EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/10 Duty to offer woman on maternity leave a suitable alternative vacancy arises when role becomes redundant (UK)

<p>The Employment Appeal Tribunal (‘EAT’) has held that the duty to offer a woman on maternity leave a suitable alternative vacancy under regulation 10 of the Maternity and Parental Leave Regulations 1999 (SI 1999/3312) (the ‘MPL Regulations’) arises when the employer first becomes aware that her role is redundant, or potentially redundant. The EAT found that if the duty only arose after a redundancy or restructuring process was complete, it would undermine the purpose of the legislation.</p>
<p>The EAT also commented on the relationship between the regulation 10 duty and direct discrimination, as defined in section 18 of the Equality Act 2010 (‘EqA 2010’). Section 18 makes it unlawful for an employer to discriminate on grounds of pregnancy or maternity. The EAT found that where the regulation 10 duty is breached by an employer, it did not automatically follow that there would also be a case of direct discrimination under section 18.</p>

Summary

The Employment Appeal Tribunal ('EAT') has held that the duty to offer a woman on maternity leave a suitable alternative vacancy under regulation 10 of the Maternity and Parental Leave Regulations 1999 (SI 1999/3312) (the 'MPL Regulations') arises when the employer first becomes aware that her role is redundant, or potentially redundant. The EAT found that if the duty only arose after a redundancy or restructuring process was complete, it would undermine the purpose of the legislation.

The EAT also commented on the relationship between the regulation 10 duty and direct discrimination, as defined in section 18 of the Equality Act 2010 ('EqA 2010'). Section 18 makes it unlawful for an employer to discriminate on grounds of pregnancy or maternity. The EAT found that where the regulation 10 duty is breached by an employer, it did not automatically follow that there would also be a case of direct discrimination under section 18.

Background

It is possible to make a woman on maternity leave redundant in the UK, unlike in some other countries. However, women on maternity leave do have various protections. Regulation 10 of the MPL Regulations means that a woman on maternity leave has the right to be offered a suitable alternative vacancy in a redundancy situation. This is an absolute right, and means in practice that if a suitable vacancy exists, it should be offered automatically without any requirement for the employee to be interviewed or assessed.

A failure by an employer to comply with this requirement renders a dismissal automatically unfair.

Women on maternity leave are also afforded protection by section 18 of the EqA 2010, which makes it unlawful for an employer to discriminate on grounds of pregnancy or maternity.

Facts

In this case, the employee, Mrs W, was on maternity leave from 16 July 2012 to sometime in July 2013 and, as such, was still on maternity leave at the time of her dismissal in April 2013. Her employer had started to plan redundancies in late 2010, though they were not implemented until 2012. As part of a general restructuring exercise, the employer decided to combine the employee's role with another senior role (occupied by a man, Mr P, to create one new role. Both of the affected employees were placed at risk of redundancy in July 2012, though the new role was created a month earlier, in June 2012.

In December 2012, both employees were invited to apply and be interviewed for the newly created role. Mr P was considered a better fit by the employer, and was consequently offered

the role in December 2012. Mrs W was put onto the redeployment register, and dismissed on the grounds of redundancy in April 2013.

Mrs W went on to win claims in the employment tribunal ('ET') for breach of regulation 10, automatically unfair dismissal and direct discrimination under section 18 of the EqA 2010.

The employer had argued that the regulation 10 duty had not arisen until the restructuring exercise had been completed, after the newly created role had been filled, i.e. the duty arose after Mr P. had been offered the role in December 2012, which would mean that Mrs W's entitlement was to be offered a vacancy if one was available at that time.

However the ET rejected that argument, reasoning instead that Mrs W had had the right to be offered the role once the employer knew that there was a redundancy situation which affected her, i.e. in July 2012 when she had been placed at risk. The employer was also criticised for requiring Mrs W to be interviewed for the newly created role, contrary to the absolute right to be offered a suitable role that is enshrined by regulation 10.

