



Presentation – December 2018

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

Emma Burrows, Partner

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team v — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication

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

Risks to an employer

Claims arising
from saying no

- Failure to consider request
- Direct sex discrimination on basis of maternity
- Indirect Sex discrimination
- Unfair dismissal

Claims arising
from saying
yes

- Direct sex discrimination

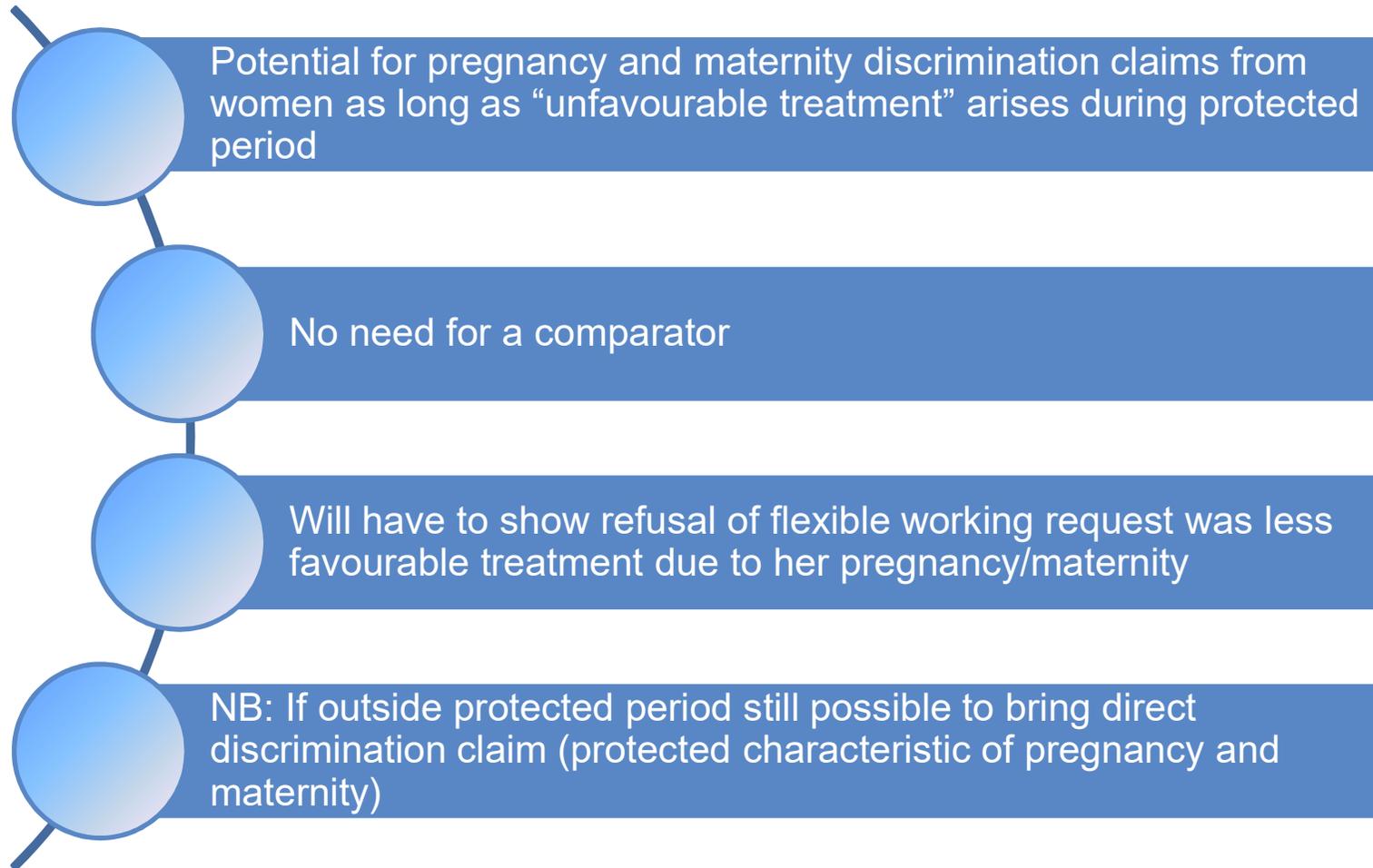
Risks: failure to consider the request

- 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: sex discrimination due to maternity

- During “protected period”
- Or if decision during protected period but implemented later
- Demotion, dismissal or denial of training or promotion opportunities
- Use trial periods to take you out of protected period

Risks: Direct discrimination



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

Be open minded

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.

“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...
 - *Eg. Cooper v HoF*

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:
 - 8 reasons
 - Need real evidence
 - 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
 - Refusal of FWR

So what do you do?

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

Practical pointers



Contact

Emma Burrows
Partner

d 0207 423 8347

e eburrows@trowers.com



© Trowers & Hamlins LLP 2015

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC 337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamlins LLP is authorised and regulated by the Solicitors Regulation Authority. The word “partner” is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP’s affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate, but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlins LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

(c) Copyright Trowers & Hamlins – January 2015 – All Rights Reserved. This document remains the property of Trowers & Hamlins LLP. No part of this document may be reproduced in any format without the express written consent of Trowers & Hamlins LLP.



trowers & hamlins