

PoBox 574
Gosford NSW 2250
Tel: (02) 4340 2000
Fax: (02) 4340 4288

A.B.N. 64 142 608 204

Dear Members

DISCRIMINATION CASE – CHANGE OF ROSTER

MEMBER ADVICE 47 –August 2011

A Victorian tribunal has ruled Nissan discriminated against an employee with two disabled children, when it insisted he be 100% compliant with a work roster.

In April 2009, Nissan Motor Co Pty Ltd wrote to staff advising them of a review and restructure, and in some cases enclosed new employment contracts for employees.

A mechanical engineer was offered the position of senior engineer in the services and accessories group. The agreement, which he accepted, provided that his working hours would be 38 per week between 7 am and 7 pm. He had previously been working between 8.30 am and 5 pm.

A year later, the engineer was advised by his supervisor that he would be undergoing a performance development plan. His boss felt the engineer had issues with time management and that Nissan was not getting a 'fair week's work for a fair week's pay'.

The engineer went on stress-induced sick leave for two months. However during that time, a new roster was devised that would better suit the worker's need for flexible working hours to help care for his disabled children.

On his return, Nissan insisted that the worker's roster was 100% complied with, with a 'five minute buffer' (the engineer had requested an hour). The engineer viewed this as unfair and was unable to comply.

He wrote to HR, stating he viewed his new position as an effective redundancy and that he was being discriminated against when the company did not allow him flexible working hours to 'reasonably accommodate his parental responsibilities' that he had previously been granted. He made a claim under s14 of the *Equal Opportunity Act 1995*.

Victorian Civil and Administrative Tribunal found there was nothing 'malign' in the performance process Nissan had undertaken against the engineer.

However, the Tribunal criticised Nissan's 'punitive' adherence to the roster.

'What is troubling is the respondent's (Nissan) consistent insistence on 100% compliance with the roster having regard to the threats made about disciplinary action or possible termination in the event of non-compliance,' she said.

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'Mr Capes (engineer) had made it clear, that due to his family responsibilities, he could not guarantee compliance.'

Further, the senior member noted that other employees were not subject to the same time strict adherence to start times or the 'buffer'.

'The Tribunal was told that the respondent had a reasonably flexible attitude to work times and it is clear from the evidence that no other employee was subject to such a punitive reporting regime...The Tribunal was told that other personnel could phone in if they were going to be late and appropriate leeway would be granted.'

Nissan 'unkind'

Megay also found it 'troubling' that Nissan 'reagitated' the 100% compliance as soon as the engineer returned from sick leave, 'a step that struck me as unfortunate and inconsiderate'.

'On balance I am persuaded that the condition imposed of 100% compliance with the starting times of 8.45 and 8.30 imposed an unreasonable condition that Mr Capes could not comply with and that other people without his attribute could comply with,' the Tribunal said. The Tribunal ruled the engineer had suffered indirect discrimination.

Lessons

Members should not impose conditions that may be interpreted as unreasonable and that do not apply to staff more generally. A condition applying to one person is likely to be discriminatory. Changing rosters, for example, needs to take into account parental responsibilities.

If members have queries please call Anton Duc on 0412 421 786.

Yours sincerely

Anton Duc

National Workplace Relations Manager

Baking Associations Australia