



Presentation – November 2018

# What happens if you cannot agree over flexible working options with an employee returning from maternity or shared parental leave?

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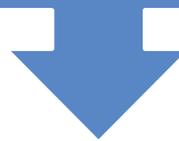
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## Right to return: the basics

To the same job if OML or period of SPL which, when added to another period of relevant statutory leave, is 26 weeks or less



To a “suitable alternative job” if AML, or where SPL was last of 2 or more consecutive period of relevant statutory leave



It is generally at this point that a flexible working request will be made

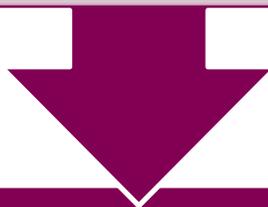
## Right to request flexible working

- Applies to all employees with 26 weeks' service
- Onus on employer to deal with application in a "reasonable manner"
- A proscribed process
- Employer can refuse the request for one of eight reasons:
  - Additional costs; detrimental effect on ability to meet customer demand; inability to reorganise work; inability to recruit additional staff; detrimental impact on quality or performance; insufficiency of work during periods of work; planned structural changes

# Risks to an employer

## Claims arising from saying no

- Failure to consider request
- Indirect Sex discrimination
- Unfair dismissal



## Claims arising from saying yes

Direct sex discrimination

## Risks: failure to consider the request

- Employee can bring tribunal complaint if:
  - Application not dealt with in a reasonable manner
  - Employer fails to notify decision
  - Employer fails to rely on one of statutory reasons to refuse request
  - Employer bases decision on incorrect facts or treats application as withdrawn when not entitled to do so
- Tribunal can make a declaration, order the employer to reconsider the application and make an award of up to eight weeks' pay

# Risks: Indirect discrimination

Established statistically that more women than men have childcare responsibilities and are therefore disadvantaged by requirement to work full-time

No cap on compensation

Possible for a tribunal to dismiss a flexible working claim, but uphold one for indirect sex discrimination

## “Provision, criterion or practice”

- *British Airways plc v Starmmer* – argument that decision not to allow woman to return on 50 per cent of her full-time hours was a one-off discretionary management decision, failed
- Examples of PCPs:
  - A requirement to work full-time
  - A requirement to work full-time core hours
  - A requirement to work three days a week

## Particular disadvantage

- Must place women at that disadvantage when compared with men, and also place the individual at that disadvantage
- Challenge to statistical assumption that more women than men are likely to be disadvantaged by a requirement to work full-time
  - *Sinclair Roche & Temperley v Heard*
  - *Hacking & Paterson and another v Wilson*
- Employer may be able to objectively justify a full-time working requirement

# Justification

- Employer must show that PCP is “a proportionate means of achieving a legitimate aim”
- Are there any alternatives which would achieve the same aim without causing disadvantage?
- Possible arguments:
  - Role not suitable for job-sharing
  - Organisational and administrative efficiency
  - Client needs

# Risks: Unfair dismissal



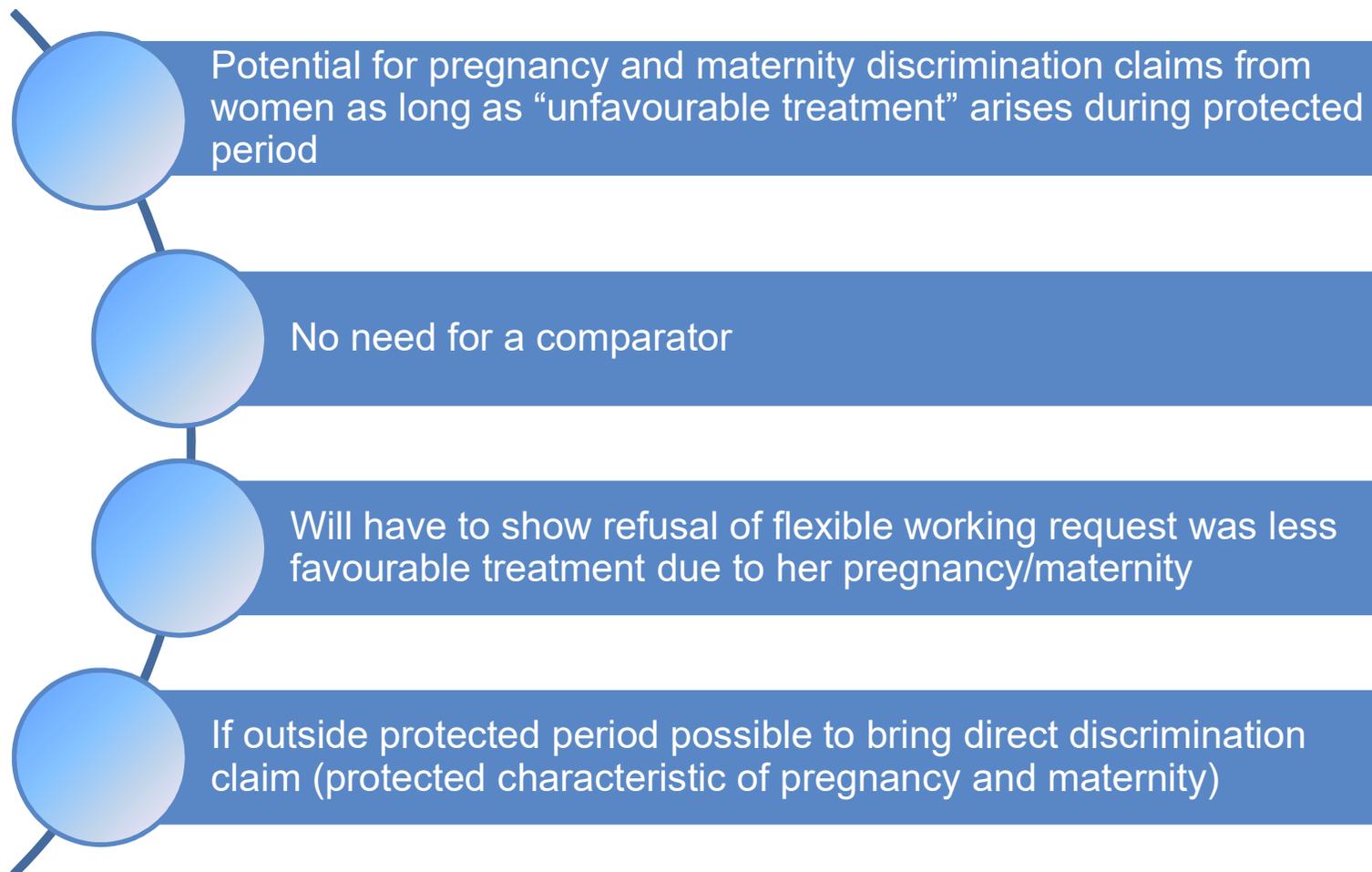
## Risks: Direct discrimination (1)

