

## WHITE PAPER DISMISSAL CONFERENCE 2024 – 26 JUNE 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?

#### Introduction

1. Employers are able to dismiss employees fairly by reason of redundancy. In order to achieve this, there must be a “genuine redundancy situation” and the decision to dismiss must be reasonable in all the circumstances. This requires a fair process, which, in the redundancy context, requires the employer to consult with affected employees individually and, if applicable, collectively.
2. The law provides that a genuine redundancy situation will arise where the proposed dismissal is wholly or mainly attributable to the fact that the:
  - a. employer has ceased or intends to cease to carry on business (i) for the purposes of which the employee was employed; or (ii) in the place where the employee was so employed; or
  - b. requirements of that business for employees to (i) carry out work of a particular kind; or (ii) to carry out work of a particular kind in the place where the employee was employed, have ceased or diminished or are expected to cease or diminish.<sup>1</sup>
3. This means that redundancy situations fall into one of three categories. First, the closure of a whole business. Second, the closure of a particular part of the workplace. Third, the diminished requirements of a business for employees to do work of a particular kind.
4. Having established a genuine redundancy situation, the employer must follow a fair process prior to dismissing an employee for redundancy. Save where the collective redundancy consultation rules apply (discussed below), there is no mandatory procedure that must be followed. For example, it is expressly stated that the Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals. Instead, our understanding of what constitutes a fair redundancy procedure is derived from caselaw. The leading case is Polkey v A E Dayton Services Ltd.<sup>2</sup> In summary, the employer will be expected to take the steps set out below.
  - a. **Warn and consult employees about the redundancies.** Such warning and consultation will take the form of letters and in-person consultation meetings. The consultation should take place when the proposals are still at a formative stage, so that employees have the opportunity to influence outcomes. The consultation should cover a range of matters including the proposals, ways of avoiding or reducing the redundancies and/or mitigating their consequences. Where 20 or more redundancies are proposed within a 90-day period, the employer must also comply with collective consultation obligations.<sup>3</sup> This means that part of the consultation will be conducted with representatives of the affected employees (which may be a combination of

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<sup>1</sup> Section 139(1), Employment Rights Act 1996 (ERA).

<sup>2</sup> [1987] IRLR 503.

<sup>3</sup> Section 188, Trade Union and Labour Relations (Consolidation) Act 1992.



7. In such cases, the employee may claim that the redundancy dismissal was related to the pregnancy and/or maternity leave and, as such, was “automatically unfair”.<sup>5</sup> This has two key consequences. First, the minimum service requirement to bring a claim for unfair dismissal does not apply, meaning the claim may be brought from Day 1 of employment. Second, if the Tribunal is satisfied that the reason or principal reason for the dismissal was the inadmissible reason, then the employee wins the claim. The Tribunal will not go on to consider whether the employer has acted reasonably in all the circumstances.
8. In addition, the employee may also claim that her redundancy dismissal amounts to unfavourable treatment amounting to pregnancy and maternity discrimination.<sup>6</sup> A woman is protected from such discrimination:
  - a. during the “protected period”, which starts when her pregnancy begins and ends at the end of the additional maternity leave period (i.e. at the end of the 52<sup>nd</sup> week of maternity leave), or when she returns to work if earlier;
  - b. after the end of the protected period where the unfavourable treatment in question relates to a decision which was taken *during* the protected period; and
  - c. after the end of the protected period where the unfavourable treatment in question relates either to her pregnancy or a pregnancy-related illness which arose *during* the protected period.

In addition and in any case where the treatment falls outside of these parameters, an employee may be able to bring a claim of direct or indirect sex discrimination instead.

9. Where a dismissal has been found to automatically unfair, there is a higher chance that it will be found to be discriminatory, although this is not inevitably the case (this is discussed further below). Like automatic unfair dismissal related to pregnancy and maternity, pregnancy and maternity (and sex) discrimination claims may be brought from Day 1 of employment. However, unlike automatic unfair dismissal, compensation for discrimination is uncapped. Further, awards of injury to feelings of up to £58,700 may also be made (or even more in exceptional cases).
10. Aside from these legal risks, employers should be alive to the fact that there is likely to be much greater media interest in claims asserting dismissal and discrimination related to pregnancy and maternity. Even if the employee is unsuccessful, the media coverage of such claims is still likely to damage an employer’s reputation as an employer of choice. Accordingly, employers would be wise to tread carefully before making such employees redundant.
11. In this paper, I am going to discuss how an employer should approach certain key aspects of a redundancy process to minimise the risk of such claims. First, I will consider the implications for redundancy selection criteria where an employee is pregnant or has taken maternity leave. Next, I will discuss how SAVs should be allocated between such employees and other employees who have “priority status” or other protected characteristics.
12. Throughout, I will assume that there is a genuine redundancy situation, rather than a sham situation intended to conceal a wish to exit an employee because she is pregnant or has taken

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<sup>5</sup> Section 99(3), ERA.

<sup>6</sup> Section 18, Equality Act 2010.

maternity leave. Whilst, of course, such dismissals do occur, I suspect that they are unlikely to be orchestrated by the types of employers reading this paper. For a good example of a case where it was found that the “redundancy” was a mere sham designed to push out a senior employee on maternity leave see the Employment Tribunal’s decision in Shipp v City Sprint Ltd.<sup>7</sup>

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

#### ***Choosing fair and non-discriminatory selection criteria***

13. In order to be reasonable, redundancy selection criteria should usually be objective and capable of independent verification. This means the criteria should be measurable, rather than based purely on a subjective opinion. The criteria should also be non-discriminatory. Applying a criterion which disadvantages employees who are pregnant or have taken maternity leave may be regarded as unfavourable treatment and discriminatory. Therefore, the first key point for employers is to take care to ensure that fair and non-discriminatory selection criteria are chosen. This could include some or all of the following:

- a. performance and skills;
- b. qualifications / experience;
- c. attendance records;
- d. timekeeping;
- e. revenue generation;
- f. disciplinary record; and/or
- g. length of service.<sup>8</sup>

14. Criteria based upon a subjective assessment should be avoided since a manager’s judgement may be improperly influenced by a woman’s pregnancy or maternity leave. There follows some examples of criteria that could be problematic in this way.

