

# Return to work guarantee, redundancy and redeployment: Do you know your obligations?



An employee returning from parental leave is entitled to return to the position they held immediately before commencing parental leave. But what happens if there is a restructure while the employee is on parental leave? A recent decision has emphasised the tricky balancing act for employers in complying with the “*return to work guarantee*” and avoiding a claim for unfair dismissal.

## Fast facts

Ms lanello was employed by Motor Solutions Australia as a Recruitment Manager prior to taking four months’ maternity leave. By agreement, Ms lanello’s return date was deferred because of a downturn in business. Ms lanello indicated her intention to return full-time at the expiry of 12 months’ maternity leave. Motor Solutions stated that it could only provide two days work per week, but it hoped business would improve. Ms lanello maintained that under the “*return to work guarantee*”, she was entitled to return to her position on a full-time basis. Motor Solutions told Ms lanello that her full-time role of Recruitment Manager had ceased to exist and made her redundant. Motor Solutions retained another employee in an “*amalgamated role*” which comprised some of his former duties, and some of Ms lanello’s, on a four day per week basis paid commission only. Ms lanello lodged an unfair dismissal application with Fair Work Australia (FWA).

## Return to work guarantee

In general terms, an employee returning from parental leave is entitled to return to the position they held immediately before commencing parental leave. If that position no longer exists, they are entitled to the position nearest in status and remuneration as the former position.

## Genuine redundancy exemption to unfair dismissal

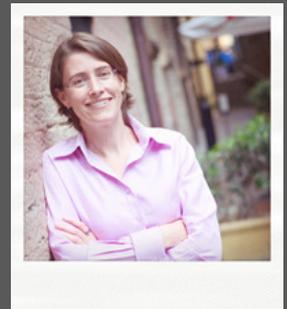
Prior to 1 July 2009, an employee could not make an application for unfair dismissal if their employment was terminated for genuine operational reasons. Under the *Fair Work Act*, the exemption remains, but is more limited. A “genuine redundancy” will exist where the person’s employer no longer requires the person’s job to be performed by anyone because of changes in operational requirements, and the employer has complied with any consultation obligations in a modern award or enterprise agreement. However, the termination will not be a genuine redundancy if it would have been reasonable to redeploy the person within the employer’s enterprise or associated entity. This factor was critical to FWA’s decision.

## Outcome

FWA decided that the termination was due to operational reasons. However, it found that given favourable comments about Ms lanello’s performance, and her greater experience and seniority, it would have been reasonable to redeploy her into the “*amalgamated role*”, and the other employee could have been made redundant. FWA acknowledged that it was a “*difficult case [involving] questions of fine balance*” and that the “*right to return to work after taking maternity leave [was] an important factor in this case*”.

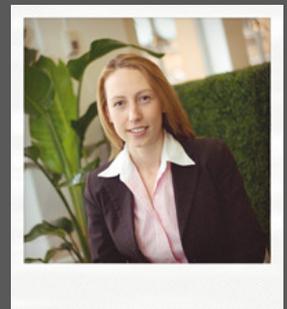
## Lessons learned

Great caution should be exercised before terminating an employee returning from parental leave. Aside from unfair dismissal exposure, a breach of the return to work guarantee can result in a \$33,000 penalty. Employers also need to be aware of the new obligation under the *Fair Work Act* to consult with employees on parental leave about any decision that will have a significant effect on the status, pay or location of the employee’s pre-parental leave position, and take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of that decision on their position.



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