Women in the workforce and Schou's Case – Favouritism or equality?

Verity Quinn, Russell Kennedy

When VCAT found in Schou v State of Victoria (Dept of Victorian Parliamentary Debates) (2000) EOC 93-100 that the State of Victoria had indirectly discriminated against a former employee by refusing to install a modem which would allow her to work from home two days a week to look after her sick child, it seemed that anti-discrimination law was opening up a bright new future for working women.

The decision was important for women because, despite the gender neutral terms in which anti-discrimination law is shrouded, it is still primarily women who take on the major responsibilities of child rearing and so it is women who experience particular difficulty in meeting the requirement of attending the workplace full time or being available for variable hours.

Schou's Case appeared to cement the suggestion in recent anti-discrimination cases such as *Hickie v Hunt & Hunt* (1998) and *Bogle v Metropolitan Service Board* (2000) that employers have an obligation to accommodate employee's family responsibilities with alternative work arrangements. However, the decision was overturned on appeal in *State of Victoria v Schou* [2001] VSC 382, throwing into doubt the efficacy of anti-discrimination law to bring about such structural changes to the workplace.

Facts and findings

Ms Schou had been employed by the Department of Parliamentary Debates for 18 years when in 1996 her second child became recurrently ill. Ms Schou met with her supervisors and it was agreed that the Department would install a modem line which would allow her to continue to work on a full-time basis with two days working from home. The Department failed to install the modem and Ms Schou resigned. In 1997 Ms Schou applied for another position at the Department and was not granted an interview.

VCAT found indirect discrimination under the *Equal Opportunity Act 1995* based on the following:

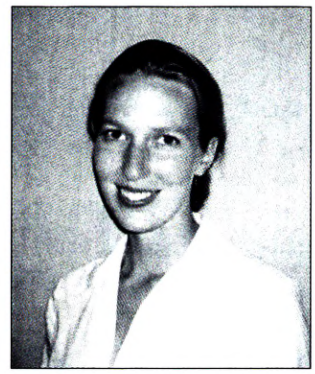
- The Department imposed a requirement or condition on employees to attend the workplace full-time ("the attendance requirement").
- Ms Schou, as a parent and carer, could not comply with this requirement.
- However a higher proportion of persons who were not parents or carers could comply with this requirement.
- This requirement was not reasonable.

VCAT awarded $161, 307.40 in damages for economic loss, the largest sum ever awarded in Australia for a discrimination complaint.

The Appeal

On appeal, Justice Harper set aside VCAT's orders and remitted the matter to be heard by a differently constituted tribunal. Justice Harper found that VCAT had, amongst other things, incorrectly inquired into whether the modem option was reasonable, rather than focusing on whether the attendance requirement was reasonable. Justice Harper thought that whether the attendance requirement was "reasonable" depended on whether it was "appropriate and adapted" to ensuring that employees provided the requisite standard of service, not on the availability of viable alternatives.

The *Equal Opportunity Act 1995* states that, in assessing whether a requirement is "reasonable" for the purposes of the Act, the cost of alternatives and the



financial circumstances of the person imposing the requirement are relevant considerations. VCAT's assessment of the cost of the alternative modem option ($2,000-2,500) and the likely burden of such a cost on an employer such as the State of Victoria was therefore a legitimate enquiry. Justice Harper, however, placed little emphasis on the fact that the Act expressly contemplates such inquiries and concluded that the Tribunal considered the complaint "only through the prism of the modem proposal" and thus fell into an error of law.

Can the *Equal Opportunity Act 1995* be used to bring about structural change to the workplace?

The significance given to alternative arrangements in assessing the "reasonableness" of an attendance requirement is important as it would be very difficult for a complainant to show that an attendance requirement is not appropriate and adapted to ensuring that a certain level of service is maintained. If complainants cannot satisfy the legislation by being able to show that the attendance requirement is unreasonable because there are other ways of achieving that level of service, then it is unlikely that the Act will prove an effective tool for bringing about structural change.

Furthermore, Justice Harper thought that if full time attendance at the workplace was appropriate and adapted, then by applying to be relieved of this requirement, Ms Schou was seeking "a favour" of her employer. The Act therefore had no role to play because it is not intended to "compel the bestowing of special advantage" and Ms Schou was "simply treated as all other sub-editors were and are treated: not better, but certainly not worse."

Inherent in these statements is the idea that equality is about treating people the same, and hence discrimination is about treating people differently. But central to the idea of indirect discrimination is the premise that sometimes treating all people the same *is* discriminatory, because the same treatment can have different impacts on people depending on the surrounding social, economic, and cultural circumstances. Requiring all employees to attend the workplace full time can be discriminatory when it is taken into account that female employees with children generally have family responsibilities which their male counterparts do not and these responsibilities are inconsistent with the traditional workplace structure. Unless this is recognised, there is little scope for altering workplaces structured around male employees with full time availability to accommodate female employees who have substantial additional responsibilities in the private sphere.

The issue of altering the traditional workplace structure to enable women to have careers, as well as taking on the role of primary carer to their children, is a complex one. However a legal obligation on employers to accommodate employees with family responsibilities where technology is available, subject to cost and workplace efficiency, seems a good place to start. If Justice Harper is right, however, in thinking that accommodation of women who bear the dual role of employee and carer is not a matter for the law but a "favour" at the discretion of individual employers, then equality for working women in real terms rather than in rhetoric will remain elusive.

The Health Records Act 2001 (Vic)

Catherine Symons, Corporate solicitor, GSO

Late last year, amendments to the* Privacy Act *1988 (Cth) were introduced, the effect of which has been to extend the coverage of privacy law to the private sector.

These changes received moderate media exposure at the time and have seen the advent of new documentation requirements, including the need for businesses to make available a privacy statement, which is an exposition of that organisation's policies for the handling of personal information.

Taking a back seat to the Commonwealth initiative is a new piece of Victorian legislation, the *Health Records Act* 2001 (Vic).

This State Act has to date been overshadowed by its Federal counterpart but will assume greater prominence in the lead-up to its introduction on 1 July 2002.

The Health Records Act establishes a separate regulatory regime for the handling of health information and applies with particular vigour to health service providers.

Any individual or organisation that provides a health service (for example, provision of a medical, aged care, disability or recreation service) will be classified as a health service provider for the purpose of the State Act. The effect of this classification is that any personal information collected for the purpose of providing the health service, such as a patient's contact details, will be considered health information.

Both the Commonwealth and State privacy schemes take a similar approach to health information and accord it special treatment. Under the Commonwealth law it is placed in the category of "sensitive information".

The Victorian legislation introduces a set of 11 Health Privacy Principles ("**HPPs**") that cover similar ground to the Commonwealth National Privacy Principles. However, the standards contained in the Victorian legislation are more stringent and have particular application to health service providers.

The HPPs can be summarised under the following headings:

Collection and use of health information

An organisation can only collect health information where this is necessary for the performance of an activity or function.

An organisation can only use or disclose the health information for the purpose for which it was collected unless the individual's consent has been obtained.

Data quality and security

An organisation must take reasonable steps to ensure that the health information it holds is accurate, complete, up-to-date and relevant to its functions. It must also safeguard the information against misuse, loss, unauthorised access and modification.

An organisation will generally be prohibited from destroying or deleting health information about an individual until at least 7 years have passed since the individual's last attendance.