80 Unpaid special maternity leave

Entitlement to unpaid special maternity leave

(1) A female employee is entitled to a period of unpaid special maternity leave if she is not fit for work during that period because:
   (a) she has a pregnancy-related illness; or
   (b) all of the following apply:
       (i) she has been pregnant;
       (ii) the pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child;
       (iii) the child is not stillborn.

   Note 1:   Entitlement is also affected by section 67 (which deals with the length of the employee's service).

   Note 1A: If the child is stillborn, the female employee may be entitled to unpaid parental leave (see section 77A).

   Note 2:   If a female employee has an entitlement to paid personal/carer's leave (see section 96), she may take that leave instead of taking unpaid special maternity leave under this section.

Notice and evidence

(2) An employee must give her employer notice of the taking of unpaid special maternity leave by the employee.

(3) The notice:
   (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
   (b) must advise the employer of the period, or expected period, of the leave.

(4) An employee who has given her employer notice of the taking of unpaid special maternity leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).

(5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.

(6) An employee is not entitled to take unpaid special maternity leave unless the employee complies with subsections (2) to (4).

77A Effect of stillbirth or death of child on unpaid parental leave

Stillbirth—preserving entitlement to birth-related leave

(1) If:
   (a) a child is stillborn; and
   (b) an employee would have been entitled to unpaid parental leave that is birth-related leave, if the child had been born alive;

then the employee is taken to be entitled to the unpaid parental leave, despite the stillbirth of the child.

(2) A *stillborn* child is a child:

(a) who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks; and

(b) who has not breathed since delivery; and

(c) whose heart has not beaten since delivery.

(3) The provisions of this Division have effect in relation to the employee as if the birth of a child included the stillbirth of a child.

Note: One effect of this subsection is that if the employee has not given notice in accordance with section 74 before the stillbirth of the child, the employee can do so as soon as practicable (which may be a time after the leave has started).

Stillbirth or death of child—cancelling leave or returning to work

(4) If a child is stillborn, or dies during the 24-month period starting on the child's date of birth, then an employee who is entitled to a period of unpaid parental leave in relation to the child may:

(a) before the period of leave starts, give his or her employer written notice cancelling the leave; or

(b) if the period of leave has started, give his or her employer written notice that the employee wishes to return to work on a specified day.

(5) For the purposes of paragraph (4)(b), the specified day must be at least 4 weeks after the employer receives the notice.

(6) If the employee takes action under subsection (4), the employee's entitlement to unpaid parental leave in relation to the child ends:

(a) if the action is taken under paragraph (4)(a)—immediately after the cancellation of the leave; or

(b) if the action is taken under paragraph (4)(b)—immediately before the specified day.

Interaction with section 77

(7) Subsections (4) to (6) do not limit section 77 (which deals with the employee reducing the period of unpaid parental leave with the agreement of the employer).