Potential for direct discrimination claims by men

Will have to be able to demonstrate that a woman's flexible working request would have been granted

If can show this then likely to be direct discrimination

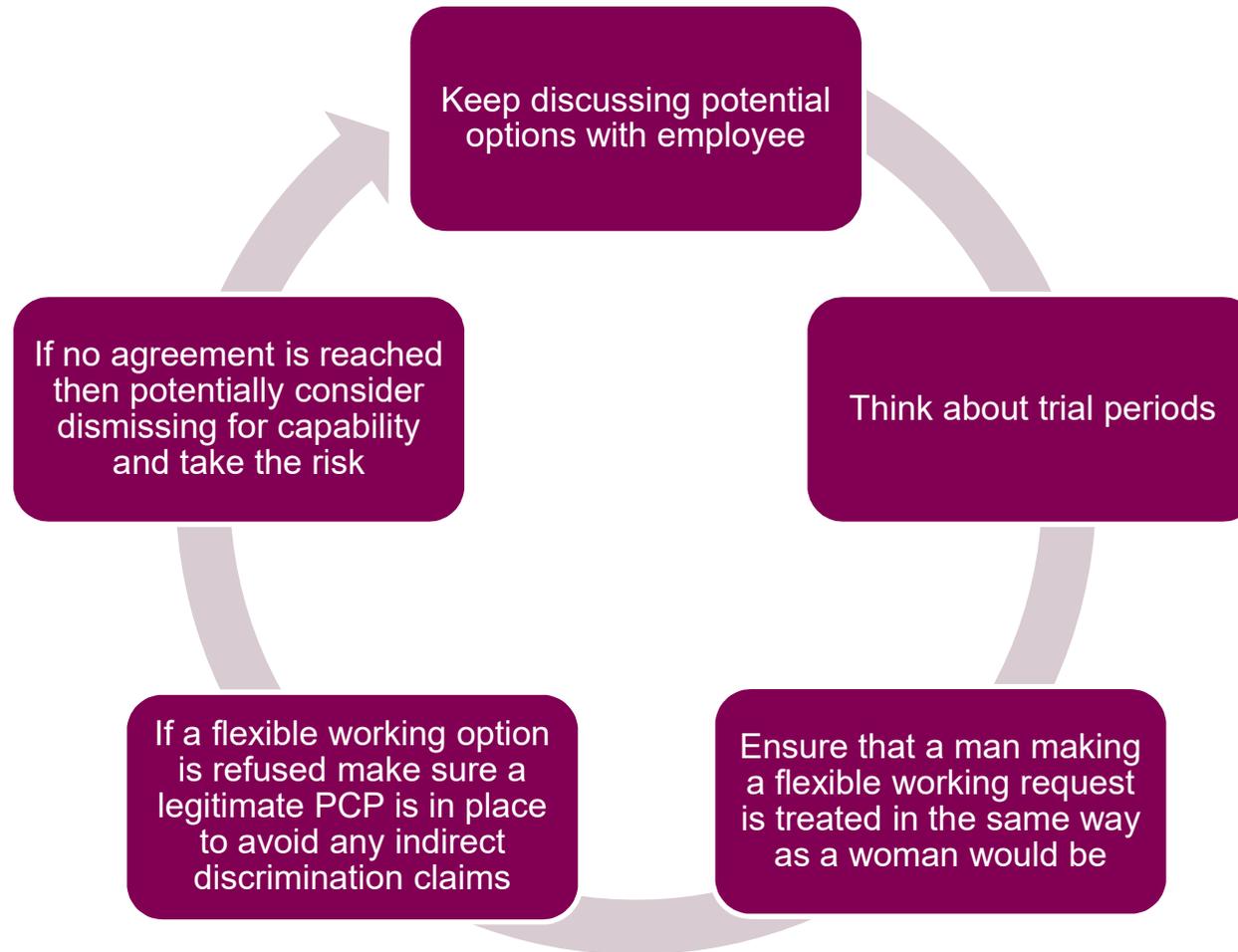
## Risks: Direct discrimination (2)



## Is a capability dismissal your best option?

- ***It is possible Abernothy v Mott, Hay and Anderson***  
– inflexible and unadaptable employee held to be lacking in capability
- **But do you want to?**
- Risks
  - Unfair dismissal
  - Discrimination claims
  - Right to return on different terms?

# Practical pointers



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