

Inflating redundancy score of employee on maternity leave can constitute sex discrimination

June 2010

As a general rule, employers find it difficult to deal with employees on maternity leave when a redundancy situation arises. Employers have to balance equality for all their employees whilst abiding by the maternity leaver's enhanced protection in relation to unfair dismissal and/or sex discrimination. Law firms are by no means the exception to this rule as the case of *De Belin v Eversheds Legal Services Ltd* highlights.

In this case, Eversheds was found by an employment tribunal to have unfairly dismissed, and discriminated on grounds of sex, against one of its male lawyers (Mr De Belin), when it inflated the redundancy score of his female colleague (Ms R) to take account of the fact that she was on maternity leave at the time of the scoring.

The scoring criterion in question was a measure of financial performance. Mr De Belin was assessed against this criterion and was given a score of 0.5. It was not possible for Eversheds to give Ms R an actual score as the period for calculating her financial performance coincided with her being on maternity leave. Eversheds therefore decided to notionally award her the highest possible score of 2 for that criterion.

Under the Sex Discrimination Act 1975, the prohibition of less favourable treatment of a woman on grounds of sex is subject to a provision which states that "no account shall be taken of a special treatment afforded to women in connection with pregnancy or childbirth". Eversheds, took this to mean that they were allowed to give special treatment Ms R by reason of her maternity leave and award her the full notional score.

Overall, Mr De Belin scored 27 and Ms R scored 27.5. The two employees were the only employees in the selection pool and the employer conducted a formal consultation with Mr De Belin. He

contended that the financial criterion had been unfairly assessed and pointed out that had the calculation period been the 12 months before Ms R went on maternity leave, she would also have scored 0.5. Eversheds rejected this and proceeded to dismiss Mr De Belin by reason of redundancy.

The tribunal held that Mr De Belin had been discriminated against on grounds of his sex and that he had been unfairly dismissed. The application of the financial criterion was held to be unreasonable and to constitute less favourable treatment on grounds of sex.

So what can we learn from this case?

- Firstly, in situations like this, you should carefully consider what alternative methods of selection are available to you. For example although Eversheds were not in a position to give Ms R an actual score for the period when she was absent on maternity leave, it could have removed the contentious financial criterion in its entirety or used a different reference period for both employees and thus avoided unfairness.
- Secondly, do not assume that giving the benefit of the doubt to the employee on maternity leave will be the safest option. This case highlights that artificially enhancing a maternity leaver's score where this has a decisive effect is likely to constitute sex discrimination against the disadvantaged employee and lead to a finding of unfair dismissal.

It seems that Eversheds intends to appeal this decision, so this decision may not be the end of the story.