- a. *“Employees best suited to the future needs of the business”*. This criterion runs the risk of a low score being given to a woman who is going to be absent from work on maternity leave or is believed to be likely to want to return part-time.<sup>9</sup>
- b. *“Maximising value for the business”*. This criterion runs the risk of a low score being given to a woman who is going to be absent from work on maternity leave on the basis that it will cost the business money to retain her during her maternity leave, with no upside of work in return or revenue generation.<sup>10</sup>

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<sup>7</sup> ET Case Nos. 2201395/2020 & 2204577/2020.

<sup>8</sup> Length of service has fallen from favour as a dominant selection criteria due to the risk of indirect sex and/or age discrimination. However, it is likely to be acceptable if used as part of a balanced set of criteria or as a tie break where all the other factors are equal.

<sup>9</sup> Webb v EMO Cargo (UK) Ltd (No.2), [1995] IRLR 645.

<sup>10</sup> Dekker v VJV Centrum, [1991] IRLR 27.

- c. *“Attitude” or “Commitment”*. This criterion runs the risk of a low score being given to a woman who is pregnant or going to be on maternity leave. This could arise where a woman has had a second or third pregnancy in quick succession. Or where a woman had concealed her pregnancy from her employer upon recruitment.<sup>11</sup> It could also be unlawfully applied to someone returning part-time.
  - d. *“Future potential”*. This criterion runs the risk of a low score being given based on assumptions about the intentions of a woman on maternity leave to have a second child or to return part-time.
15. The risk associated with subjective selection criteria is not just a theoretical one. Negative views of women who are pregnant or on maternity leave persist in the workplace even in this day and age. A good illustration of this is the recent case of Smith v Greatwell Homes, where an Employment Tribunal found that a woman had been subjected to maternity discrimination when her employer failed to inform her of a sweeping reorganisation or notify her about two senior roles that she may have wished to apply for within the new structure. The Employment Tribunal concluded that the employer’s evidence revealed its *“lazy and unfair assumptions”* that those on maternity leave will insist on taking the full 12 months’ leave, cannot, or will not, return to work before this and are less useful assets in the workplace.
16. Having said that, subjective selection criteria may be acceptable if they are applied dispassionately.<sup>12</sup> Indeed, in Swinburne & Jackson LLP v Simpson the EAT held that *“...our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgment and a degree of subjectivity.”*<sup>13</sup> One way to use such criteria safely might be to have two people making the assessment, rather than one. Increasingly, we may see artificial intelligence (AI) deployed to make such assessments of candidates. However, this would not eradicate the risk of discrimination claims. If the underlying data fed into the AI tool was unsafe or incomplete, this could mean the AI tool’s judgement is also unsafe. And even if the data were safe and accurate, unsuccessful candidates could argue that the algorithm used has led to a discriminatory outcome. For example, in 2018, it was reported that Amazon had used an algorithm to hire employees basing the data set on hires from the past 10 years. Because Amazon had hired more men than women in that period, the AI tool taught itself to look for male candidates and deselect CVs containing the word “women”. Amazon has since abandoned the tool.
17. AI software has also been deployed to make “live” assessments of candidates in redundancy selection exercises. The cosmetics company, MAC, used AI software to make a live assessment in a redundancy selection exercise, rather than by feeding it historical data. Three employees were asked to attend a video interview but were not told that AI software would assess their levels of “engagement” by reference to the words that they used and their facial expressions. All three employees went on to lose their jobs and brought claims. The case settled, but it is easy to see how a similar AI assessment could lead to discriminatory outcomes for those who are pregnant or on maternity leave, where there are obvious factors that might negatively affect their engagement (e.g. morning sickness, post-natal depression, broken sleep and/or the general stress and exhaustion experienced when dealing with a new baby). This could give rise to a claim of indirect sex discrimination.

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<sup>11</sup> Tele Danmark A/S v HK, [2001] IRLR 853

<sup>12</sup> Mitchells of Lancaster (Brewers) Ltd v Tattersall, UKEAT/0605/11; Nicholls v Rockwell Automation Ltd, UKEAT/0540/11 and UKEAT/0541/11.

<sup>13</sup> UKEAT/0551/12.

18. Once the selection criteria have been provisionally chosen, an employer should usually consult with employees about them *before* carrying out any scoring. A failure to do this could potentially undermine the fairness of the process. In De Bank Haycocks v ADP RPO UK Ltd the employer applied selection criteria to the pool and decided who should be made redundant before undertaking any consultation meetings. The EAT held that the dismissal was unfair as a result of the clear absence of meaningful consultation at the formative stage of the redundancy process.<sup>14</sup> Prior to this decision, the general orthodoxy had been that consultation at a formative stage was only required in *collective* redundancy processes – this decision extends that requirement to *individual* redundancy processes. By consulting with employees about the proposed criteria (and, ideally, agreeing what they will be), there is less scope for criticism of the criteria at a later date. Of course, an employer must ensure that all affected employees or their representatives are consulted. Where an employee is absent on maternity leave there is a risk that they will be “out of sight, out of mind” and excluded from the process. Further, the commercial dangers of putting an entire group of staff at risk when only a handful are to be selected may outweigh the legal risks identified above.

