



Presentation – November 2018

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

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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 periods of relevant statutory leave



Requests generally made beforehand to take effect from the date of return

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

Flexible working in the public sector

- Guidance:
 - NJC Agreement
 - Flexible Working in the NHS
- Consider full range of flexible working arrangements and support facilities
- Take needs of breastfeeding employees into account
 - Provide rest facilities
- Provide a lead in good practice in family friendly forms of working

Risks to an employer



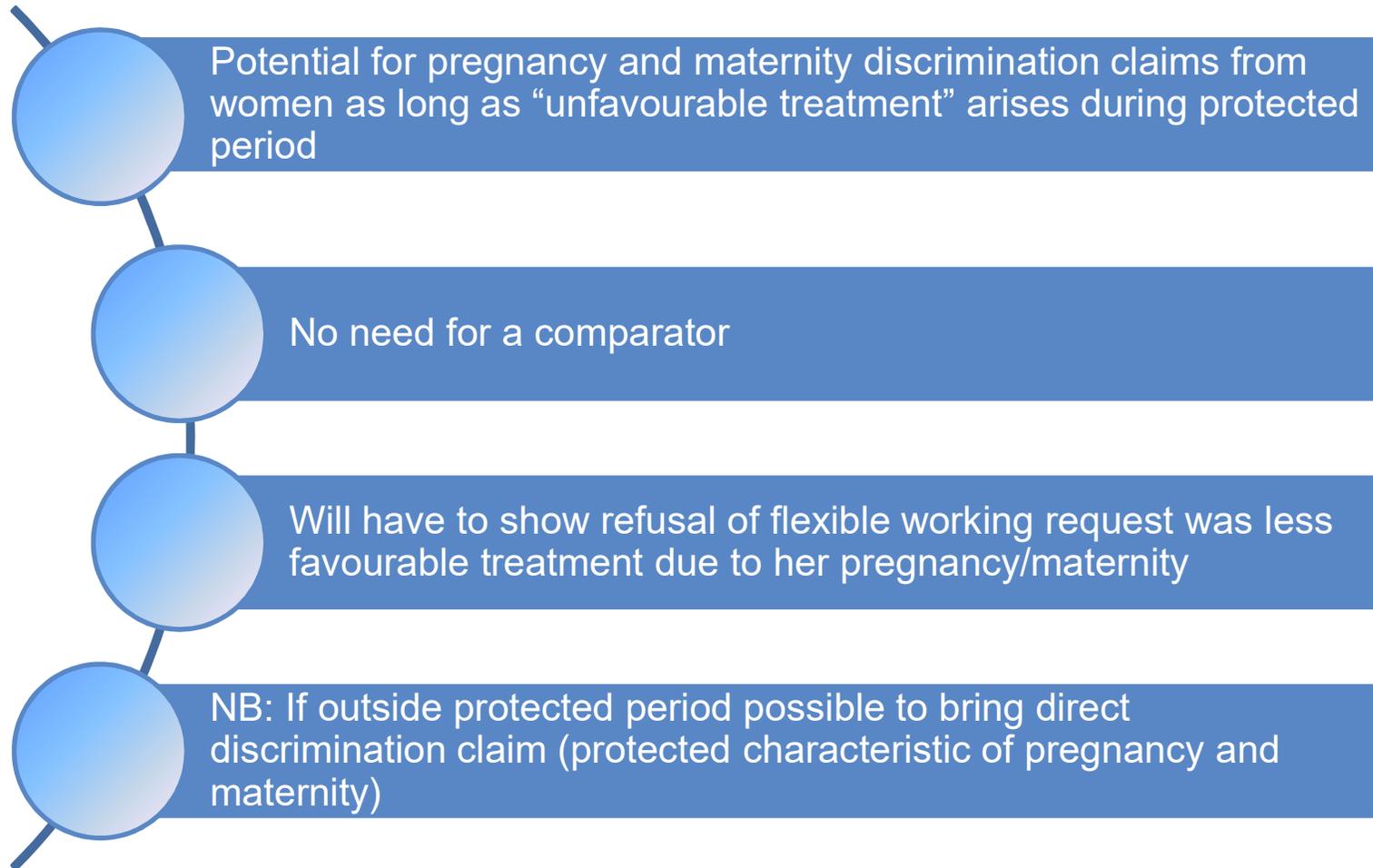
Risks: failure to consider the request

- 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 - Employer bases decision on incorrect facts or treats application as withdrawn when not entitled to do so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: sex discrimination due to maternity

- Where still on maternity leave
- Demotion
- Dismissal
- Denial of training or promotion opportunities

Risks: Direct discrimination



Risks: indirect discrimination

- Where an employer (A) applies a provision, criterion or practice to B who has a protected characteristic
- it puts, or would put, persons who share the protected characteristic at a particular disadvantage when compared with persons with whom B does not share it
- it puts, or would put, B at that disadvantage, and
- A cannot show it to be a proportionate means of achieving a legitimate aim.

