



EMPLOYMENT LAW

HANDLE WITH CARE: AVOIDING PITFALLS IN REDUNDANCY EXERCISES AFFECTING EMPLOYEES WHO ARE PREGNANT OR ON MATERNITY, ADOPTION OR SHARED PARENTAL LEAVE

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Speakers



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What are we going to cover today?

Introduction - recap of the key principles governing redundancy exercises

Pitfall 1 - the consultation process

Pitfall 2 - choosing the selection criteria

Pitfall 3 - scoring employees against the selection criteria

Pitfall 4 - offering suitable alternative vacancies

INTRODUCTION – A RECAP OF THE KEY PRINCIPLES

A fair redundancy dismissal

Genuine redundancy situation

- Closure of business
- Closure of part of a workplace
- Diminished requirements for employees to do work of a particular kind



Fair redundancy process

- Warning and consultation (including on a collective basis if applicable)
- Fair selection process (i.e. pooling, selection criteria and scoring)
- Suitable alternative vacancies

Higher stakes where an employee is pregnant or on maternity, adoption or shared parental leave

- Employee may argue:
 - Entire redundancy is a sham to hide a wish to exit the employee because of pregnancy or leave (see Shipp v City Sprint Ltd, ET)
 - They were excluded from the consultation process because they were on leave
 - Selection criteria disadvantaged them because of pregnancy or leave
 - Scoring against selection criteria was improperly influenced by pregnancy or leave
 - Failure to offer a suitable available vacancy ahead of others

Claims the employee may have

Automatic unfair dismissal

- Day 1 right
- If redundancy connected to pregnancy, childbirth, maternity, adoption or shared parental leave, the employee wins the claim
- Compensation capped at lower of £118,223 or 12 months' pay

Pregnancy and maternity discrimination (direct only)

- Day 1 right
- If redundancy because of pregnancy, pregnancy-related illness, childbirth or maternity leave during the “protected period” (and, sometimes, afterwards)
- Uncapped compensation and injury to feelings award

Sex discrimination (direct or indirect)

- Day 1 right
- If treated less favourably because of sex or part of the process indirectly disadvantages women or men
- Uncapped compensation and injury to feelings award

PITFALL 1

THE CONSULTATION PROCESS

Consulting with employees on leave

What to consult about?

- How the redundancy situation has arisen
- The proposed pool (if used) and selection criteria
- The employee's score
- Suitable alternative vacancies and other ways to avoid redundancies

When and how to consult with an employee on leave?

- Do not overlook them! Consult at the same time and to the same extent as other employees
- Be flexible about the process. Agree a suitable way for them to engage in the process in light of their other commitments
- Keep records of all communications and meetings

PITFALL 2

THE SELECTION CRITERIA

Choosing fair and non-discriminatory selection criteria



Performance
and skills



Qualifications
and experience



Attendance
records



Timekeeping



Revenue
generation



Disciplinary
record



Length of
service

Can you use subjective criteria?

- Risk that a manager's judgement is improperly influenced by the pregnancy or leave – examples:
 - *“Employees best suited to the future needs of the business”*
 - *“Maximising value for the business”*
 - *“Attitude” / “Commitment” / “Engagement”*
 - *“Future potential”*
- But may be acceptable if applied “dispassionately” – how?
 - Two people making the assessment?
 - Use artificial intelligence tools?

PITFALL 3

SCORING EMPLOYEES

Scoring employees who are pregnant or on maternity leave against the selection criteria