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

19. If fair criteria are applied unfairly and lead to the dismissal of employees who are pregnant or on maternity leave, this could give rise to legal claims.
20. Unfair scoring may mean that the dismissal is automatically unfair for a reason connected with pregnancy or maternity, or, alternatively, ordinarily unfair.
21. It may also mean that the dismissal is directly discriminatory by reason of pregnancy and maternity (or sex). For example, in Shaw v Symphony Group plc, Ms Shaw worked as a Business Account Manager and was one of the company’s highest performers. She told the company she was pregnant in April and was due to go on maternity leave in October. In July, the company began to transfer her accounts to other employees. Ms Shaw was unhappy about this and decided to take annual leave before her maternity leave, so as to bring her absence forward. Ms Shaw was selected for redundancy in October. The Employment Tribunal held that the dismissal was directly discriminatory. Ms Shaw was a top performer and had been selected for redundancy ahead of lower performers. The company had failed to satisfy the burden of proving a non-discriminatory reason for her dismissal.
22. A finding that a dismissal is unfair may mean it is more likely to be discriminatory but not inevitably so. For example, in Parkinson v Training 2000 Ltd, the Employment Tribunal held that the redundancy dismissal of an employee who had recently been pregnant was unfair but not discriminatory. The employer had adopted an inconsistent and subjective approach to assessing candidates and the employee’s manager had exaggerated her faults and underplayed strengths. The employee argued that her manager had been influenced by the fact that she had had a recent miscarriage and had intimated that she might get pregnant again. The Tribunal concluded that a *prima facie* case of direct sex discrimination had not been made out – the manager was unaware of her desire to get pregnant again and the majority of the pool were women of childbearing age.
23. Where the unfair scoring is not *because of* the pregnancy or maternity (or sex as the case may be), there is still a risk of indirect sex discrimination. It is recognised in law that employees who are pregnant or on maternity leave face disadvantages in the workplace, for example, increased sickness absence, extended absence from workplace and the knock-on effects of

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<sup>14</sup> [2023] EAT 129.

that in terms of things like experience or revenue generation. As a result, the Equality Act 2010 provides that “special treatment” may be afforded to a woman in connection with pregnancy, childbirth or maternity and must be disregarded for the purposes of direct discrimination.<sup>15</sup> This means that a man cannot claim that he has suffered sex discrimination where a woman receives such special treatment.

24. Scoring such a woman against redundancy selection criteria at face value, *without* making any special adjustments, risks “baking in” the disadvantages and may lead to her selection for redundancy. In such circumstances, the employee may argue that the practice of scoring against selection criteria without making special adjustments to offset the disadvantages occasions by pregnancy, childbirth or maternity amounts to indirect sex discrimination.
25. For this reason, employers should be prepared to adjust the way they score such employees in redundancy exercises. Examples of the kinds of adjustments that may be required are discussed below. Before turning to this, it is crucial to note that the special treatment should be sufficient to offset the disadvantages but should go no further than that. If it does, it risks claims of sex discrimination from men in the pool. An example of this was seen in the important case of Eversheds Legal Services Ltd v De Belin.<sup>16</sup>
  - a. Eversheds notified Mr de Belin, an Associate, that he was at risk of redundancy. He was placed in a pool of two, along with his colleague, Ms Reinholz, who was on maternity leave. To decide which of the two would be made redundant, Eversheds scored them against five selection criteria. The decisive criterion was “lock-up”. This measured the time between a lawyer completing a piece of work and Eversheds receiving the fees for it. The shorter the lock up, the higher the score.
  - b. Mr de Belin’s lock-up for the relevant reference period was over 160 days. He scored half a point, which was the lowest possible score. As Ms Reinholz was absent on maternity leave during the reference period, Eversheds decided to give her special treatment and award her two points, the highest possible score. Overall, Mr de Belin scored 27 points and Ms Reinholz 27.5. Mr de Belin was selected for redundancy.
  - c. Mr de Belin raised a grievance, arguing that if Ms Reinholz's lock-up had been measured with reference to the period immediately before she went on maternity leave, then she would also have scored 0.5, and would have ended up with an overall score of 26, meaning she would have been selected for redundancy. He claimed that the special treatment given to her went further than it should have done and, as a result, Eversheds had discriminated against him because of sex. Eversheds rejected the grievance and relied on the special treatment provisions in the Sex Discrimination Act 1975 (the predecessor to the Equality Act 2010, but which contained similar special treatment provisions).
  - d. Mr de Belin brought claims of direct sex discrimination and unfair dismissal and succeeded in both claims at first instance. Eversheds appealed. The EAT upheld the Employment Tribunal's decision that Mr de Belin had been discriminated against and unfairly dismissed. The EAT held that any special treatment to offset the disadvantages occasioned by pregnancy, childbirth or maternity leave must be proportionate, otherwise it risked discriminating against men.

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<sup>15</sup> Section 13(6).

<sup>16</sup> [2011] IRLR 448.