Risks: Indirect discrimination

Can be 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

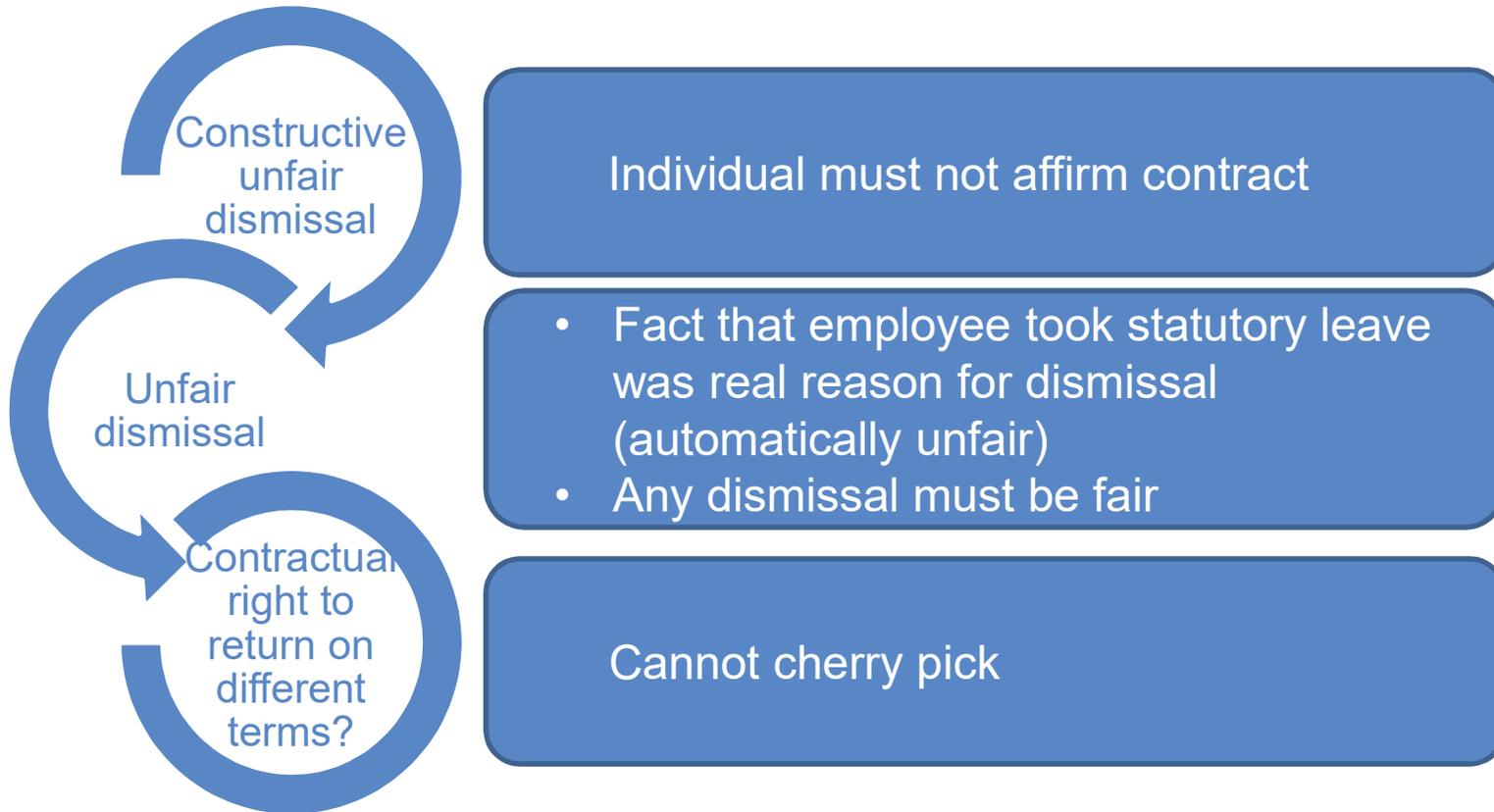
Particular disadvantage

- Must place women at that disadvantage when compared with men, and also place the individual at that disadvantage
- EAT findings challenge 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
- BUT tribunal decisions since disagree...