Direct pregnancy and maternity (or sex) discrimination

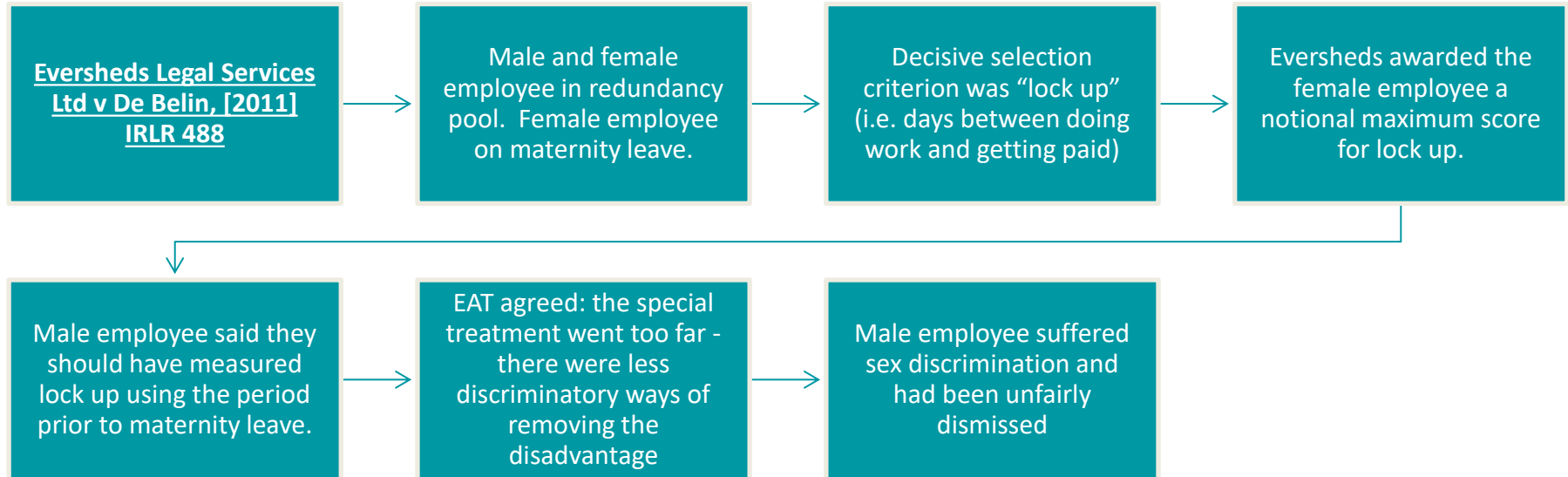
- Where a low score is given because of the pregnancy or maternity leave or sex
- See: Shaw v Symphony Group Plc, [2023] EAT 129

Indirect sex discrimination

- Where a low score is given due to the neutral application of selection criteria which embeds the disadvantages suffered by women due to pregnancy and maternity
- Special treatment is required but be careful not to over-compensate

Selection criterion	Examples of possible special treatment adjustments to offset disadvantage
Performance and skills	<ul style="list-style-type: none"> • Adjust or discount earlier appraisal ratings if performance was negatively affected by pregnancy • Use an earlier year's rating / average of several years or award a notional score but have reasonable basis for it
Qualifications and experience	<ul style="list-style-type: none"> • Award a notional score based on experience / qualifications the employee would have had but for absence • Score experience by reference to bands of experience rather than a specific number of years • Score qualifications for everyone up to the point the woman went on leave so as to level the playing field
Attendance record	<ul style="list-style-type: none"> • Discount all pregnancy-related sickness absence • Discount sickness or other absence associated with miscarriage or stillbirth
Time-keeping	<ul style="list-style-type: none"> • Discount any lateness due to pregnancy-related sickness or ante-natal appointments
Revenue generation	<ul style="list-style-type: none"> • Use a different reference period for the employee if available • If she has worked part of the relevant reference period, pro-rate her figures accordingly
Subjective criteria such as best fit/attitude/future potential	<ul style="list-style-type: none"> • Address risk of bias by ensuring managers receive appropriate training • Find a way to apply dispassionately - two managers giving scores?

The danger of over-compensating



Consulting with the employee about their scores

- Employee should be:
 - told their score and how it was reached; and
 - given an opportunity to challenge the scoring and/or explain any other relevant factors (e.g. sickness absence that may have been pregnancy-related but not recorded as such and, therefore, not discounted in the scoring process)
- Especially important where subjective criteria are used

PITFALL 4

SUITABLE ALTERNATIVE VACANCIES

“Priority status” of employees absent on maternity, adoption or shared parental leave



Employees on maternity, adoption or shared parental leave have **absolute priority** for SAVs even if the employer prefers another candidate or if the appointment would have adverse consequences for the business



Duty to offer usually arises after the selection exercise is complete but may be earlier where roles are simply deleted



Failure to offer an available SAV to a priority status employee will mean the dismissal is automatically unfair and possibly discriminatory

Extension of “priority status” to additional groups of employees from 6 April 2024 / 2025

Who?	Start of protection	End of protection
Pregnant employees	Date employee notifies employer of pregnancy	First day of statutory maternity leave
Maternity leave returners	Day after last day of statutory maternity leave	18 months after the child’s birth
Adoption leave returners	Day after last day of statutory adoption leave	18 months after date the child is placed with employee for adoption
Shared parental leave returners	Day after the employee has taken six consecutive weeks’ shared parental leave	18 months after the child’s birth or the date the child is placed with employee for adoption
During absence on neonatal care leave AND neonatal care leave returners (6 April 2025)	Day after the employee has taken six consecutive weeks’ neonatal care leave	18 months after the child’s birth or the date the child is placed with employee for adoption

Allocating SAVs where there are multiple “priority status” employees

No guidance on how to choose between different “priority status” employees



Employer is left having to find a fair way to choose between them (e.g. look at original scores, score on new criteria specific to the SAV, competitive interviews)



However, adjustments may be needed to help two types of priority status employee during this selection process:

An employee on maternity leave: to remove the comparative disadvantage but without overcompensating

A disabled priority status employee: to remove any substantial disadvantage

What about employees with other protected characteristics?

