Celebrate Global Day of Parents 2018

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1 June 2018 marks **Global Day of Parents** – a day declared by the UN General Assembly in 2012 which aims to honour parents and their commitment to nurturing and raising children throughout the world.

In my field as an employment lawyer acting for individuals, I have often had to explain to clients that being a parent is not itself a "protected characteristic" to claim

discrimination. As such, whilst many employees may feel that their parenting responsibilities puts them at a disadvantage in the workplace (being side-lined for promotions, or viewed as being uncommitted and uninterested in their careers), their only course of action usually turns on establishing sex discrimination. This means that it is not always the easiest case to put forward, and for men, it can be tortuous.

So what is the UK doing to help and protect families in an employment law context? What (if anything) is likely to change?

- The introduction of Shared Parental Leave allows both men and women to tag out of a woman's right to maternity leave and share the childcare responsibilities for the first 50 weeks (either separately or concurrently) after the mother has taken the compulsory period of 2 weeks' maternity leave. Whilst I know a few friends who have taken up this right (usually at the end of maternity leave when baby becomes more fun), shared parental leave take-up may be as low as 2%. Until uptake increases, stereotypical childcare perceptions of women bringing up the family are unlikely to change in the workplace.
- Since 30 June 2014, all employees with at least 26 weeks' of continuous service can make a flexible working request. This is a useful tool for working parents who may need a flexible working arrangement in order to balance work and family life. Employers have a wide scope to reject such requests and the penalties for an employer's failure to agree to a flexible working request are limited.
- Parental leave is available to some working parents and allows for up to 13 weeks unpaid leave for each child up to the age of 18 years old (although only a maximum of 4 weeks can be taken each year).

What more could the UK do to improve family rights?

- Consider introducing “parenthood” as a protected characteristic under the Equality Act.
- Extend the time limit for submitting claims for maternity and/or pregnancy discrimination from three months to six months. Evidence shows that the current time limit has a deterrent effect on the ability of pregnant women and new mums to access justice. This is unsurprising given that the focus is on the health and welfare of the mother and new baby, and not on litigation at this time.
- Dispense with maternity and paternity leave and have one “family” leave right so that both men and women can choose who looks after the baby.
- An alternative to a general “family leave” is to increase the duration and pay of paternity leave so that the options for childcare are more evenly distributed between parents (not just women). The present maximum of two weeks’ paternity leave is inadequate.
- A small step that everyone can do today is to recognise the importance of parents, whether biological, non-biological, grandparents, foster parents, adoptive parents, step parents or anyone else who plays a role in shaping children’s lives.

Given that the UN’s Sustainable Development Agenda aims to end poverty, promote equal economic prosperity, social development, wellbeing and protect the environment, it is clear that the importance of the ‘family’ is key to the UN’s ambitions.

Creating a more supportive atmosphere for parents and carers can only lead to a more cohesive, happier and productive workforce, and society.

Emily Plosker is a Senior Associate at leading employment law firm BDBF

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Mental Health First Aid – #where’syourheadat?

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Emma Sell, Practice Manager of BDBF explores how mental health first aid training works and what to expect from it.

I first heard about the existence of mental health first aid training when attending a breakfast seminar on mental health. I had no idea it was available, let alone that there were so many courses across the country.

Mental health first aid courses

There are three courses available: a half-day awareness session; a day course to become a mental health champion; and an in-depth 2-day mental health first aid qualification. I attended the 2-day course, which enables you to spot the signs and triggers of mental ill health, give you the confidence to step in and offer help and support, and familiarises you with the resources available to help. Throughout all of this, you also learn the invaluable concept of non-judgmental listening, which is far more difficult than it sounds.

The training groups are small – no more than 16 – but there were just 8 of us, with two instructors. Initially, I thought the group was going to be too intimate, especially given the subject matter we were going to be discussing, but it was the perfect size to enable good interaction and everyone felt listened to. Of course, everyone is there for the same reason – because they want to help other people feel good about themselves; this meant that even when we were talking about the darkest of subjects, the atmosphere was still positive.

