Employers' family violence obligations

A recent Employment Relations Authority case, RDJ v SGF [2023] NZERA 462, clarifies and provides a useful reminder of an employer's obligations when an employee requests family violence leave. It is also an opportune time to reflect on those obligations, with 1 April 2024 being the five-year anniversary of family violence leave being enacted into New Zealand law.

The Domestic Violence – Victims' Protection Act 2018 provides an ability for employees who are affected by family violence to take up to ten days paid family violence leave each year, and to request a short-term flexible working arrangement of up to two months, such as a change to their duties, work location, or start and finish times.

The short-term flexible working arrangement request can be refused on specified grounds such as an inability to re-organise work among existing staff, a burden of additional costs, or a detrimental effect on ability to meet customer demand. However, providing the employee has been employed by the same employer continuously for at least six months, there are no grounds to refuse family violence leave unless the employer has requested proof and the employee has been unable to provide it.

This raises the question, what constitutes proof? Proof is not defined in the legislation and is partly the subject of RDJ v SGF [2023] NZERA 462. In that case, a couple (RDJ and ZEL) co-owned a business, SGF, for several years. After their relationship ended, RDJ cut financial ties with the business, however, he subsequently agreed to return to work as an employee while ZEL recovered from a mental health breakdown. Further down the track, RDJ resigned and sought family violence leave until the end of his notice period.

SGF requested proof that RDJ qualified for family violence leave, and RDJ provided copies of abusive text messages from ZEL, such as "hope you die"; a photo of a bite mark on his new partner's arm that had been inflicted by ZEL; and described ZEL physically attacking both him and his new partner. Despite this, SGF rejected RDJ's request for family violence leave on the basis of a lack of proof. Moreover, ZEL had her own strongly felt and expressed views that it was RDJ who was the perpetrator of family violence, and not her.

The Employment Relations Authority determined that the details provided by RDJ did constitute proof of family violence and said that whilst the statute does not establish what level of proof is required, "*learned commentaries suggest it is set at a low bar*". Furthermore, the Authority noted that Parliament had specifically rejected prescribing a range of acceptable documents to prove family violence and instead indicated that "any proof" would be sufficient. It is possible that even an employee's self-declaration of family violence could constitute acceptable proof.

The Authority also pointed out that in a situation where two employees from the same family allege family violence against each other, the employer cannot be expected to conduct an extensive enquiry into the respective merits of each employee's claim. In such a situation, both employees would likely meet the standard of proof required, and therefore entitled to family violence leave.

It is also worth remembering what the definition of a person affected by family violence is – a person against whom any other person is inflicting, or has inflicted, family violence. This means that even in a situation where an employee suffered family violence 20 plus years before the commencement of their employment, they are considered to be a person affected by family violence and therefore able to access family violence leave. The definition further extends to a person who lives with a child who is impacted by family violence.

The Domestic Violence – Victims Protection Act 2018 also introduced a new personal grievance: that the employee has been treated adversely on the basis that he or she is a person affected by family violence.

Employers' Family Violence Obligations
(Continued)

Employers should also be conscious of Privacy Act 2020 issues, by being careful not to disclose any family violence issues to other employees, and considering how family violence leave is coded by payroll to minimise any such risk of disclosure.

In RDJ v SGF [2023] NZERA 462 the employee was awarded payment for the two weeks' family violence leave that had been declined and $7,000 non-taxable compensation both in relation to the unfair treatment of his leave application and a separate issue regarding his being served a trespass order for personal purposes during a work-related meeting.

RDJ v SGF [2023] NZERA 462 serves as a helpful reminder that employers should think carefully before declining family violence leave given the low bar for what constitutes proof. In addition, employers should not treat employees affected by family violence in an adverse way, instead providing them as much support as they can to help them resolve their issues and continue a productive employment relationship.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist Employment Team.