The employer appealed. At the EAT, the ET's decision that there was a breach of section 18 of the EqA 2010 was remitted for re-consideration by the same tribunal panel.

However the EAT broadly agreed with the ET's decision regarding regulation 10.

Judgment

Relationship between regulation 10 and section 18 EqA 2010

The EAT judge explained that in order to show direct discrimination under section 18, a woman does not have to show less favourable treatment, but merely unfavourable treatment because of pregnancy or maternity leave. Regulation 10, on the other hand, provides that a woman is entitled to special protection and will be treated as unfairly dismissed if that protection is denied to her.

In this case, the unfavourable treatment was Mrs W's own role being made redundant, and the failure to offer her a suitable alternative vacancy.

The judge said that Mrs W's assertion that a breach of regulation 10 automatically meant that direct discrimination was established was a step *"beyond the language of the statute"* and that while the unfavourable treatment of Mrs W coincided with her being on maternity leave, it did not mean that the unfavourable treatment was because of it.

The judge explained that it was, therefore, necessary to establish the reason why the Claimant was treated the way she was. While the judge recognised that in many cases a finding that

regulation 10 had been breached would also answer the question of whether there had been a breach of section 18, she commented that the facts of this particular case allowed for more than one answer. This question was therefore remitted back to the ET.

Scope of the regulation 10 duty

As regards determining when the regulation 10 duty arises, the judge commented that it is largely left open to employers to decide how best to carry out redundancy processes. However if it was also left open to an employer to decide *when* a redundancy occurs, the position could be abused. Referring to the definition of 'redundancy' in section 139 of the Employment Rights Act 1996, the judge held that the ET had been correct to conclude that there was a redundancy when the employer decided that two positions would be removed and replaced by one.

This was because at that point, the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished, or were expected to do so. If Mrs W was not provided, therefore, with a suitable alternative vacancy allowing her to avoid being dismissed, her employment would be terminated on the grounds of redundancy.

The judge did accept that regulation 10 does not define the term 'vacancy', and does not expressly oblige an employer to offer every suitable vacancy (or any particular vacancy) if more than one might be suitable. As a result, the judge said that the employer might have satisfied its obligations under regulation 10 if it had offered Mrs W another suitable alternative (i.e. a different vacancy to the one offered to Mr P).

The employer sought to argue that the position in question was not actually a vacancy at all, as it was not open to anyone other than Mrs W and Mr P. However the judge disagreed, commenting that the employer was seeking to define the terms in question through the prism of its own way of proceeding.

While the judge accepted that the employer might have preferred to give the vacancy to Mr P, rather than Mrs W, in her view the employer was obliged to offer it to Mrs W unless it could find some other suitable alternative vacancy to offer.

As regards the interview process that the employer had required, the judge referred to the EAT's judgment in Eversheds Legal Services - v - de Belin, in which it was found that the obligation upon the employer is to do that which is reasonably necessary to afford the statutory protection to a woman who is pregnant or on maternity leave.

Doing more than is reasonable necessary would be disproportionate and would put an employer at risk of unlawfully discriminating against others.

In this case, the judge commented that in order to afford Mrs W the necessary statutory protection, the employer had been obliged, upon her position becoming redundant, to assess what available vacancies might have been suitable and to offer one or more of them to Mrs W. She should not have been required to engage in any sort of selection process, and the judge noted that the purpose of the special protection for women on maternity leave was graphically illustrated by the fact that Mrs W had, at the time of the interview, three children under the age of three.

Commentary

It is clear that neither being on maternity leave nor regulation 10 provides a woman with immunity from being considered for redundancy. Indeed, a man can complain of sex discrimination if a woman is not put into a redundancy selection pool simply because she is on maternity leave. However in this case, Mrs W's right to be offered the only vacancy in the proposed restructure effectively amounted to removing her from the redundancy pool altogether.

There is very little case law surrounding the regulation 10 duty, and in particular regarding when the duty arises. The result of this judgment, however, seems to be clear – that an employer ought to offer a vacancy when it becomes aware that the employee's role is redundant or potentially redundant. However this does not answer the question of how likely the redundancy or restructure needs to be in order for the duty to be triggered.