- e. Here, the special treatment was *not* proportionate – it went further than necessary. There were less discriminatory ways of removing Ms Reinholz’s maternity-related disadvantage. The best option would have been to measure the lock-up of both candidates by reference to the most recent period when Ms Reinholz was at work. Ms Reinholz was entitled to be scored for lock-up on a basis that reflected her performance and this alternative would have achieved this. Giving Ms Reinholz a notional maximum score, while restricting Mr de Belin to his actual score, was sex discrimination. The unfair dismissal decision was also upheld.
26. Therefore, employers should afford special treatment to offset the disadvantages occasioned by pregnancy, childbirth and maternity but must do so proportionately. This requires an assessment of ways to mitigate the disadvantages, rather than automatically favouring them over others in the pool. When it comes to scoring against typical redundancy selection criteria, this may require the types of adjustments discussed below.
- a. **Performance and skills:** scoring should be based upon verifiable records such as appraisals, rather than solely on a manager’s personal opinion which risks bias. If performance has been negatively affected for a reason related to pregnancy and maternity, then an adjustment may need to be made when scoring. To the extent that lower performance had not already been discounted from the appraisal rating (which may be discriminatory in itself) then that appraisal rating should not be used for the purposes of scoring for performance and skills as this could taint the redundancy score. The employer could use an earlier year’s rating, or perhaps an average of several earlier years’ ratings. Or it could award a notional score, but great care would need to be taken not to overcompensate – there would need to be reasonable grounds underpinning the notional score. For example, new feedback could be taken from colleagues and managers and, together with past appraisal ratings, be used to inform the notional score.
  - b. **Qualifications/experience:** if an employee has missed out on development or training opportunities due to pregnancy or maternity leave and awarded a lower score as a result, this could be discriminatory. In Williams v Ministry of Defence, Mrs Williams was a highly regarded engineering officer and flight lieutenant, who had achieved joint top score at an Advanced Pre-Employment Training (APET) Board.<sup>17</sup> She was told she was eligible to undertake further APET training, which would have led to her promotion to the rank of squadron leader. However, Mrs Williams became pregnant and was unable to complete the further APET training that year. She believed (as did her wing commander) that she would automatically be selected for the training the following year. However, she was not and this was later held to be direct sex discrimination. If the claimant in this case had subsequently been marked down in a redundancy exercise against the criterion of qualifications, this would likely have been discriminatory. This is more difficult to correct by way of adjustments, as looking back at an earlier period is unlikely to result in a fairer score (indeed, it may be less fair). One solution would be to award a notional score based on the qualifications and/or experience that the employee was expected to have obtained but for the absence. Again, employers would need to guard against over-compensating. Alternatively, the criterion could be constructed in broad terms to reduce the impact of the period of absence. For example, instead of a specific number of years’ worth of experience, it could be assessed in wider bands e.g. 1 – 5 years, 5 – 10 years etc (this is not a

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<sup>17</sup> UKEAT/0833/22.

complete answer but may, depending on the facts, address the problem). As to qualifications, if the employer were reluctant to award a notional score, it could assess qualifications for *all* candidates up to the point that the woman went on maternity leave, so as to level the playing field. (If an earlier period is used just for the woman she is still disadvantaged compared to colleagues who have had the opportunity to acquire additional qualifications during her absence).

- c. **Attendance record:** an employee's absence connected with pregnancy should be ignored when scoring an employee.<sup>18</sup> Employers should take care to check the accuracy of its data and consider the reasons behind any absences to establish whether they might be pregnancy-related. Sickness absence or compassionate leave associated with miscarriage or stillbirth should likewise be treated in the same way as pregnancy-related sickness absence. The period spent on maternity leave should also be discounted.
- d. **Time-keeping:** lateness due to pregnancy-related sickness or ante-natal appointments should be discounted. Again, employers should take care to check the accuracy of its data and consider the reasons for any lateness (e.g. was it due to morning sickness?).
- e. **Revenue generation:** following De Belin, it is clear that employers should take care when assessing revenue generation. If the employee has been absent on maternity leave, the best option would be to use a different reference period for that candidate, or, if she has worked for part of the relevant reference period, pro rate her figures accordingly. The key is not to be over generous in the scoring.

**Subjective criteria such as best fit/attitude/future potential:** as discussed above, subjective criteria may be used if applied dispassionately. Nevertheless, extra care needs to be taken to ensure that managers are not making biased decisions – potentially a high risk in pregnancy and maternity cases. In Chagger v Mullis and Peake LLP, the Employment Tribunal held that an employee suffered discrimination when selected for redundancy while on maternity leave.<sup>19</sup> She had not been included in the departmental restructuring that had led to the redundancy situation. When she was on leave, she had told her employer she wished to return on a part-time basis. The Employment Tribunal held that the employer had adopted an “out of sight, out of mind” approach that reflected the fact it did not want her to return on a part-time basis. As to scoring, the selection criteria included “flexibility” and “future potential”, and the Tribunal found the scoring against these criteria had been negatively influenced by the employee's maternity leave and future childcare requirements. Employers can address the risk of bias by ensuring managers receive appropriate training, and by having more than one manager scoring.

### ***Consulting with the employee over their scores***

- 27. Once the scoring process is complete, the employer should give each of the employees their score and explain how it was arrived at. A fair process requires the employer to afford employees the opportunity to challenge their score and to explain any factors that might have led to their selection and/or alert the employer to any relevant factors it did not know. For example, a pregnant employee may have taken pregnancy-related sickness, but this fact may not have been highlighted on her absence record. If she was scored by a manager who was

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<sup>18</sup> Paragraph 17.25 of the EHRC Employment Statutory Code of Practice.

<sup>19</sup> ET Case No. 3201 677/09.

not aware of the underlying reason for the absence, this could result in a lower score and may be discriminatory.

28. Such consultation is all the more important where subjective criteria have been used. In Graham v ABF Ltd, the lack of consultation on how an employee scored was fatal to the fairness of the dismissal, particularly since the decisive criterion was “attitude”, which was said to be nebulous and subjective.<sup>20</sup>
29. By ensuring that employees have the opportunity to ask questions and make representations about their score, an employer can minimise the risk of locking in unfair or discriminatory scores.

