SUMMARY

2011/21 Favouring employee on maternity leave in redundancy selection was discriminatory (UK)

<p>An employer unlawfully discriminated against a male employee on the ground of his sex by inflating the score of an employee who was on maternity leave in a redundancy selection process. Employees who are pregnant or on maternity leave may be accorded favourable treatment, but only to such extent as is reasonably necessary to compensate for the disadvantages occasioned by their condition.</p>

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Facts

This case concerns Mr de Belin who was employed by Eversheds Legal Services Ltd as a solicitor. In September 2008, he was placed at risk of dismissal for redundancy along with a female colleague, Ms Reinholz.

In carrying out the redundancy selection process, Eversheds scored both employees according to a number of performance criteria. One of these was “lock up”, which measures the length of time between a piece of work being undertaken and the receipt of payment from the client: the shorter the period, the higher the score awarded. The measurement was performed as at 31

July 2008 and Mr de Belin received the lowest possible score of 0.5.

Ms Reinholz had commenced a period of maternity leave on 10 February 2008 and was still absent on the measurement date. This meant it was not possible to measure her lock up period as at 31 July 2008, since she had no client files at that time. Eversheds decided to award her the maximum score of 2 for this criterion. At the conclusion of the redundancy scoring process, Mr de Belin's overall score was 27 and Ms Reinholz's score was 27.5. Accordingly Mr de Belin was selected for redundancy.

Mr De Belin complained that the way in which he had been treated was unfair and also constituted sex discrimination. Had Ms Reinholz not been awarded the maximum score for lock up, her overall score at the conclusion of the process would not have been higher than his. Mr de Belin suggested some alternative methods of scoring lock up performance which he argued would have been fair to both employees, such as looking at the period before Ms Reinholz went on maternity leave. Eversheds, however, declined to change their approach. It said that it was required by law in order to ensure that Ms Reinholz was not disadvantaged as a result of her maternity absence, since this could expose the firm to the risk of her bringing a sex discrimination claim.

Mr de Belin complained to the Employment Tribunal that Eversheds' treatment of him amounted to direct discrimination contrary to the Sex Discrimination Act 1975 (the "SDA"). He also claimed that he had been unfairly dismissed.

Eversheds' main defence was to rely on section 2(2) of the SDA which provided that any "special treatment afforded to women in connection with pregnancy or childbirth" must be ignored when assessing whether a man had suffered sex discrimination.

The Employment Tribunal's Decision

The Employment Tribunal decided that section 2(2) should be interpreted narrowly, to mean that a man cannot bring a claim for sex discrimination based on the legislative protections enjoyed by employees who are pregnant or on maternity leave. For example, there is a statutory provision in the UK that women in this position must be given priority for suitable alternative employment in a redundancy situation. However, the Tribunal said, if an employer goes beyond those specific statutory protections, a comparable man who has been treated less favourably will have a valid case for sex discrimination.

On this basis, the Tribunal upheld Mr de Belin's claim under the SDA. It also found that he had been unfairly dismissed. He was awarded compensation for loss of earnings to date and

for two years into the future. Eversheds appealed to the Employment Appeal Tribunal (EAT).

The Employment Appeal Tribunal's Decision

Eversheds submitted that in various cases the European Court of Justice had been rigorous in interpreting EU law so as to exclude a possibility of disadvantage to pregnant employees or those with young children. Construing section 2(2) of the SDA in accordance with those underlying principles, Eversheds argued that it was under a positive obligation to accord Ms Reinholz the maximum score with regard to lock up. It was possible that, had Ms Reinholz remained at work until 31 July 2008, she would have performed sufficiently well to receive the maximum score. It followed that awarding her any lesser score might have meant she lost out by reason of her absence on maternity leave.

In relation to unfair dismissal, Eversheds contended that even if the Employment Tribunal's finding of sex discrimination were to be upheld, it did not automatically follow that the dismissal should be unfair. The firm had been faced with a very difficult legal situation and had acted reasonably, even if it turned out that it had acted wrongly, in attempting to comply with what it understood to be its legal obligations to Ms Reinholz. Since it had acted reasonably, the dismissal could not properly be characterised as unfair.

In reply, Mr de Belin accepted that Ms Reinholz would have been treated unlawfully if no arrangements had been put in place to see that she did not lose out in the application of the scoring system through her absence on maternity leave. However, any such arrangements should have gone no further than was necessary to achieve that aim. Mr de Belin argued that Eversheds, in adopting the approach that it did, had gone beyond its legal obligations with the result that he was placed at an unfair and illegal disadvantage.

In essence, Mr de Belin argued that Eversheds had failed to observe the principle of proportionality. There were alternative ways in which Ms Reinholz's right not to be placed at a disadvantage as a result of her absence on maternity leave could have been proportionately protected, as Mr de Belin had suggested during the redundancy consultation process.