The decision suggests that employers should be aware of the exact point at which a redundancy situation arises, and offer any suitable vacancies from that point onwards. Given the difficulty in establishing exactly when a redundancy situation is in place, it seems sensible for employers to assume that the duty under regulation 10 arises when it first decides to make redundancies.

Comments from other jurisdictions

Denmark (Mariann Norrbom): It is interesting to see that pregnant employees enjoy wider protection under UK law than required under EU discrimination law. In Denmark, it is considered to be in accordance with EU law to make a pregnant employee redundant under certain circumstances, which is also the case in the UK. A Danish employer is required to try to offer the pregnant employee a suitable alternative vacancy. However, according to Danish law the employer is not required to automatically offer a vacancy to a pregnant employee who is placed at risk of redundancy if the employer can justify that another employee is more suitable for the vacancy.

As mentioned in the case report, there is a risk that it will be considered unlawful discrimination against men if a male employee and a pregnant employee are both placed at risk of redundancy and the employer does not consider who is most suitable for the position but automatically gives the vacant position to the pregnant employee even though the male employee is in fact more qualified than the pregnant employee. Unlike the conclusion in this particular case, it is likely that it would be considered disproportionate under Danish law to automatically offer the vacant position to the pregnant employee, thus barring the male employee from having a chance of obtaining the position. Of course, the reason for the dismissal of the male employee would be redundancy, but the choice between him and the female employee would be based on pregnancy only.

Germany (Peter Dworski): In Germany, pregnant employees enjoy a high level of protection against dismissal. In principle, the time of maternity leave lasts from six weeks before the estimated birth date until eight weeks after delivery. However, according to sec. 9 para. 1 of the Maternity Protection Act (MuSchG), the employment relationship of a pregnant employee must not be terminated by the employer during the entire pregnancy up to the expiration of four months following delivery. A termination contrary to the aforementioned provision is null and void if the employer had been aware of the pregnancy or the delivery at the time of the termination or if he has been informed accordingly within two weeks after receipt of the notice letter. A dismissal during pregnancy and maternity leave is only possible in exceptional cases (e.g. an irreparable disruption of the employment relationship due to employee's severe misconduct (criminal offence)) and with the consent of the responsible public authority.

In view of this extensive protection against dismissal, according to German law, an employer has the duty to offer a woman on maternity leave a suitable alternative vacancy when her role is redundant. In In this respect, the judgement is in line with German law. An exceptional case that can justify a termination because of operational reasons is only recognised when there is no possibility for continued employment at all (e.g. the permanent closure of the company) or if the economic existence of the employer is at risk. However, in any case, the prior consent of the responsible public authority has to be obtained.

In regard of possible discrimination, the termination of the employment must not be based on reasons related to the pregnancy or motherhood. Had the employer terminated the employment after the maternity leave, the result would probably have been the same, since in Germany an employer is always under the obligation to seek alternative positions to employ the employee in question resulting from the Unfair Dismissal Protection Act.

The Netherlands (Peter Vas Nunes): Article 10 of Maternity Directive 92/85 prohibits dismissal, save in exceptional circumstances, not only during maternity leave but from the first day of

pregnancy. Regulation 10 of the MPL Regulations is very favourable for female employees, but only during the period of their maternity leave. Until that leave begins, a pregnant employee may be dismissed on the ground of redundancy without triggering a "regulation 10 duty".

Subject: Working time and leave, Maternity and parental leave

Parties: Sefton Borough Council - v - Wainwright

Court: Employment Appeal Tribunal

Date: 13 October 2014

Case number: UKEAT/0168/14

Internet publication: www.bailii.org

**Eleanor King is a lawyer at Lewis Silkin LLP in London, www. lewissilkin.com*

Creator: Employment Appeal Tribunal
Verdict at: 2014-10-13
Case number: UKEAT/0168/14