Self care and self awareness about mental health

There is no skirting around any aspect of mental ill health, and the depth of understanding was eye opening – and I thought I knew a bit about it already. As we learnt early on, you cannot predict whether a particular subject will trigger a reaction in you, so it's important to set "ground rules" so you know you're safe to talk through any real life situations, and know that you can get up and leave if it becomes upsetting. It was good to share experiences with others as, while the statistics tell you that 1 in 4 of us will suffer a mental health issue, those are only reported issues. It doesn't account for those who live with or regularly witness mental ill health incidents, and the effect it can and does have on the people around sufferers. The course reiterates the need for self care and self awareness when trying to help others.

Training to spot the early symptoms

The training really brought home to me how vast an area mental [ill] health is, and after a solid two days' learning I still feel like there's so much more to know. However, this training isn't designed to turn you into a counsellor; it is exactly what it says: first aid. I now feel confident about offering to help someone who is visibly struggling, and how to guide them to the relevant qualified people to find them the care and support they may need.

In some ways it was a life changing course for me, but the most important thing is that it becomes life changing for others as a result.

#Where'sYourHeadAt?

According to law (the Health and Safety (First-Aid) Regulations 1981), employers must make sure they provide adequate and appropriate first aid equipment, facilities, and numbers of qualified first aiders in the workplace; however, this only applies to physical first aid.

There is currently no legal requirement for employers to provide mental health first aid in the workplace. The #wheresyourheadat campaign is petitioning to make it compulsory for employers to provide mental health first aiders, and you can add your name to the petition at www.change.org or wheresyourheadat.org to help ensure the matter is discussed in Parliament

Even if employers are reluctant to proactively manage their staff's wellbeing, with latest reports showing that mental ill health costs employers £34.96 billion a year – £1,300 per employee in the UK workforce – can your company afford not to invest in employees' mental health?

For more information on training and resources, visit: www.mhfaengland.org

Emma Sell is Practice Manager at BDBF LLP, a leading specialist employment law firm.

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Barclays CEO fined by UK Regulators for Trying to Expose Whistleblower

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Barclays CEO Jes Staley has been fined **£642,430** by City regulators and had **£500,000** of bonus clawed back by the bank after he attempted to identify an anonymous whistleblower.

In 2016, a whistleblowing member of staff raised concerns about the appointment of Tim Main to the senior position of head of the bank’s financial institutions group in New York, and about Mr Staley’s involvement in that appointment. It is reported that Mr Staley is a friend and former colleague of Mr Main, that Mr Staley considered the accusation to be harassing and malicious and that the whistleblower had unfairly targeted Mr Main in an attempt to ‘smear’ him. Mr Staley instructed the bank’s security team to identify the source of the complaint and the name of the whistleblower.

What is the legal protection for whistleblowers under UK law?

UK legislation protects whistleblowers from being subjected to any form of 'detriment' by their employer or fellow colleagues for having blown the whistle. The meaning of 'detriment' is very wide. It means being disadvantaged in the workplace, for example, by not being promoted, receiving a lower bonus, or being marginalised and isolated from decision-making. Under UK legislation whistleblowers have no legal entitlement to anonymity.

Protection for whistleblowers in financial services

However, in the regulated UK financial services sector the protections go further:

- The FCA Handbook requires regulated firms to implement and maintain effective measures to handle whistleblowing complaints – this includes where they are made anonymously.
- Firms are also required to ensure that no one under the firm's control engages in victimisation of a whistleblower and that managers are adequately trained to identify and deal with whistleblowing complaints.
- A 'whistleblowing concern' is defined more widely under the FCA Handbook. It can include a matter disclosed as being a breach of the firm's policies and procedures and other behaviour that harms or is likely to harm the firm's reputation or financial well being.
- The FCA Handbook makes clear that if a whistleblower is treated detrimentally by a colleague it may call into question the colleague's fitness and propriety and/or continued suitability for their role. Whereas it may be possible for an individual who is found to have breached Conduct Rule 2 (due skill care and diligence) to continue in their regulated role, if they are found to have breached Conduct Rule 1, (integrity) that is likely to be career limiting.

