Maternity leave and redundancy: the risks of assuming an internal reorganisation justifies a redundancy dismissal.

An internal reorganisation which led to an employee's part-time role being subsumed within a broader full-time role did not necessarily mean the role was redundant. Given that the employee was on maternity leave, if the role was not redundant, it raised the prospect that the process was a sham motivated by the maternity leave.

What happened in this case?

Ms Ballerino began working for The Racecourse Association as a part-time Financial Accountant in August 2018. She was engaged to work from home for 40 days per year, although she felt that the role really needed her to work more than double that amount. The employer agreed to review the role when a new Chief Executive was in post the following year. As Ms Ballerino was pregnant when she started employment, she began a period of maternity leave in December 2018.

In February 2019, the new Chief Executive, Mr Armstrong, came on board. He undertook a review of the business and decided that a new full-time, office-based role of "Finance Manager and Business Analyst" should be created. The new role would subsume Ms Ballerino's duties. In late June 2019, two

candidates attended second-round interviews for the new role.

Around the same time, the employer contacted Ms Ballerino (who was on maternity leave) to inform her that she was at risk of redundancy because of the decision to amalgamate her duties within the Finance Manager and Business Analyst role. She was provided with a job description for the new role and invited to apply for it, but, at the same time, was given a draft settlement agreement governing the terms of her exit from the business. Ms Ballerino did not apply for the new role and, after settlement negotiations had broken down, she was dismissed.

Ms Ballerino claimed that the redundancy process was a sham designed to exit her from the business because of her maternity leave or sex. In the alternative, she argued that if there had been a genuine redundancy situation, the dismissal was automatically unfair because the employer had failed to allocate the new role to her, which it should have done given that it was (she said) a suitable alternative vacancy and she had been on maternity leave at the time.

The Employment Tribunal rejected the discrimination claims, finding that there was an acceptable business reason for the reorganisation and the redundancy was not a sham. It also rejected the automatic unfair dismissal claim, finding that the new role was not a suitable alternative vacancy because its main focus was on business analysis rather than financial accounting. Further, it was a full-time, office-based role rather than a part-time, home-based role. As such, the employer had not been obliged to offer it to her ahead of other potential candidates.

Ms Ballerino appealed to the Employment Appeal Tribunal.

What was decided?

The EAT upheld the appeal.

On the automatic unfair dismissal claim, the Employment Tribunal had formed the impression that there was a genuine redundancy situation and had then jumped straight to the question of whether the new role was a suitable alternative vacancy. Yet, the Tribunal had failed to interrogate the legal question of whether the employer's need for employees to carry out financial accounting work had, in fact, ceased or diminished or was expected to do so. Although that short-cut may be permissible in some situations, that was not the case here. Ms Ballerino's role was still relatively new and there had been a debate about how many working hours the role really required. In these circumstances, the fact there was some internal reorganisation and a need for additional tasks to be performed, did not necessarily mean that her role was no longer required.

On the discrimination claims, the Employment Tribunal had accepted the employer's explanation for the dismissal at face value i.e. that she was redundant. However, this decision was problematic because the Tribunal had not properly scrutinised the question of whether her role was, in fact, redundant. That question needed to be answered – because if her role was *not* redundant then this would bolster her argument that the dismissal was a sham.

The case has been remitted to the Employment Tribunal to

examine the question of whether the role was genuinely redundant.

What are the learning points for employers?

This decision reminds employers (and Employment Tribunals) of the need not to make assumptions in business reorganisations. Expanding a role in terms of hours and/or duties does not necessarily mean that the requirement for the original duties has ceased or diminished. This is particularly so where the original role is relatively new, fluid and subject to review, as was the case here.

In internal reorganisation situations, the best advice for employers is to take care to undertake the necessary groundwork. Create a job specification for the new role setting out its scope and duties in full. This is especially important where duties are to be reallocated from existing roles to a new role. Having proper documentation in place helps to overcome suggestions that the whole exercise is a sham designed to exit specific employees. Ensure that appropriate redundancy consultation is undertaken, and that careful consideration is given to whether any new role amounts to a suitable alternative vacancy for a woman on maternity leave, who will have priority for such vacancies (as do certain other employees). If an employee who has priority is denied such a role, they may be able to claim that they have been automatically unfairly dismissed and/or they have suffered pregnancy and maternity or sex discrimination.

Ballerino v The Racecourse Association Ltd

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 Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.