on her behalf. Subsequently Ms Rind was represented by Ms Teffaha.

[28] Beyond attempting to resolve the dispute at the workplace level with her immediate manager and the contemplated notification to the Chief Executive Officer, obtaining representation from the Finance Sector Union, and the union taking the matter up with the Company, Clause 32.2 of the Agreement provides that a party 'may' refer a dispute to Fair Work Australia. Neither Ms Rind nor the Company exercised their respective discretion to refer the dispute to Fair Work Australia.

[29] The employment relationship ended as a consequence of, the Company refusing Ms Rind's request to work part time and Ms Rind deciding that the employment was no longer viable. The circumstances are captured in two letters from the Company to Ms Rind and Ms Teffaha in response to representations on Ms Rind's behalf which are referred to therein. The contents of these letters are as follows;

24 January 2013

Dear Hannina,

We note that you have not returned to the Australian Institute of Superannuation Trustees ("AIST") since your period of maternity leave ended yesterday on Wednesday, 23 January 2013. We also note you have not formally sought any type of leave or notified anyone at AIST regarding your absence.

We understand you have engaged Serene Teffaha, of Miracles Australia Inc, to act on your behalf. Yesterday, on 23 January 2013, we received an email from Ms Teffaha (23 January 2013 Email") via our employer association, the Victorian Employers' Chamber of Commerce and Industry ("VECCI"), of which AIST is a member. In MS Teffaha's 23 January 2013 Email it was alleged:
"AIST has not demonstrated a genuine desire to properly explore the job-sharing option... The relationship of trust and confidence has now been completely severed and Ms Rind is highly distressed by the actions of AIST. A return to work is no longer a safe or viable option for Ms Rind."

The last line of Ms Teffaha's 23 January 2013 Email states:
"I am instructed to progress this matter through the appropriate legal channels to enable Ms Rind to seek compensation for the distress suffered and loss of opportunity.'

AIST disputes the allegation it has not demonstrated a genuine desire to explore job sharing options regarding your 26 October 2012 written request for flexible working arrangements. Indeed, AIST advertised the part-time job-share position on SEEK from on or around 11 December 2013 in order to try and accommodate your request for a proposed job-share arrangement. AIST also disputes the allegation the relationship of trust and confidence between us has been severed and completely disagrees with the allegation a return to AIST is no longer a safe or viable option for you. **AIST still wishes to see you remain gainfully employed by us** and looks forward to your returning to work.

As a sign of good faith, in the interests of reaching a mutually beneficial outcome, AIST is willing to allow you to remain employed by ending your period of unpaid maternity leave to Friday, 22 February 2013 and re-advertising the part-time job-share position of IT and Data Administrator from as early as tomorrow on 25 January 2013 until 22 February 2013.

Should the above option not be expressly agreed to by you, as previously stated, other available options for you include:
- resuming you pre-leave position of full-time IT and Data Administrator;
- performing the IT and Data Administrator position for three full days and two half days per week (on a permanent basis); or
- performing the IT and Data Administrator position for one day per week (on a permanent basis) allowing AIST to employ a full-time IT and Data Administrator.

Your pre-leave position of full-time IT and Data Administrator is still available for you to return to and **AIST does not want to lose you as a valued employee.**

Currently, in light of the fact that:
- you have not attended AIST since your return date of 23 January 2013;
- you have not notified anyone at AIST regarding your absence; and
- Ms Teffaha's 23 January 2013 Email indicates that she has been instructed to progress this matter through the appropriate channels on your behalf,
AIST believes you have either abandoned your employment and do not intend to return to AIST or have resigned from your employment at AIST without providing express notice of termination of employment.
Please advise me if this is correct and confirm you do not intend to return to AIST by close of business on **Tuesday, 29 January 2013.** Alternatively, if you wish to return to work on one of the above options please advise me, in writing, no later than **Tuesday, 29 January 2013.**

If I do not hear from you by close of business on Tuesday, 29 January 2013, AIST will be left with no choice but to assume you do not intend to return to AIST and have abandoned your employment. Accordingly, AIST will pay and all of your accrued entitlements (paid out on termination of employment) to your nominated bank account.

Yours sincerely

Maryann Mannix-White
General Manager
Australian Institute of Superannuation Trustees.

[30] It is appropriate to note that the proposals in this letter commencing "As a sign of good faith" follow Ms Teffeha's previous email on behalf of Ms Rind, referred to at the first italicised paragraph, is set out below.

Dear Mr Thomas Page,

I refer to your email correspondence dated 21 January 2013.

It is our contention the AIST has not demonstrated a genuine desire to properly explore the job-sharing option for Ms Hanina Rind. This issue is of great significance to Ms Rind and quite frankly omitting to renew an advertisement is unacceptable. This issue is compounded by the fact that most people during this period are not at work or are unavailable and the omission has arisen at a most critical point.