The EAT accepted Mr de Belin's submissions and dismissed Eversheds' appeal as to liability. In the EAT's judgment, an employer's obligation to pregnant employees or those on maternity leave cannot extend to favouring them beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition. Accordingly, to the extent that a benefit extended to a woman who is pregnant or on maternity leave is disproportionate, this will entitle a male colleague who is correspondingly disadvantaged to bring a claim for sex discrimination.

As to the fairness of Mr de Belin's dismissal, the EAT accepted that there may in principle be circumstances in which a discriminatory dismissal is not unfair. However, in the present case, the EAT did not consider it was reasonable for Eversheds to believe that it had no alternative to maintaining a maximum lock up score for Ms Reinholz when it became clear that this would be decisive in Mr de Belin's selection for redundancy. The dismissal was therefore unfair as well as discriminatory.

Eversheds' appeal on the issue of remedy was, however, successful. The EAT ruled that the Employment Tribunal had unduly dismissed evidence that Mr de Belin was likely to have been made redundant a few months after his dismissal without giving it proper consideration. This could have reduced his award for future loss of earnings substantially. Ordering that Mr de Belin's compensation should be reconsidered by a different tribunal, the EAT stated that tribunals must not opt out of their duty to consider thoroughly evidence relating to future loss simply because the task is a difficult one which may involve a large degree of speculation.

Commentary

This decision serves as a cautionary tale to employers who treat pregnant employees and those on maternity leave more favourably than colleagues in the belief that they are doing what is required of them by law, without considering the detrimental impact that such conduct may have on other employees. The EAT's interpretation of section 2(2) of the SDA is surely correct. It would be inconsistent with the spirit and purpose of the SDA and EU equal treatment principles for there to be a general prohibition on male employees complaining about more favourable treatment given to female colleagues on maternity leave.

Employers should therefore not automatically give a woman on maternity leave the "benefit of the doubt" when assessing performance Ð whether this is for the purposes of a redundancy exercise, appraisal or bonus decision. Rather, they should consider whether there is any alternative, fairer way of making the relevant assessment (for example, by reference to the woman's performance before beginning maternity leave).

In my view, the most sensible course of action for Eversheds to have taken would have been to dispense altogether with lock up as a redundancy scoring criterion. Alternatively, they could have considered the most recent period for which they were able to obtain actual lock-up data for both individuals, which would have been the period immediately preceding the commencement of Ms Reinholz's maternity leave.

Note: At the time of this case, the legislation relevant to the discrimination claim was the SDA, which has since been replaced by provisions contained in the Equality Act 2010. (In particular,

the provision previously set out in section 2(2) of the SDA is now located at section 13(6) of the 2010 Act.) The EAT's ruling in this case therefore continues to be relevant under current UK anti-discrimination legislation.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This is an interesting case and the court decision regarding sex discrimination seems well-founded. Under Austrian discrimination law any measures promoting the factual equality of women with men ("affirmative action") must be proportionate, which was clearly not the case here. I share the view that the employer should have either dispensed with lock-up as a redundancy scoring criterion or considered an earlier period for which there was a lock-up date in respect of both employees.

Under Austrian employment law the "fairness" of a dismissal can be challenged only if it is "socially unjust" (sozialwidrig). If the plaintiff is successful the dismissal is quashed by the court and the employee will have to be re-instated by the employer. In a redundancy situation the employer has to select the employees to be dismissed mainly on the basis of social criteria (on the assumption that the works council has objected to the proposed dismissal, which is normally the case). As the lock-up score relates neither to the social situation of the employee and his family nor to the employee's performance, it would not have justified the dismissal of Mr de Belin before an Austrian court.

Germany (Paul Schreiner): In Germany selection schemes always have to include the basic characteristics of a social selection process within the meaning of the Dismissal Protection Act (Kündigungsschutzgesetz, abbreviated "KschG"), such as age, obligations to support relatives, duration of service and disability. It is in principle possible to agree on additional selection criteria, but in general the social selection process is solely based on these criteria. This selection process is subject to review by the courts and therefore the employer is usually advised to adhere to the criteria given in the KSchG. If, however, two employees are equally protected against a dismissal due to social selection, the employer may well establish additional criteria for its decision.

Therefore a case like this is hard to find in German case law. From my point of view, on the assumption that both employees in this case were equally protected, a German court would likely have examined whether two points were usually awarded to persons who had reached their targets by 100% or only if targets were exceeded. In general, German courts tend to assume that an employee is able to achieve her targets in full had she been working, but if the employee claims she would have exceeded the amount forecast, she would need to deliver sufficient proof.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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