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

#### ***General duty to look for SAVs***

30. The consideration of SAVs is fundamental to the fairness of any dismissal for redundancy. A dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether a SAV existed within its organisation.<sup>21</sup> Until the dismissal takes effect, the employer is under a duty to make “reasonable” efforts to look for SAVs. It is not required to make every possible effort, nor is it obliged to create SAVs for redundant employees where none exist. However, the search should be sufficiently thorough and, depending on the circumstances, this may mean looking within the wider group of companies.
31. Whether a role is “suitable” is an objective question. It must:
  - a. be work of a kind which is both suitable in relation to the employee and appropriate for him or her to do in the circumstances; and
  - b. its provisions as to the capacity and place in which the employee is to be employed, and as to the other terms and conditions of employment, are not substantially less favourable to the employee than if he or she had continued to be employed under the previous contract.

It is for the employer to decide whether a vacancy is suitable, taking into account the employee’s personal circumstances and work experience.

32. Where SAVs are identified, this information should be given to the relevant employees to consider. Where there is more than one potentially redundant employee, the employer should ensure that they are *all* made aware of vacancies. Employers should take care not to “forget” to include women who are absent on maternity leave. In Watt v Croydon College the employer failed to inform an employee on maternity leave about the SAV and the role was subsequently given to a male employee.<sup>22</sup> The Employment Tribunal held that the reason why the employer had failed to inform her about the SAV was because she was on maternity leave. The dismissal was held to be both automatically unfair and an act of maternity discrimination.

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<sup>20</sup> [1986] IRLR 90.

<sup>21</sup> Vokes Ltd v Bear, 1973 IRLR 363

<sup>22</sup> ET Case No. 2300048/15.

33. Where there are multiple potentially redundant employees, the employer will also need to consider how it will choose who gets the SAV. However, this is subject to the legal duties to prioritise certain employees, which is explored further below.
34. In the event that there are *no* SAVs, then the at-risk employees may be dismissed as redundant, and this should usually amount to a fair redundancy dismissal (assuming that the underlying selection and consultation processes were fair). Where there *are* alternative vacancies, but the employer does not consider them to be “suitable”, these do not need to be notified and the employees may be dismissed as redundant. However, this does run the risk of an employee challenging the employer’s assessment of suitability. If such a challenge is successful, then this may undermine the fairness of the dismissal.

***Priority status of employees absent on maternity, adoption or shared parental leave (SPL)***

35. Employees who are absent on either maternity leave, adoption leave or SPL are afforded priority status in relation to SAVs.<sup>23</sup> The law provides that before making a woman who is absent on maternity leave (or a man or woman who is absent on either adoption leave or SPL) redundant, an employer *must* offer any SAV to them, where one is available with the employer, the employer’s successor or an associated employer. In other words, these employees have an absolute priority for SAVs, ahead of other colleagues, even if the employer thinks another colleague would be better suited to the role, or even if appointing them would lead to adverse consequences for the business.<sup>24</sup>
36. In simple scenarios where the number of roles are to be reduced, the duty to offer the SAV to a priority status employee arises *after* the selection exercise has been carried out and their role has been identified as potentially redundant. However, in certain types of restructuring situations, the duty to offer the SAV to a priority status employee may arise earlier than the employer realises. In Sefton Borough Council v Wainwright, two different roles were deleted and combined into a new role.<sup>25</sup> The two existing employees were asked to compete for the combined role. Ms Wainwright was on maternity leave at the time and the other employee was not. The other employee was given the role and Ms Wainwright was dismissed for redundancy. The employer argued that the priority status right was not engaged until after the restructuring had taken place, and there being no SAV available, Ms Wainwright was dismissed for redundancy. However, the EAT said the redundancy situation had arisen as soon as the two roles were deleted. Once the structure had changed, there was merely a chance to compete for the combined role. The EAT said that if employers could decide when a redundancy situation arose, this would undermine the priority right because, as here, they could decide a redundancy situation arose only after other employees had been redeployed into potential SAVs. Since Ms Wainwright was on maternity leave when her role was deleted, the priority right was engaged. This meant that the Council was obliged to offer her the combined role, unless it was in a position to offer a different SAV instead (which, on the facts, it was not). In other words, where there are multiple SAVs, the employer may select which SAV to offer; it is not obliged to offer a specific SAV to a priority status employee.
37. If a priority status employee is dismissed by reason of redundancy in breach of a legal requirement to offer the SAV, the dismissal will be automatically unfair. Such a dismissal may also constitute pregnancy and maternity discrimination (or sex discrimination), although this is not an automatic outcome. The Employment Tribunal would need to ask the reason why

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<sup>23</sup> Regulation 10, Maternity and Parental Leave Regulations 1999, SI 1999/3312, Regulation 23, Paternity and Adoption Leave Regulations 2002, SI 2002/2788, and Regulation 39, Shared Parental Leave Regulations 2014, SI 2014/3050.

<sup>24</sup> Community Task Force v Rimmer, 1986 IRLR 203.

<sup>25</sup> UKEAT/0168/14.

the employer failed to offer the SAV and determine whether it was because of her pregnancy or maternity leave (or sex).

38. For example, in McKeith-Wellington v Denial London Ltd and anor, Ms McKeith-Wellington told her employer that she was pregnant in January 2010. In the April, the employer undertook a review of the business and decided that the line on which Ms McKeith-Wellington worked should be discontinued because it was not profitable, and she was told that she was at risk of redundancy. At a consultation meeting, the employer mentioned the possibility of a new Sales Manager role. However, when she was on maternity leave, the employer wrote to her to say that it did not think she would be suitable for the role. She was given notice of dismissal and offered a much more junior role. The Employment Tribunal found that she had been entitled to be offered the Sales Manager role. The reason she had not been offered the role was because the Director wanted someone who could start immediately, which she could not do as she was on maternity leave. The Employment Tribunal held that the dismissal was automatically unfair and amounted to pregnancy and maternity discrimination.