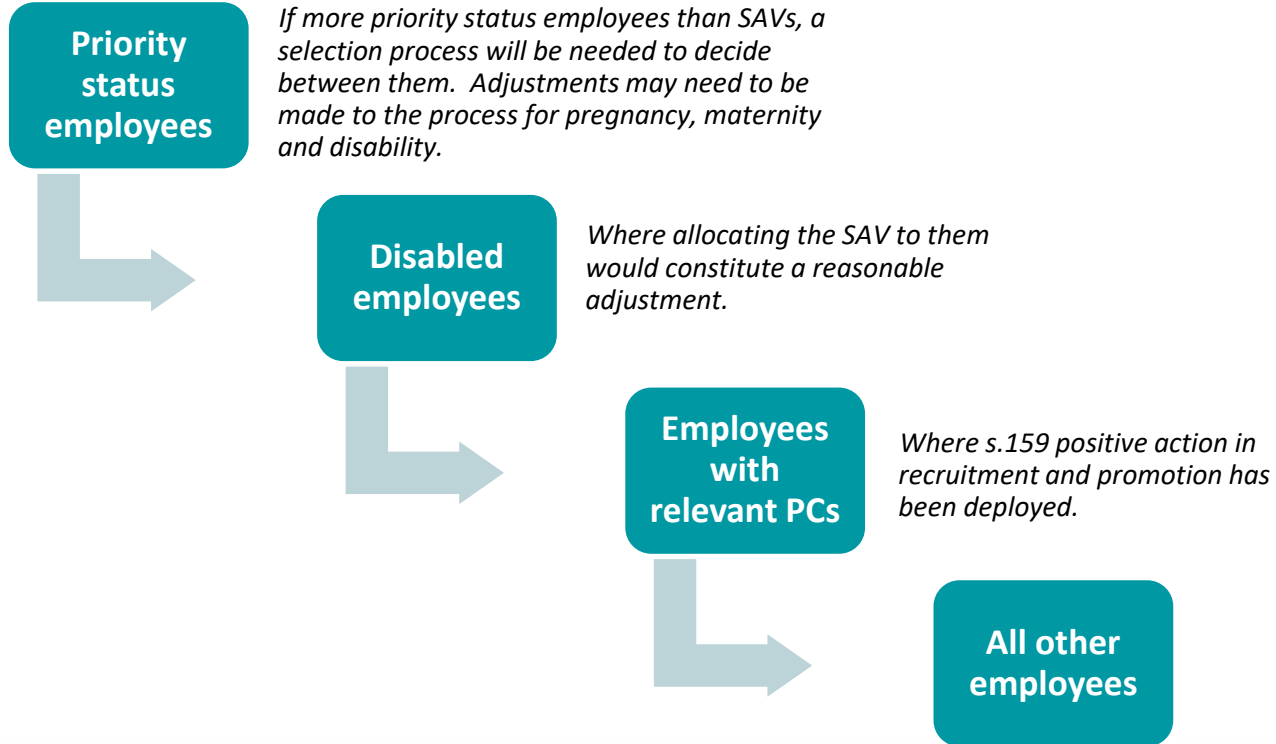
Disabled employees

- Positive duty to make reasonable adjustments may require disabled employees to be prioritised in redeployment, potentially even to roles at a higher grade / which do not appear suitable
- But disabled employees are still secondary to “priority status” employees for SAVs
- May result in some unpalatable outcomes and lead to an employer to consider a “risk-based” approach

Other protected characteristics

- An employer may deploy provisions on positive action in recruitment and promotion (s.159). But unlikely in practice as:
 - would need to have already gathered evidence to justify the need to take positive action
 - may only be used in rare “tie-break” situations where candidates are of equal merit
 - risk of reverse discrimination and unfair dismissal claims

Order of priority for offering a SAV



Practical takeaways

- ✓ Ensure employees absent on leave are involved in the consultation process from the start
- ✓ Consult with employees before finalising choice of selection criteria
- ✓ If using subjective selection criteria, ensure managers are suitably trained and criteria are applied dispassionately
- ✓ Adjust scores to offset disadvantages associated with pregnancy, childbirth and maternity
- ✓ Check scores applied fairly and do not cause disadvantage to those on other types of leave
- ✓ Consult with employee about their scores and provide an opportunity for them to challenge
- ✓ Ensure employees on leave are notified about suitable alternative vacancies
- ✓ Take care in applying the priority rules and seek advice where you have more priority status employees than SAVs
- ✓ Keep track of developments in the Employment Rights Bill

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