

WHITE PAPER – DISMISSAL FOR HR CONFERENCE 2024

What are the implications for redundancy selection criteria if an employee is pregnant or on maternity leave? What is the priority order for suitable available vacancies vis-à-vis candidates with other protected characteristics?

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What will I cover today?

1. Introduction: recap of key principles
2. What are the implications for redundancy selection criteria if an employee is pregnant or on maternity leave?
3. What is the priority order for suitable available vacancies vis-à-vis candidates with other protected characteristics?

The Key principles

- ordinary unfair dismissal

- automatic unfair dismissal

- Pregnancy and maternity discrimination

- Sex discrimination

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 (individual and collective if necessary)
- Fair selection process (i.e. pooling, selection criteria and scoring)
- Suitable available vacancies (**SAVs**)

Higher stakes where an employee is pregnant or on maternity leave

- She may argue:
 - Redundancy is a sham to hide a wish to exit her because of pregnancy or maternity
 - Selection criteria disadvantaged her because of pregnancy or maternity
 - Scoring against selection criteria was improperly influenced by pregnancy or maternity
 - Failure to offer her a SAV ahead of others

Claims that she may have

- **Automatic unfair dismissal**
 - Day 1 right
 - If redundancy related to pregnancy, childbirth or maternity leave, she wins the claim
 - Compensation capped at lower of £115,115 or 12 months' pay
- **Pregnancy and maternity discrimination (direct)**
 - Day 1 right
 - If redundancy because of pregnancy, childbirth or maternity leave during the “protected period” (and, in certain cases, afterwards)
 - Uncapped compensation and injury to feelings award
- **Sex discrimination (direct or indirect)**
 - Day 1 right
 - If treated less favourably because of sex or the process indirectly disadvantages women
 - Uncapped compensation and injury to feelings award

What are the implications for redundancy selection criteria if an employee is pregnant or on maternity leave?

Choosing fair and non-discriminatory selection criteria

- Use objective and measurable criteria e.g. performance, attendance, disciplinary record etc.
- What about subjective criteria e.g. “future potential”?
- What about the use of AI in selection processes?
- Discuss with employees before finalising choice – don’t forget to include employees on maternity leave

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

The dangers 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

What is the priority order for SAVs vis-à-vis candidates with other protected characteristics?

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

- Employees on maternity leave (or adoption or shared parental leave) have **absolute priority** for SAVs
 - Applies even if the employer prefers another candidate or if the appointment would have adverse consequences for the business
- Duty to offer usually arises after selection exercise complete but may be earlier where roles deleted
 - See Sefton Borough Council v Wainwright, UKEAT/0168/14.

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

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 (SPL) returners	Day after the employee has taken six consecutive weeks’ SPL	18 months after the child’s birth or the date the child is placed with employee for adoption

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

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

Allocating SAVs where there are multiple “priority status” employees

- No guidance in law on how to choose between “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:** may need to adjust the process to remove the comparative disadvantage but without overcompensating
 - **A disabled priority status employee:** may need to make reasonable adjustments to the process to remove any substantial disadvantage

Order of priority

1. Priority status employees
 - *If there are too few SAVs a selection process will be needed*
2. Disabled employees
 - *Where allocating the SAV would be a reasonable adjustment*
3. Employees with relevant protected characteristics where positive action in recruitment is permissible and desired
4. All other employees

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