#### ***Extension of priority status to additional groups of employees from 6 April 2024***

39. The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 came into force on 24 July 2023. The Act allowed for secondary legislation to be made which would set out the detail of how new priority status rights would work. The Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 finally came into force on 6 April 2024. These regulations have extended priority status for SAVs to pregnant employees and those who have recently returned to work from periods of maternity leave, adoption leave or SPL.

#### ***Pregnant employees***

40. Pregnant employees who are at risk of redundancy now have priority status for SAVs. This will be known as the “protected period of pregnancy”.
41. The protected period of pregnancy *starts* on the day that the employee informs her employer of her pregnancy (where the notification was made on or after 6 April 2024). In practice, most women notify their employers when they are around 12 weeks’ pregnant. However, it should be remembered that if a woman notifies her employer before then (for example, if she has a high-risk pregnancy), her protection will start at that point. The regulations do not stipulate how the notification should be made and so employers should work on the assumption that an oral notification to an appropriate member of staff would count.
42. The protected period of pregnancy *ends* on the day that the statutory maternity leave starts (when the original protection that applied during maternity leave would kick in). However, where a woman suffers a miscarriage before 24 weeks of pregnancy, her additional protected period will end two weeks after the end of the pregnancy. Where a woman suffers a stillbirth after 24 weeks of pregnancy, she would remain entitled to statutory maternity leave, meaning the protection would end of the day that her maternity leave started.

#### ***Maternity leave returners***

43. Employees returning to work from a period of maternity leave and who are at risk of redundancy, now also have priority status for SAVs. This is known as the “additional protected period”.

44. The additional protected period *starts* on the day after the last day of the employee's statutory maternity leave. In practice, this may pre-date the day the employee actually returns to the workplace. For example, it is common for employees to tag a period of holiday or parental leave onto the end of the maternity leave period. It is important for employers to remember that employees who do that are still within the additional protected period.
45. The additional protected period *ends* 18 months after the date of the child's birth, provided that this has been notified to the employer. Employers may stipulate that such notification is given in writing. If notification of the birth date is *not* given, then the additional protected period will end 18 months after the first day of the expected week of childbirth.
46. In practice, this means that the additional protected period will differ depending on when the woman starts her maternity leave in relation to the date of the child's birth (or the first day of the expected week of childbirth) and how much maternity leave she takes. Examples of how this works are given below.
- a. Jane notified her employer of her pregnancy when she was three months' pregnant. As Jane had a high-risk pregnancy, she started her statutory maternity leave two months before the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. She took her full 12 months' maternity leave entitlement. She returned to work ten months after the birth date. Jane would have an additional protected period of eight months (being 18 months after the birth).
  - b. Sarah notified her employer of her pregnancy when she was three months' pregnant. As Sarah wished to maximise the amount of time off with her baby, she started her statutory maternity leave in the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. She took her full 12 months' maternity leave entitlement. She returned to work 12 months after the birth date. Sarah would have an additional protected period of six months (being 18 months after the birth). Note that if Sarah had elected to tag one month's annual leave on to the end of her maternity leave, this six-month additional protected period would span the one month's annual leave and a further five months when she was back at work.
  - c. Huda notified her employer of her pregnancy when she was three months' pregnant. Huda started her maternity leave in the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. However, Huda only took three months' maternity leave. She returned to work three months after the birth date. Huda would have an additional protected period of fifteen months (being 18 months after the birth).
47. At first sight this appears anomalous, however, Jane, Sarah and Huda's overall period of protection starting with the notification of pregnancy and ending with the end of the additional protected period would be the same for all of them, i.e. 24 months in total. Jane had a shorter part of the protected period pregnant (since she started her maternity leave quite early) and so she benefits from a longer additional protected period after her maternity leave ends. In contrast, Sarah had a longer protected period of pregnancy (since she started her maternity leave at the latest possible point) and so she has a shorter additional protected period after her maternity leave. Huda was similar to Sarah in that she also had a longer protected period whilst pregnant (again, she started her maternity leave at the latest possible

point), but because she took such a short period of maternity leave, she benefits from a longer additional protected period after her maternity leave ends.

48. The key takeaway point for employers is that there is no “one size fits all” in terms of the length of the additional protected period after maternity leave. It will depend on when the birth date (or the first day of the expected week of childbirth) fell during the maternity leave (i.e. earlier or later) *and* how long the maternity leave lasts. Employers will need to take care to calculate the exact period of protection available to each maternity leave returner.

#### *Adoption leave returners*

49. Employees returning from a period of adoption leave and who are at risk of redundancy, also now have priority status for SAVs. Again, this is known as the “additional protected period”.
50. The additional protected period *starts* on the day after the last day of the employee’s statutory adoption leave. As above this may pre-date the day the employee actually returns to the workplace if they tag a period of holiday or parental leave onto the end of the adoption leave period.
51. The additional protected period *ends* 18 months after the day the child is placed with the employee for adoption or the date that they enter Great Britain in the case of overseas adoptions.
52. As with maternity leave, there is no “one size fits all” in terms of the length of the additional protected period after adoption leave. Examples of how this works are given below.
  - a. Ravi started his adoption leave two weeks before the child was placed with him for adoption. He took eight and half months’ adoption leave and returned to work eight months after the adoption placement date. Ravi would have an additional protected period of 10 months.
  - b. Zoe started her adoption leave on the date the child was placed with her for adoption. She also took eight and a half months’ adoption leave. Zoe would have an additional protected period of nine and a half months.
  - c. Yusuf started his adoption leave on the date the child was placed with him for adoption. He took three months’ adoption leave. Yusuf would have an additional protected period of 15 months.
53. As these examples show, the length of the additional protected period will depend on when the adoption leave starts in relation to the adoption placement date (which can be no more than two weeks before the placement date) and how long the adoption leave lasts after the placement date. Again, employers will need to take care to calculate the exact period of protection available to each adoption leave returner.