We had initially proposed that the advertisement be placed continuously over the January-February period of time so that circulation is properly facilitated and the prospects for recruitment are maximised. But the actions of AIST have ensured that this objective has now been compromised.

The relationship of trust and confidence has now been completely severed and Ms Rind is highly distressed by the actions of AIST. A return to work is no longer a safe or viable option for Ms Rind.

I am instructed to progress this matter through the appropriate legal channels to enable Ms Rind to seek compensation for the distress suffered and loss of opportunity.

Kind Regards

Serene Teffaha

[31] The second letter of the Company was as follows:

24 January 2013

Dear Ms Teffaha

As you know, we act on behalf of our member, Australian Institute of Superannuation Trustees ("AIST"). We note your 23 January 2013 email where you indicate Ms Rind, who you have been acting as an advocate for, will not be returning to AIST and you have been instructed *"to progress this matter through the appropriate legal channels to enable Ms Rind to seek compensation."*

In consideration of your above advice and instructions and given Ms Rind did not return to AIST yesterday, despite being due to return following her period of maternity leave, AIST considers Ms Rind has either abandoned her employment and does not intend to return to AIST or has resigned from her employment at AIST without providing express notice of termination of employment.

Accordingly, please find enclosed correspondence from our member to your client seeking confirmation of her abandonment or resignation of employment.

Please forward the enclosed correspondence to Ms Rind as soon as you are able.

Yours faithfully

Thomas Page
Workplace Relations Consultant
Victorian Employers' Chamber of Commerce and Industry

[32] It is necessary to say something about the reference in this letter to what the Company refers to as the part time job share option.

[33] The Company had agreed to explore the possibility that Ms Rind could return to work part time, on the condition that it was able to find a suitable candidate to share the role of Database/IT Systems Administrator to a full time equivalent, so that either Ms Rind or the prospective candidate would work two or three days per week respectively.

[34] In my view, the conditional nature of this agreement in the factual circumstances of the case can be considered as a refusal of Ms Rind's proposal request to work part time, for reasons which I hope will become, effectively, clearer below. Before departing from this subject, it is informative to consider what the necessary circumstances would be which would reasonably prevent Ms Rind from returning to work on a part time basis for three days a week while the recruitment of an additional part time employee for two days proceeded. That issue is addressed by what follows.

Constructively dismissed.

[35] The Common law concept of constructive dismissal is of long standing and was discussed by Allsop J in *Thomson v Orica*[5] and Driver FM in the case of *Howe v QANTAS Airways Limited*[6] at paragraph 6 thereof.

[36] In my view, a radical distillation of the relevant legal principles which characterise a constructive dismissal is that an employee is entitled to leave their employment in circumstances where conduct of their employer is sufficiently inimical to the continuation of the contract of employment and the employment relationship.

[37] For my purposes the word inimical should be given its ordinary meaning. Inimical conduct will be conduct which is adverse, unfriendly or hostile to the contract of employment and the employment relationship. Given the breadth of such a concept it would seem self evident that individual cases will turn very much on their own facts, including the specific nature of the contractual relationship between the employer and employee and any other legal governance of the rights, duties and obligations of the parties to the contract and the employment relationship.

[38] In any given factual matrix the task of a court or tribunal will be to objectively assess an employer's conduct as a whole and determine whether, judged reasonably and sensibly, relevant conduct of an employer was so harmful, adverse or unfriendly to the contract of employment and the employment relationship that the employee could not be expected to put up with it.[7]

[39] In order to consider whether the Company reasonably refused Ms Rind's request to return to part time work in accordance with Clause 21.6.1(c) of the Agreement it is appropriate to have regard to and evaluate that refusal in the circumstances, as revealed by the evidence before me.

[40] Basically, Ms Mannix-White's evidence is that the Company sought to have Ms Rind return to full time employment because in her absence her role had been contracted to an external service provider for 12 hours per week and this had not proved entirely satisfactory. In addition, the letter of the Company set out above makes clear that the position of the Executive Team of the Company was for Ms Rind to return to full time employment for various reasons. However, that expression of the Company's position must be objectively considered having regard to the actions of the Company in relation to the ongoing arrangements for the performance of the role Ms Rind performed. The letter portrays a situation where the Company is in imperative need of full time performance of the Database/IT Systems Administrator role at Spring Street.

[41] Of relevance is Ms Mannix-White's evidence that, since the employment relationship came to an end in late January, the arrangement for provision of externally contracted services for limited hours has been continued. Additionally, it was conceded by the Company, that this arrangement with occasional or possible extension to 15 hours a week remains the case.