FCA and PRA fines for retaliating against whistleblowers

In this case, the FCA concluded that Mr Staley had acted without due skill and care when he had attempted to identify the Barclays whistleblower. It did not find that Mr Staley lacked integrity to continue in the role of CEO because it accepted that he had acted in the honest but mistaken belief that he was permitted to take steps to identify the whistleblower after an investigation had taken place.

Consequently, the FCA and PRA have each fined Mr Staley 10% of his total pay package of £4.5m. The fine could have been as high as £917,800 had he not agreed to early settlement with the regulators. Barclays has also announced it will claw back £500,000 of Mr Staley's bonus.

Continued monitoring and enforcement

As a result of the enforcement and the regulators' concerns about Barclays' existing systems for managing whistleblowing issues, the bank will also have to report to the FCA and PRA annually in respect of its relevant systems and controls.

The decision marks a message from the regulators that they will take serious steps to protect whistleblowers, although some commentators have criticised the regulators' decision not to make a finding that Mr Staley acted without integrity. Mr Staley has previously apologised to Barclays's investors for his mistake.

If you or your organisation need any guidance on whistleblowing law, implementing whistleblowing policies or bringing or defending claims, please contact Nick Wilcox, Partner, or Rolleen McDonnell, Associate at leading employment law firm BDBF LLP.

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Key Steps to Overcome Mental Health Stigma at Work

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It is clear from recent studies that a change is needed in terms of how employers deal with mental health issues.

Research from Mind, the mental health charity, has found that stress and other mental health issues are the second biggest

cause of sickness absences from work. This is unsurprising given that the Stevenson-Farmer Report, commissioned in 2017 by the government, found that 15% of people at work have symptoms of a mental health condition. It also found that 300,000 people with mental health problems lose their jobs each year.

A factor contributing to these concerning statistics is the extent to which mental health problems are still seen as taboo. Some employers already recognise this – over 600 companies have signed the Time to Change pledge, committing them to ending the stigma surrounding mental health issues.

Speaking up about mental health concerns is hard

Whilst this is a positive step, it is clear that many employees still do not feel comfortable discussing their mental health concerns at work. In fact, reports suggest that only 6.2% of employees in the UK would confide in their employer.

There are good reasons why employers would want to change these trends. Staff who are healthy (both mentally and physically) perform better, are more productive and engaged, and take fewer sick days. Not only that, but employers owe a duty of care to their workforce to protect them from harm caused by work-related stress.

What can employers to do make discussing mental health less of a taboo?

Fostering an open culture surrounding mental health is key. A company's employees need to feel able to raise any concerns they have without fear of repercussions or judgment and be reassured that they will be taken seriously.

Step 1 – create a culture of openness and awareness

An important first step in creating this culture is to open up

a dialogue about mental health and let staff know that it is important to the company's values. Even just having it on the radar is a good start, but there are plenty of firms yet to do it. An analysis of all FTSE 100 firms' annual reports showed that two out of three of them made no mention at all of mental health issues in their annual reports.

Step 2 – implement a mental health support structure

Once a company has raised awareness, there are some more tangible things it should do. First is to have in place appropriate policies for supporting those who experience mental health difficulties at work, so that there is a standardised system of empathetic support at all levels of the business, which also maintains confidentiality.

Step 3 – mental health training at all levels

Managers should be trained on recognising and dealing with mental health issues in the workplace by specialists. Not only will this help supervisors to spot the signs that any of their reports are having problems, but it will also give them the tools and the confidence to broach the subject with them. Not knowing what to say for fear of making things worse is commonplace and overcoming it can make a big difference to the wellbeing of the workforce.

With that aim in mind, the Bank Workers Charity in partnership with Mind has initiated a mental health training programme for managers in the UK's biggest banks, paving the way for others to follow. Similarly, Lloyds Banking Group provided e-learning on the subject to over 28,000 staff in 2017.

When it comes to dealing with particular individuals suffering with their mental health at work, managers should be empathetic, tactful and approachable. Regular catch-ups are helpful, as is discussing practical steps which can be taken to make the situation easier for that member of staff.

Gone is the time where must people suffer with mental health conditions in silence –employers should reflect on their attitudes towards mental health and make positive changes to bring the stigma to an end.

