DechertOnPoint

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A legal update from Dechert's Employment Law Group

Sex Discrimination, Redundancy and Maternity Leave

In *Eversheds Legal Services Ltd v De Belin*, the Employment Appeal Tribunal ("EAT") upheld the employment tribunal's decision that effectively inflating the score of a female employee on maternity leave in a redundancy selection process constituted unlawful sex discrimination against the other, male, colleague in the relevant selection pool. In this *DechertOnPoint*, we report on this recent decision which illustrates that giving the benefit of the doubt to the employee on maternity leave is not always the safest option.

Background

Mr De Belin was employed as a property lawyer by Eversheds. He was placed in a pool for redundancy with his female colleague, Ms Reinholz. They were the only two employees in the pool and were assessed against five selection criteria. One of the criteria was a measure of financial performance called "lock-up", which assessed the length of time between carrying out work and being paid for the work. This was assessed over the preceding 12-month period, during which time Ms Reinholz had been on maternity leave.

Mr De Belin scored 0.5, the lowest possible score out of a maximum score of 2. Ms Reinholz was awarded a notional score of 2, the highest possible score, on the basis that she had not been at work for some of the period under review and did not have the opportunity to influence the score. This meant that, overall, Ms Reinholz scored 27.5 and Mr De Belin scored 27.

The Tribunal Decision

Mr De Belin argued that, if Ms Reinholz had not been on maternity leave, she would not have scored the maximum score of 2, and she would have been selected for redundancy instead of him. Had she been assessed by reference to the 12-month period preceding her maternity leave she, too, would have scored the lowest possible mark in relation to the lock up criterion. He argued his dismissal was not only unfair but also constituted unlawful sex discrimination because Ms Reinholz was treated more favourably (and therefore retained) by reference to the fact that she had been on maternity leave—the employer therefore treated her more favourably than him by reason of her sex.

The employer argued that its actions were justified under section 2(2) of the Sex Discrimination Act 1975 (now set out in the Equality Act 2010), which provides that, although the principle of equal treatment applies equally to men and women, "special treatment" can be afforded to women in connection with pregnancy or childbirth. The tribunal rejected this defence and held that Mr De Belin had been discriminated against on the grounds of his sex and that he had been unfairly dismissed. In so doing the employment tribunal made several key findings:

- The "special treatment" provisions are not intended to provide blanket protection against sex discrimination claims brought by men. They did not protect a woman on maternity leave in a redundancy scoring exercise where she had received an artificially inflated score.

- The employer should have considered other options to ensure that the two employees were fairly treated, such as removing the lock-up criterion altogether or using a reference period prior to her maternity leave.
- Mr De Belin was therefore unlawfully discriminated against because he was treated less favourably on grounds of his sex and the special treatment provisions did not apply to provide the employer a defence to that claim of sex discrimination.
- The appropriate level of compensation was £123,300 to reflect the losses consequent upon Mr De Belin's unfair and discriminatory dismissal.

EAT Decision

The EAT upheld the employment tribunal's decision and concluded that the employer's approach to scoring Ms Reinholz was not proportionate and went beyond what was reasonably necessary. In terms of the special treatment provisions, the EAT made the following points:

- Whilst employees who are pregnant or on maternity leave sometimes need to be treated more favourably, such employees should not be treated more favourably than is "reasonably necessary to compensate them for the disadvantages occasioned by their condition".
- The principle of proportionality must apply where an employer seems to rely on the "special treatment" provisions. Where a woman who is pregnant or on maternity leave is disproportionately favoured, a disadvantaged male colleague is entitled to claim sex discrimination.

Practical Aspects

Despite the fact that the special treatment provisions allow for favourable treatment in connection with pregnancy and childbirth, this case demonstrates that employers must be very careful if they seek to take advantage of those provisions. An employee's absence on maternity leave may make it difficult directly to compare employees' respective performance by reference to a recent reference period. In such circumstances, it may be very tempting to give the employee a deemed score and defend that by reference to the special treatment provisions. However, to do so may not be to err on the side of caution but may actually expose the employer to a sex discrimination complaint from a man whose position is prejudiced as a result. Where employees who are pregnant or have been on maternity leave are in a redundancy selection pool, employers will need to devise their selection criteria and their application to those in the selection pool carefully to ensure they maintain a defensible selection process.

Practice group contacts

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