[42] There was no evidence of an attempt to recruit a full time Database/IT Systems Administrator to fill Ms Rind's role since the employment came to an end, no such advertisement of the position has occurred, no recruitment service provider has been engaged

to fill the position and no internal promotion has occurred. Nor, on what is before me, is there any intention to do any of these things. Nor has the Company increased the level of service provided by the external contractor to the equivalent of what would be provided by a full time employee. All of this was put by me to Mr Page and was not refuted.

[43] A reasonable conclusion therefore is that despite some frustration with the service provided by the external contractor the Company, notwithstanding the content of the letter to Ms Rind dated 29 October 2012, has been operating on what can be reasonably construed as a 'part time' performance of the Database/IT Systems Administrator for some considerable time and intends to continue accordingly for the foreseeable future.

[44] While no figures were mentioned Ms Mannix-White gave evidence that the ongoing cost of the external provider is greater than if Ms Rind had returned to work on a part time basis.

[45] While the terms of Clause 21.6 refer to a lack of adequate replacement staff as a potential ground for refusal of Ms Rind's part time employment request this must be considered in context.

[46] The choice of the Company not to pursue a full time temporary replacement employee or full time external service provider during Ms Rind's maternity leave and not to fill the position since January 2013, with no intention of doing so as of late May 2013, contextualises what should be considered in relation to adequate replacement staff. In my objective judgement, the Company has made a decision, despite what Ms Mannix-White referred to as some ongoing frustration with the limited level of external service provision of the role of Database/IT Systems Administrator, to persist with an allocation of resources to the role of less than a full time employee equivalent, by the limited engagement of a contracted service provider.

[47] On my consideration of the evidence, Ms Rind's request to work part time for three days per week would most likely have provided a greater number of hours of work performing the Database/IT Systems Administrator role than are currently provided by the contractor service provider. Ms Rind in my objective judgement, could have more than adequately replaced the external service provider had her request been granted. Rather than making Ms Rind's return to part time work conditional upon recruitment of another part time employee, which in my objective judgement was unreasonable, it would have been reasonable to have Ms Rind return to work for three days a week in late January. If the further resources were required that could have been achieved by subsequent recruitment or contracted services. However, it is clear that the Company has continued to provide part time equivalent performance of Ms Rind's role.

[48] Finally, the refusal of Ms Rind's request to work part time would not seem reasonably based in relation to the impact on customer service. The nature of the role would seem to impact on internal customers, presumably with potential consequential effects on the delivery of the Company's service to its clients. On the evidence, it is not possible to judge that the primary impact on the customers referred to in Clause 21.6.2 of Ms Rind's request to work part time for three days per week would have been adverse had it been granted in the circumstances, given that Ms Rind was an experienced employee of the Company and would have provided a greater number of hours of work in the role than was being delivered in a not entirely satisfactory manner by an external service provider.

[49] Taking all of the above into account, I consider that the Company's refusal to grant Ms Rind's request to work three days per week was not reasonable.

[50] In my judgement, there is a presumptive element to the provisions of Clause 21.6 of the Agreement such that an employee returning from unpaid parental leave will be able to work part time until the child in respect of which the leave was available reaches school age, unless there are reasonable grounds upon which that part time employment can be refused. Those grounds must be objectively based and objectively judged. The presumptive element is reinforced by the terms of Clause 21.1.1 of the Agreement. The position of the Company for Ms Rind to work full time, of itself, does not displace that presumption. Particularly, having regard to the evidence that the Company has chosen to continue with part time equivalent service provision.

[51] In my view, once a request is made and refused under Clause 26.1 of the Agreement it will be necessary for the Company to be able establish the reasonableness of the refusal on an objective basis. On my critical evaluation of all the circumstances revealed by the evidence, including the Company's position, I judge the refusal of the request not to have been reasonable.

[52] The Enterprise Agreement governs the employment relationship between Ms Rind and the Company, while the terms of the Enterprise Agreement are not to be confused with the common law contract of employment, failure to carry out the Company's obligations under the Enterprise Agreement is, in my view, relevant conduct of the employer which can be taken into account when considering whether or not Ms Rind was constructively dismissed. In my view, this conclusion is supported by the approach taken by Allsop J in *Thomson v Orica*[8] The question reasonably arises as to whether Ms Rind was required to put up with a persistent and unreasonable refusal of her request to work part time which was in accordance with the Enterprise Agreement.

[53] What will be sensibly and reasonably judged to be conduct inimical to the contract of employment and the employment relationship must have regard to the gravitas of the relevant conduct. While rights to parental leave may be of recent origin in the long history of employment in Australia the right in this case is no small thing. Ms Rind's parental circumstances fundamentally affected her capacity to work for the Company. The practical necessity of her right not to have her request to work part time until her second child reached school age unreasonably refused was essential for her continued employment to be viable. The parenting of her children was a matter of fundamental importance to her capacity to give efficacy to the contract of employment, which was formally recognised in the Enterprise Agreement.