Our next mental health article will focus on our experience of 'mental health first aid' training.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact us.

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Employer discriminated against employee because of perceived disability

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An employer was found to have directly discriminated against an employee on the basis of a hearing disability it perceived that employee to have.

The Employment Appeal Tribunal stated that the evidence clearly showed that the Acting Chief Constable was concerned that Mrs Coffey had a hearing condition which could progress to the extent that she would have to be placed on restricted duties. Therefore, the perception was that Mrs Coffey had a progressive disability.

Mrs Coffey was a police constable in the Wiltshire area. She suffered with some hearing loss which, whilst it did not amount to a disability, put her just outside of the national standards for hearing loss for the police. When Mrs Coffey joined the Wiltshire Constabulary, her hearing loss had been flagged during an initial test, but she passed a practical functionality test showing that she was able to work as a constable without the need for any adjustments.

She later applied to transfer to the Norfolk Constabulary. As before, her hearing was tested and the same level of hearing loss was identified. The Acting Chief Inspector of Norfolk rejected Mrs Coffey’s application on the basis of that hearing

test, and did not arrange a practical functionality test.

Mrs Coffey brought a claim for direct disability discrimination on the basis that her application was rejected because of a perception that she had a hearing-based disability.

The Acting Chief Constable denied discrimination; instead, she said her decision to reject Mrs Coffey was influenced by the significant resourcing and cost pressures her Constabulary was facing, in that she could not justify appointing someone who may not be fully operational.

Chief Constable of Norfolk v Coffey UKEAT/0260/16

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Injury to feelings awards available in breach of working time cases

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The Employment Appeal Tribunal has decided that compensation for injury to feelings can in principle be awarded in respect of working time detriment claims.

This type of compensation is available in trade union and whistleblowing detriment cases. The EAT held that working time detriment cases are akin to claims of victimisation under the Equality Act 2010, so injury to feelings payments should be available in those cases too.

Mr Mansell and his colleagues were firefighters employed by the South Yorkshire Fire & Rescue Service. The Fire Service intended to change the duty system from a 2-2-4 system (two day shifts and two night shifts of around 12 hours each, followed by four days off) to a scheme called “Close Proximity Crewing”. Under that scheme, firefighters would work consecutive 24-hour shifts comprised of a 12-hour day shift and 12 hours on-call each night, followed by four days off. On call time had to be spent in or near the fire station.

The firefighters disputed the decision to implement the Close

Proximity Crewing system. As a result, they were compulsorily transferred to other fire stations in South Yorkshire. The firefighters brought claims alleging that they had been subjected to detriments because they had refused to comply with a measure imposed by their employer which contravened the Working Time Regulations 1998.

Those claims were successful, and the remaining question was how much those claims were worth.

The firefighters argued that they ought to be entitled to compensation for injury to feelings caused by the detriments to which they were subjected (including interference with care arrangements, loss of free time, leisure time and family time, and disruption to their working patterns and family relationships). The Fire Service resisted on grounds that injury to feelings payments ought not to be available in working time claims.

It is now clear that injury to feelings can be awarded in working time cases in principle. However, the reality is that demonstrating sufficient injury to feelings to justify compensation will likely be quite difficult in cases concerning working time violations.

South Yorkshire Fire & Rescue Service v Mansell and others UKEAT/0151/17

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New Year – New Brand

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We have decided that it is time to refresh our branding to reflect BDBF's leading reputation in the

employment law market, its growing areas of expertise and our sterling team.

To many of you that found ‘Brahams Dutt Badrick French’ a bit of a mouthful, we have listened, and whilst the founding partners (Gareth Brahams, Arpita Dutt, Ruth Gamble (nee Badrick) and Alistair French) remain four of the pillars of our success, we are using our firm’s initials to make life easier for everyone.

So, we are delighted to introduce you to the new ‘BDBF’ website and branding.

2017 saw a growth in our partnership team with Cerys Williams, Polly Rodway, and Nick Wilcox adding their leadership and expertise.