#### *SPL returners*

54. Employees took or are taking a period of SPL of at least six consecutive weeks or more, and who are at risk of redundancy, also now have priority status for SAVs. Again, this is known as the “additional protected period”.

55. The additional protected period *starts* on the day after the employee has taken six consecutive weeks of SPL. Note that where the period of SPL is below six consecutive weeks, there is no additional protected period (although the employee will remain protected *during* absence on SPL).
56. The additional protected period *ends* 18 months after the day the child was born or placed with the employee for adoption (or the date they enter Great Britain in the case of overseas adoptions).
57. Tying the end of the additional protected period to the birth date (or adoption placement date), neutralises any difficulties which might have been caused by employees taking blocks of discontinuous leave. An example of this is given below.
- a. Jakub's baby is born on 1 January 2024.
  - b. Jakub takes his first block of SPL on between 1 February 2024 and 31 March 2024.
  - c. Jakub returns to work between 1 April 2024 and 31 October.
  - d. Jakub takes his second block of SPL between 1 November 2024 and 31 December 2024.
  - e. The additional protected period started on 14 March 2024 (i.e. the day after Jakub had completed six consecutive weeks of SPL) and ended on 1 July 2025 (being the day after 18 months from the birth of his baby).
58. Therefore, the calculation of the additional protected period for SPL returners is relatively straightforward. All the employer needs to know is the birth date (or adoption placement date). However, if the employee has *also* taken a period of either maternity or adoption leave, then the additional protected period must be calculated according to the maternity or adoption rules discussed above.
59. These rules may act as an incentive for employees to take periods of SPL of six weeks or more, since doing so attracts priority status for a full 18 months after the birth of a child. For example, if a father chose to take two weeks paternity leave straight after the birth and whilst he as off got wind of there being redundancies at his employer and so followed it by six weeks SPL and then returned to work, he would have priority status in a redundancy situation for a further 16 months following his return.

### ***Employees with other protected characteristics***

60. We know that pregnant employees, those on maternity leave, adoption leave or SPL and those who have recently returned from such forms of leave all have priority status for SAVs. Do other employees have special priority for SAVs by virtue of a protected characteristic? And, if they do, is it the case that they leapfrog the priority status employees, are on a par with them or line up behind them?

### ***Disabled employees***

61. Section 13(3) of the Equality Act 2010 provides that an employer does not discriminate against another only because they treat, or would treat, disabled persons more favourably. In other

words, unlike all other forms of discrimination, disability discrimination claims only work one way. Further, employers have a positive duty to make reasonable adjustments for disabled people so as to avoid any substantial disadvantage created by a provision, criterion or practice. The EHRC's Statutory Employment Code of Practice indicates that the duty to make reasonable adjustments may include transferring an employee to an existing vacancy, or even a higher post that they could do with some adjustments.

62. For example, in Kent County Council v Mingo, the EAT held that a policy which gave preferential treatment to redundant employees over and above employees suffering from ill health was disability discrimination.<sup>26</sup> In the EAT's view, it would have been a reasonable adjustment to amend the policy to ensure that disabled employees had priority for redeployment. In Archibald v Fife Council, the House of Lords accepted that, in some circumstances, the duty to make reasonable adjustments can require an employer to transfer a disabled employee to a vacant post at a slightly higher grade without requiring him or her to undergo a competitive interview.<sup>27</sup> In the recent case of Rentokil Initial UK v Miller, the EAT held that offering a trial period in a new role may be a reasonable adjustment, even where the employer considers that the employee is not particularly well-suited to the role.<sup>28</sup>
63. Therefore, quite a lot is expected from employers, which might lead to the conclusion that SAVs should be offered first to disabled employees at risk of redundancy, so as to avoid disability discrimination. However, this is not the case. The priority status rights are not subject to a reasonableness test and must be applied regardless of any adverse consequences to the business. One such adverse consequence could be risking a disability discrimination claim. The law is strict: priority status employees must be prioritised over *all* other employees, including disabled employees for whom allocating the role might be a reasonable adjustment. An employer in this situation would be exposed to a disability discrimination claim, but their defence would have to be that the adjustment was not "reasonable" because it would have required them to act unlawfully.
64. Clearly, this could lead to some rather unpalatable outcomes. For example, a healthy young man with relatively short service who took a short period of SPL (and who would likely have no difficulty finding a new job if made redundant), would have priority over an older, long-serving, disabled employee who would likely struggle to find new employment.

#### *Other protected characteristics*

65. In terms of the order of priority for SAVs, priority status employees (of all types) always come first. Next, are the disabled employees for whom allocating the SAV would amount to a reasonable adjustment. Who is next in line? Employees with other protected characteristics have no rights to special treatment in the way that disabled employees do. However, there are provisions in the Equality Act 2010 which permit employees to take "positive action" in recruitment and promotion. Could these provisions be used to prioritise employees with certain protected characteristics?
66. Section 159 of the Equality Act 2010 permits (but does not require) positive action in recruitment and promotion where the employer reasonably thinks that persons who share a protected characteristic either suffer a disadvantage connected to that characteristic or have disproportionately low participation. Where this is the case, the employer may take

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<sup>26</sup> [2000] IRLR 90 EAT

<sup>27</sup> ICR 954 HL.