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 by men

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

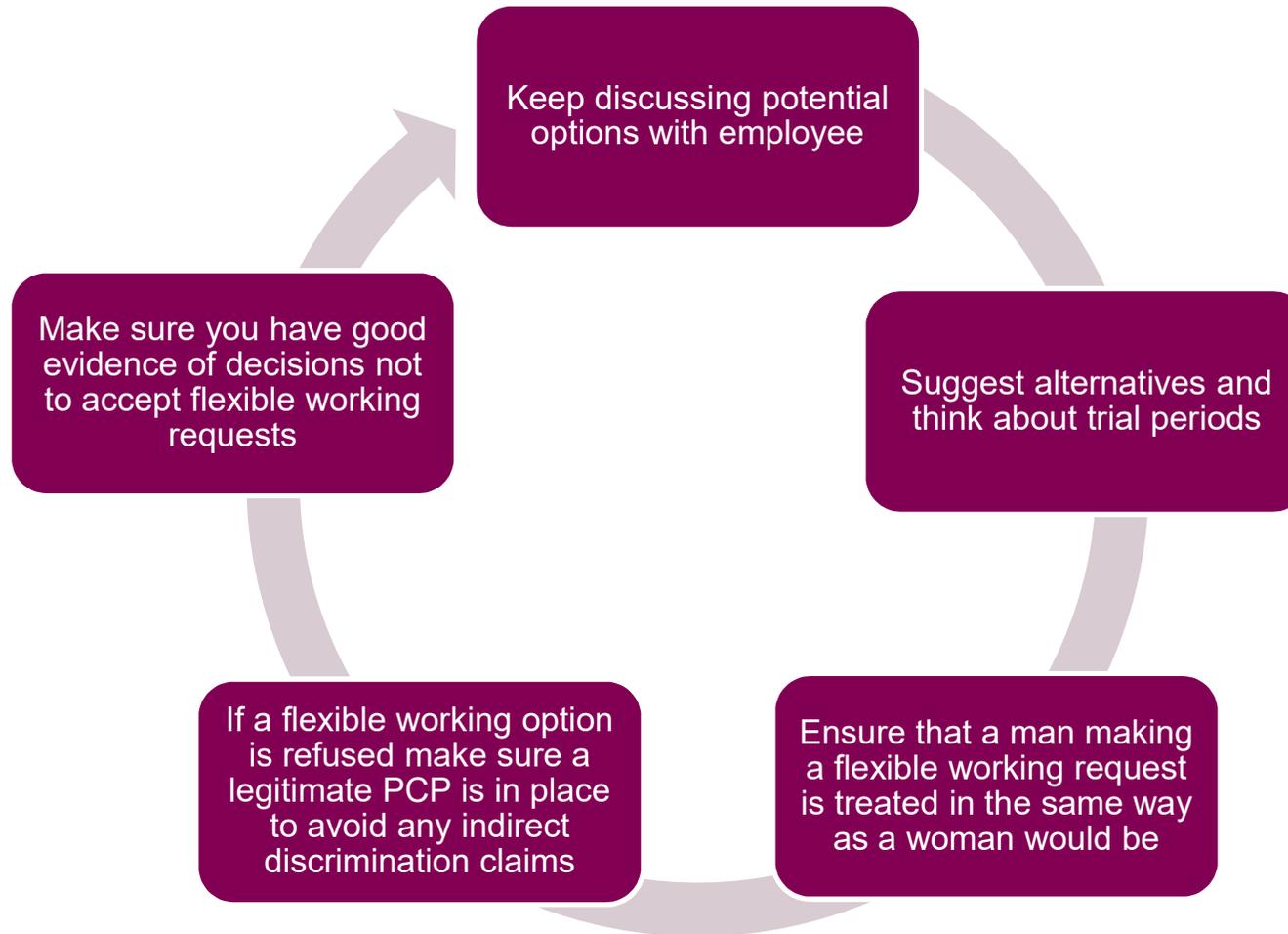
Is a capability dismissal your best option?

- *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?

So what do you do?

- Dismiss for another reason?
 - SOSRA
 - Dismissal
- Do a deal
- Don't resolve the issue and see what happens!

Practical pointers



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