Our newest solicitors are Tom McLaughlin, Clare Brereton and Jamie Barton, bringing our employment team to 15 lawyers, with the support of our Practice Team led by Emma Sell.

In addition to celebrating our success as a go-to firm for senior employees (especially at executive level, in financial services and amongst the medical profession) and partners in professional practices and hedge funds, we hope that you will find our employer ‘Insights Hub’ of interest. We built this to service the increasing number of businesses ranging from entrepreneurs facing the threat of employment disputes, technology companies seeking advice on how to enter the UK market and to grow, and to HR teams of national and global firms seeking day- to- day and strategic advice.

Thank you to all our clients, referrers, suppliers, existing and former employees for enabling us to look forward with verve to the future.

All the best,

BDBF

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Greek police's minimum height requirement is indirectly discriminatory

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The Greek police force’s requirement for new applicants to meet a certain minimum height threshold was indirectly discriminatory against women and could not be objectively justified.

Greek national law requires that applicants to police school who wish to train as police officers must be at least 1.7 metres tall without shoes, whether male or female. Ms Kalliri’s application to join the police school was rejected on the basis that she was only 1.68 metres tall. She brought a complaint in the Greek courts, and a referral was made to the European Court of Justice to ask whether the minimum height requirement was compatible with EU equal treatment law.

The European Court of Justice held that the height requirement was indirectly discriminatory on grounds of sex, in that far more women are likely to be disadvantaged by the minimum threshold than men. Whilst the Greek government did have a legitimate aim in the effective accomplishment of police functions, the height requirement was not a proportionate means of achieving it. This was because not all police roles require physical aptitude and, even if they did, physical aptitude is not necessarily correlated to height.

Other reasons pointed to by the ECJ were that the law had previously required female police applicants to meet the lower threshold of 1.65 metres, and that the minimum height requirement for female applicants to the Greek armed forces, port police and coast guard was only 1.6 metres. Ultimately, if the Greek government wished to ensure the physical aptitude of its police recruits, it should conduct pre-selection aptitude tests rather than applying rigid requirements across

the board. For those reasons, the disadvantage caused to women by the height requirement was not objectively justified and amounted to indirect sex discrimination.

Minimum height requirements are probably one of the clearest examples of work-related criteria or policies which have the potential to be indirectly discriminatory. Employers should avoid having any kind of blanket restrictions or requirements unless they are clearly able to show that they are a proportionate means of achieving a legitimate aim.

Esoterikon v Kalliri (C-409/16)

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Giving an employee a false reason for dismissal is a breach of the implied term of mutual trust and confidence

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An employer who gives an employee a false reason dismissal may be in breach of the implied term of mutual trust and confidence.

Mr Rawlinson was employed by Brightside Group from December 2014 as its Group Legal Counsel. Shortly after he commenced employment, a new CEO, Mr Wallin, took up office. Mr Wallin soon raised concerns about Mr Rawlinson’s performance, though these were not addressed directly with Mr Rawlinson. By March 2015, Mr Wallin had decided that Mr Rawlinson could not continue; the intention was for Mr Rawlinson to be dismissed on notice in due course and to train his successor during his notice period.

Rather than telling Mr Rawlinson about the concerns over his performance, Brightside led him to believe that that his job was under pressure due to a restructure of the company’s legal services. It told him that they would be shifting towards the use of external legal providers, and that, as a result, his dismissal was effective and that he was expected to work his three months’ notice period.

Mr Rawlinson considered that a TUPE transfer was taking place and asked for confirmation of the name of the firm to which legal services were being outsourced. Brightside refused to inform him; Mr Rawlinson considered this to be breach of contract. He told Brightside he was resigning in response to that breach of contract, thereby freeing himself from his notice period.

Mr Rawlinson brought various claims in the Employment Tribunal including constructive wrongful dismissal (which was worth the balance of his notice pay).

The Employment Appeal Tribunal upheld Mr Rawlinson's claim for constructive wrongful dismissal. It held that the implied term of mutual trust and confidence included a duty not deliberately to mislead. Whilst the employer did not necessarily have to volunteer information, when it chose to do so it had to do it in good faith. In any event, the decision to mislead Mr Rawlinson about the reason for his dismissal was not taken solely to spare his feelings – Brightside was keen for him to work his notice period in order to train his successor. Even though Mr Rawlinson did not rely on the lie as his reason to resign at the time, he could rely on it as justification for having done so once it came to light.

