

Eversheds Legal Services Ltd v De Belin

– Damned if you and damned if you don't!

The EAT has upheld a tribunal's decision that favouring a woman on maternity leave in a redundancy scoring was sex discrimination against a man in the selection pool. The obligation to protect employees who are pregnant or on maternity leave cannot extend to favouring such employees beyond what is 'reasonably necessary to compensate them for the disadvantages occasioned by their condition'. Where a maternity or pregnancy benefit is disproportionate – as it was here, since less discriminatory alternatives were available – a disadvantaged colleague may claim sex discrimination.



The facts are that DB scored lower in a redundancy scoring exercise than a colleague, R, on maternity leave who was given the maximum notional score for a criterion measuring the time between work being done and payment. As a result, DB scored lower overall, and was made redundant.

The tribunal held that DB had suffered sex discrimination and had been unfairly dismissed and the EAT has now upheld that decision. It held that section 2(2) of the *Sex Discrimination Act 1975*, which provides that 'no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth', could not have been intended to give employers blanket protection against sex discrimination claims by men, and did not protect a woman on maternity leave in a redundancy scoring exercise where she received an unfairly inflated score. Rather, the principle of proportionality applies to the right to 'special treatment'. Consequently, section 2(2) should be construed so as only to refer to treatment which is a proportionate means of achieving the legitimate aim of compensating a woman for the disadvantages occasioned by her pregnancy or maternity leave.

The EAT agreed with the tribunal that the obligation to protect employees who are pregnant or on maternity leave cannot extend to favouring such employees beyond what is 'reasonably necessary to compensate them for the disadvantages occasioned by their condition'. The EAT concluded that the employer's approach to scoring an employee on maternity leave in a redundancy selection exercise was not proportionate and went beyond what was reasonably necessary. There were alternative ways of dealing with the situation without disproportionately disadvantaging DB, such as looking at the performance of both candidates when they were last at work. This would have enabled R to be scored on a basis that reflected her performance unaffected by her maternity absence.

The moral of this story is to act proportionally and consider the weighting of the scoring matrix and the scores very carefully. If you are undertaking a redundancy exercise and would like further information then contact Accountax.