<sup>28</sup> [2024] EAT 37.

proportionate action with the aim of enabling or encouraging those with the protected characteristic in question to overcome or minimise the disadvantage or to increase their participation. For example, if the employer had very few transgender employees, and a transgender employee was at risk of redundancy, could these provisions be used to give the employee priority for the SAV?

67. The first question is whether this provision would even apply to allocation of SAVs in a redundancy situation, which is, arguably, neither “recruitment” nor “promotion”? However, the definition of “recruitment” in section 159(5) of the Equality Act 2010 means (amongst other things) “*a process for deciding whether to offer employment to a person*”. Arguably, offering a SAV would meet this definition, although there is no authority on the point.
68. Even if it does apply, the reality is that applying section 159 is fraught with danger for employers, such that few would be willing to take the risk. Employers must first have done the groundwork to show the need to take positive action. This means the employer must have gathered compelling evidence of the disadvantage or low participation *prior* to offering the SAV. In reality, most employers will not have done this.
69. Even if they had gathered such evidence, the rub is that this provision may only be used in true “tie break” situations where candidates are of equal merit. Arguably, a candidate could never be equal to an employee who had priority status rights or for whom the employer had a duty to make reasonable adjustments. In both cases, the law means they should be favoured, and not regarded as equal. Beyond this, it is theoretically possible that positive action could be used to give candidates with certain protected characteristics priority over others, but it remains the case that it is very rare to see two candidates of equal merit. The risk of getting it wrong is reverse discrimination and/or unfair dismissal claims from the non-favoured employees. Given that positive action in recruitment and promotion is optional, the truth is that most employers simply will not take the risk.

#### ***Allocating SAVs where there are multiple priority status employees***

70. We know that priority status employees have an absolute right to be offered SAVs ahead of all other employees, including disabled employees. However, the practical effect of the recent extension of priority status, is that employers may increasingly face situations where there are multiple priority status employees competing for the same SAV. How is an employer to prioritise between priority status employees?
71. The legislation is silent on how to deal with this situation. It merely says that where it is not reasonably practicable by reason of redundancy to continue to employ the priority status employee under their existing contract, and there is a SAV, the employer must offer them that SAV. Nor is there any case law authority offering guidance on how to approach this situation.
72. The bottom line is that the employer will have to find a way to choose between them in a fair way which limits their exposure to claims. This could include some or all of the following:
  - a. ranking the candidates by reference to their original redundancy scores;
  - b. considering new criteria specific to the SAV and scoring the candidates in relation to those (as with the original redundancy selection criteria, the employer would need to take care to avoid any potentially discriminatory criteria); and/or

c. conducting a competitive interview process.

73. However, it is worth remembering that in Wainwright the EAT held that the priority status right is an absolute right, which meant that a woman on maternity leave had the right to be offered a suitable vacancy even if she was not the best candidate for the job and should not be required to engage in any form of competitive interview process.<sup>29</sup> The EAT noted the fact that the employee was looking after "*three young children... including a babe in arms*" to highlight the difficulties she would encounter in having to engage in such a process. While this ruling is binding in the case of a single protected employee, it is difficult to see how it applies where there are multiple priority status employees with the same "absolute" right to fewer vacancies than there are priority status employees
74. Of course, one priority status employee may be part way through a long period of maternity leave, while another may have returned to work some time ago having taken a much shorter period of SPL. This may mean the woman on maternity leave is at a comparative disadvantage to the other priority status employee in any competitive selection. Where there is such disadvantage, the employer may give special treatment to the woman on maternity leave. However, it is important that a judgement about the comparative disadvantage is made on the particular facts and not simply assumed. If special treatment is afforded to a woman on maternity leave when there is, in fact, *no* comparative disadvantage, this could give rise to claims from the other priority status employees. For example, if the woman on maternity leave had been absent for six months and the only other priority status employee was a man who had adopted a baby and also been absent for six months.
75. Assuming that the employer is satisfied that there *is* a comparative disadvantage justifying special treatment, as discussed above, this must be proportionate. Simply giving her the role may be viewed as over-compensating and unlawfully discriminatory against the other candidates. A safer alternative would be to use a selection process that aims to eradicate the disadvantage, for example, by assessing her without the need for an interview, or perhaps holding an interview but giving her the option of doing it remotely at a time of her choosing and/or giving her the questions in advance and/or offering her coaching before the interview.
76. If a priority status employee has a disability, it may be necessary to make reasonable adjustments to the selection process to remove or mitigate any disadvantage (again, things like adjusting how or when an interview takes place). I do not think it would extend to allowing the disabled employee to jump to the front of the queue, as this would mean the disability rights were trumping the absolute rights of the other priority status employees. That said, the fact that a priority status employee is also disabled may encourage the employer to take a risk-based approach and award the SAV to that employee.
77. The strict order of priority for SAVs is as set out below.
- a. **All priority status employees.** In the event that there are too many priority status employees for the number of SAVs available, some form of further selection process would be needed, during which it may be necessary to afford special treatment to any women suffering a comparative disadvantage as a result of pregnancy, childbirth or maternity. It may also be necessary to make reasonable adjustments to the process for any disabled priority status employees.

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<sup>29</sup> Ibid.

- b. **Disabled employees.** This will only be the case where allocating the SAV to the employee would constitute a reasonable adjustment.
- c. **Employees with protected characteristics for which positive action has been deployed if that is something the employer wishes to do.** If positive action is deployed, candidates with the relevant protected characteristic will have priority for the SAV ahead of other employees, provided that they are of equal merit to them.
- d. **All other employees.** In the event that there are too many employees for the number of SAVs available, some form of further selection process will be needed. It may also be necessary to make reasonable adjustments to the process for any disabled employees.

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