Rawlinson v Brightside Group Ltd UKEAT/0142/17

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Redundancy Guide For Employers

Redundancy Guide For Employers

Whether you are looking to reorganise your business to change the structure or skills mix or just reduce headcount, we can support your business if a redundancy situation arises.

We understand that redundancy can be a daunting process and have extensive experience of supporting our clients through what is often a difficult time. Our practical and pragmatic advice will ensure that you are able to achieve the reduction in workforce or restructure that you envisage by following the correct legal procedures to avoid any potential claims.

We set out below our top tips for dealing with redundancy.

Before instigating any kind of redundancy dismissal process, you should be aware that if tested, you would need to satisfy a Tribunal that you have a genuine redundancy situation. Broadly speaking this means that you must either closing a place of work or reducing the number of employees doing work of a particular type. If you are replacing the employee in question, or it is a restructuring which will not result in fewer employees doing work of a particular type, then it is unlikely to be considered a genuine redundancy situation. Employees may have a valid claim against your company if they believe that there was another reason for their dismissal which amounted to discrimination (e.g. pregnancy), or was a result of whistleblowing. With our guidance throughout the redundancy process, we will show you how to avoid this

eventuality.

If you are proposing to make 20 or more employees redundant in one establishment in a 90-day period, then you will have additional collective consultation obligations. Employee representatives will need to be appointed if not in post already, and minimum time periods for consultation apply. If you fail to comply with these obligations, your employees may have an additional claim for up to 180 days' gross pay. Our team are highly experienced in the rules of collective consultation, and will follow best practice to ensure the best possible outcome for your firm.

If employees have more than two years' service, from the point of view of the Employment Tribunal, they must be consulted with, in order to ensure fairness. You have a duty to warn employees of the possibility of redundancy and consult with them during the process. In the interests of fairness, it is recommended that you enter the consultation period with an open mind, ensuring that no final decision is made until the period has ended.

Where work of a particular kind is ceasing or reducing, you will need to consider carefully which employees to 'pool' together as potentially redundant. This will normally involve grouping those who do the same or similar work, but may also include employees who, despite doing different work, have interchangeable skills.

When deciding which employees to select for redundancy, you must ensure that you undertake a comparison of all those in the pool. Your selection criteria should be, as far as possible, objective and capable of verification. You should be very careful to avoid using criteria which puts certain protected groups at a particular disadvantage; for example, a policy of 'last in, first out' can (if used on its own) put younger employees at a disadvantage, as they are less likely to have longer periods of service. This could amount to age

discrimination.

Bumping is a process whereby you move a potentially redundant employee into a different post and instead dismiss the employee currently performing that role. This can still constitute a fair dismissal and can give your business greater control over which employees are dismissed if used correctly.

Once you have identified the employees who will be made redundant, you should then make efforts to look for alternative employment for them within the company, or associated companies. Failure to do so is likely to give rise to an unfair dismissal claim. You should inform 'at risk' employees of all existing job vacancies (including roles that are more junior/senior to the role they are in), and give them a fair opportunity to apply.

If an employee is on maternity leave during your redundancy consultation process, she will have the right of first refusal of any suitable alternative roles. If you fail to offer such roles to her before all others, it may mean her redundancy dismissal amounts to an automatically unfair dismissal claim and sex/maternity discrimination.

As part of the redundancy process, there are advantages to giving your employees a right of appeal. You must ensure that you listen to the employee's issues and respond to each point they raise.

CARILLION'S DEMISE

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It is imperative directors understand their duties and obligations, not only during an insolvency, but prior to the company’s collapse. Even if personal liability is not established, in cases where there is significant media interest, such as that of Carillion, the reputational damage caused by allegations of improper and/or fraudulent actions can be severe.

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#TIMESUP

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Given the potentially serious consequences of getting it wrong, here are some top tips for employers to prevent harassment and deal with allegations.

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