[54] 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. Indeed, the importance of parental leave and in particular leave in relation to maternity has become a matter of vital public interest in various ways reflected in the Act and in the Award system. The matter variously attracts general legislative proposals in the public interest. Entitlements of employees are likely to vary and will be of great importance to pregnant women who conceive children while in employment.

[55] When judging the weight of the inimical conduct of unreasonably refusing Ms Rind's request to return to work part time in the particular circumstances of this case the gravitas or seriousness of that 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.

[56] Given the factual circumstances of the unreasonable refusal to grant Ms Rind's part time employment request, I am satisfied that the Company engaged in a course of conduct that justified Ms Rind treating the employment at an end because there was an unreasonable refusal to perform the Company's obligations to Ms Rind under the terms of the Enterprise Agreement. Accordingly, I find that Ms Rind was constructively dismissed.

[57] Alternatively, or concurrently, the Company engaged in a course of conduct which forced Ms Rind to resign, if the letter of her representative can be considered a resignation on her behalf. Either way, Ms Rind was constructively dismissed at common law and, in accordance with the definition of a dismissal as prescribed by s.386 of the Act, in the latter case because the Company, knowing the practical impossibility of Ms Rind working full time, forced Ms Rind to "resign", through her Representative after being informed that if she did not return to work on a full time basis she would be deemed to have abandoned her employment.

[58] As a consequence of these findings, I consider Ms Rind was constructively dismissed from her employment by the Company and was consequently able to make the application in this matter.

[59] Earlier I referred to the dispute resolution procedure term of the Enterprise Agreement. I am mindful of Clause 32.2 of the Enterprise Agreement which provides that an employee of the Company may refer a dispute to Fair Work Australia. Neither Ms Rind or the Company elected to refer the dispute accordingly. The issue which arises for consideration is the election of Ms Rind not to refer the dispute accordingly and consideration of the impact of that election upon the circumstances of the inimical conduct of the Company, which gave rise to Ms Rind treating the employment as at an end. The issue concerns the judgement of the gravitas of inimical conduct of the Company as I have found it in light of this provision of the Enterprise Agreement.

[60] Had the word 'may' not appeared in Clause 32.2 of the Enterprise Agreement, but rather in its place the word 'shall' had been used, I would conclude that Ms Rind was obliged to refer the dispute and by not doing so had herself repudiated the contract of employment and the governing effect of the Enterprise Agreement on the employment relationship.

[61] However, care must be taken when construing a dispute settlement procedure which creates enforceable legal obligations upon parties for the determination of their rights under an Enterprise Agreement.

[62] Importantly, the terms of the Enterprise Agreement should not be re-written. The parties to the Enterprise Agreement have made a specific compact, to the effect that referral to Fair Work Australia by either of them, is an election which each of them may or may not make, discreetly.

[63] I consider it would be contrary to this clear choice of what the Enterprise Agreement should relevantly provide for the determination of the parties rights to read into the Enterprise Agreement a de facto obligation to refer a dispute which is unresolved by other means provided for by Clause 32 of the Enterprise Agreement to Fair Work Australia. To proceed as if that were the mandatory effect of a term of the Enterprise Agreement for the determination of the parties legal rights in the respect of the Enterprise Agreement is not permissible. In my view, the optional characteristic of Clause 32.2 of the Enterprise Agreement should be respected. Moreover, if the contrary approach is considered it would require that the Company should have referred the dispute to Fair Work Australia before sending the letter of 24 January 2013 to Ms Rind. It did not. Had it done so Ms Rind would have been bound by Clause 32.6 of the Enterprise Agreement. In my view, the fact that neither party referred the dispute accordingly neutralises any consideration attaching to the right to refer the dispute about the reasonableness of the Company's refusal to grant Ms Rind's request to return to work part time for my purposes.

[64] For all of these reasons I dismiss the Company's jurisdictional objection to Ms Rind's application. The application will be listed for a Conference before the Commission.

Appearances:

S Teffaha on behalf of the Applicant

T Page on behalf of the Respondent

Hearing details:

Before Commissioner Lewin
2013
Melbourne:
20 May.

Final written submissions:

Applicant - 16 May 2013.

Respondent - 13 May 2013.

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[1] *Fair Work Act 2009* (Cth) Part 3.2, Div 2.

[2] Ibid. Part 6-1, Div 3.

[3] Ph 2.2(1) F8 Original Application.

[4] Mr Richard Webb is a

[5] [2002] FCA 939 at [141].

[6] [2004] FMCA 242.

[7] *Blaikie v South Australian Superannuation Board* (1995) 65 SASR 85.

[8] [2002] FCA 939 at [141].