April 2011

Review

Employment

Employer criticised for inflating redundancy score of woman on maternity leave

Most employers get nervous when carrying out a redundancy exercise if the selection pool includes a woman on maternity leave. The risk of her bringing a sex discrimination claim if she is made redundant is usually at the back of their minds – but she might not be the only one to bring such a claim! The EAT has this month upheld a claim of sex discrimination brought by a male employee who was made redundant after his employer inflated the score of his colleague who was on maternity leave (***Eversheds Legal Services Ltd v De Belin***).

Mr De Belin (DB) was a lawyer at Eversheds. In September 2008 DB and his colleague, R, were both put at risk of redundancy. Eversheds' selection criteria included "lock-up" performance, being the amount of time it took for the lawyer to receive payment from a client for any work carried out. Employees were scored in 0.5s between 0 and 2, with 2 being the best score. At the time of the redundancy exercise R was on maternity leave and it was not therefore possible for Eversheds to measure her current lock-up performance, as she had no active client files. In accordance with its policy for dealing with women on maternity leave, it awarded her the highest score for this criterion. DB, on the other hand, was given his actual score, which was 0.5. This proved highly significant, as the scoring exercise was already a very close-run thing and it gave R and DB overall scores of 27.5 and 27 respectively. As a result of this DB was made redundant.

DB challenged Eversheds' decision before an Employment Tribunal, claiming that by artificially inflating R's score it had treated him less favourably on the grounds of his sex. He pointed out that if R had been given anything less than the highest score there would either have been a tie or she would have scored less than him and she would have been the one to lose her job. Eversheds defended the claim by arguing that it was positively required by law to give R the maximum score with regard to lock-up. It said that it would have been acting unlawfully if it had not put in place arrangements to ensure that R did not lose out on the application of the scoring system because of her absence on maternity leave. As it was not able to measure her lock-up performance at the time of the redundancy exercise it had to treat her as if she had been at work. As it was possible under that hypothesis that she might have been good enough to achieve the highest score, it felt it was required to award this. The Tribunal disagreed. It upheld DB's sex discrimination and unfair dismissal claims and said that Eversheds had acted unlawfully by inflating R's score.

At the heart of this debate was the extent to which women who are pregnant or on maternity leave are entitled to be treated differently. This case was considered before the Equality Act 2010 came into force, but the Sex Discrimination Act 1975, like the Equality Act, made it clear that it is not unlawful for women to be afforded "special treatment" in connection with pregnancy or childbirth. But what does this mean and how far are employers required to go in meeting their legal obligations?

Before the EAT, DB acknowledged that R was in a special position by virtue of being on maternity leave but said that Eversheds had gone further than was necessary to ensure that she did not lose out as a result of this. He pointed out that there were other ways in which the firm could have removed the maternity-related disadvantage to R which would not have unfairly disadvantaged him. It could, for example, have omitted the lock-up criterion from the scoring exercise altogether, assessed their performance as at the last date R was at work or given R an average score by reference to what others in the pool (in this case him) had achieved. It had done none of these things even though he had suggested them at the time. The EAT does not appear to have explored the alternative argument that if DB had been a non-pregnant woman the same process would have applied and she would still have lost her job, so how could the decision be a function of DB's gender?

"At the heart of this debate was the extent to which women who are pregnant or on maternity leave are entitled to be treated differently"

The EAT accepted DB's arguments and upheld the Tribunal's decision that Eversheds had acted unlawfully (and unfairly) in inflating R's score as part of the redundancy process. It acknowledged that women who are pregnant or on maternity leave are in a special position which means they will sometimes be treated more favourably than their colleagues (whether male or female), but said that this does not mean that they can be treated more favourably than is "r*easonably necessary to compensate them for the disadvantages occasioned by their condition*". In other words, it is a question of proportionality. The approach adopted by Eversheds was not proportionate, as it went beyond what was reasonably necessary to ensure that R did not lose out by being on maternity leave. In its view the most satisfactory alternative would have been to measure the lock-up performance of both candidates as at the last date that R was at work. Eversheds' argument that it was legally obliged to give R the highest score was also undermined somewhat by the fact it had since adopted an "averaging" approach instead of simply giving the maternity leaver the maximum score. Even that approach would be challengeable - if the average was higher than R's performance at the point she went on leave then the same argument could be run, but if it was lower then she would be disadvantaged by it in a potentially discriminatory manner. Without the clearest grounds for departing from it, an assessment based on an extrapolation from her actual performance would be the only safe way forward.

"Employers continue to be in a very difficult position when it comes to carrying out a redundancy scoring exercise that involves a woman on maternity leave"

The EAT's decision is probably sensible, especially on the facts of this case, but it does mean that employers continue to be in a very difficult position when it comes to carrying out a redundancy scoring exercise that involves a woman on maternity leave. They are now faced with the prospect of a sex discrimination claim from a woman if she is not afforded special treatment and a claim from a man if she gets too much!

This principle of proportionality is going to be most relevant if a redundancy scoring exercise involves performance elements (such as hitting sales targets) that cannot be measured because the woman is not there. It means that employers must think about the most appropriate way to measure a woman's performance and not just automatically award her the highest score – not that most employers would do this anyway. Provided employers address their minds to this issue (and have the notes to prove it!) they are much less likely to be criticised should the matter end up in Tribunal.

Three further points. It goes without saying that employers should ensure they discount any maternity-related absences if absence is one of the chosen redundancy selection criteria. Second, if the woman on maternity leave is selected for redundancy she is entitled to go to the top of the pile when it comes to handing out suitable alternative employment. This in itself might not seem very "proportionate", but it is specifically required by statute and cannot therefore be circumvented. Last, the principle of proportionality in scorings for redundancy selection will also apply in other cases where hypothetical performance is at issue, e.g. pay reviews and bonus decisions.

FURTHER INFORMATION

For more information relating to this newsletter, please contact:

Caroline Noblet
Partner
E: caroline.noblet@ssd.com

David Whincup
Partner
E: david.whincup@ssd.com

Matthew Lewis
Partner
E: matthew.lewis@ssd.com

Charles Frost
Partner
E: charles.frost@ssd.com

Nick Jones
Partner
E: nick.jones@ssd.com

5062/04/11