Maternity leave and redundancy — helpful clarification for employers

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Melissa Paz
SENIOR ASSOCIATE | UK

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The recent case of *Simpson v Endsleigh Insurance Services Ltd* concerns Regulation 10 of the Maternity and Parental Leave Regulations 1999 **('Regulation 10')**, which states that, if it is not practicable by reason of redundancy for an employer to continue to employ a woman on maternity leave, the employee is entitled to be offered a suitable available vacancy with her employer (or an associated employer). In essence, this gives the woman priority over other employees who are at risk of redundancy, even if they are better qualified for the job. If an employer breaches Regulation 10 and dismisses the employee on maternity leave, the dismissal will be automatically unfair.

Regulation 10 states that the right of a woman on maternity leave to a vacancy in a redundancy situation depends on two conditions:

- the work to be done must be both suitable for her and appropriate for her to do in the circumstances; and
- the terms and conditions of her new job, including the capacity and place in which she is to be employed, must not be 'substantially less favourable'.

In this case, Endsleigh Insurance Services closed down several branches, including Mrs Simpson's place of work in London, while she was on maternity leave. During the redundancy consultation process, she was invited to apply for a position at a call centre in Cheltenham. She failed to apply, claiming that the relevant correspondence had piled up at her home while she was recuperating elsewhere. In her claim, she argued that, under Regulation 10, she should have been offered the new role in Cheltenham. It was not enough for her employer simply to send her information on vacancies and invite her to reply.

Endsleigh accepted that the new position was suitable for Mrs Simpson, but argued that it was less favourable to her in relation to its terms and conditions, including the fact that she would have to relocate, and would have a seven day shift (rather than Monday to Friday office hours with limited evening and weekend work). Therefore, it argued that there was no obligation to offer her the post as only one of the conditions in Regulation 10 had been fulfilled.

The employment tribunal held that Mrs Simpson had not been unfairly dismissed. On appeal, she argued that the two conditions on the right to an alternative vacancy should be read separately. In other words, if there was a suitable post, this should have been offered to her even if the terms and conditions of the contract were less favourable. However, the Employment Appeal Tribunal (EAT) decided that the two conditions on the right to an alternative vacancy should be read together. If both were not satisfied, there was no obligation on the employer under Regulation 10.

The EAT also confirmed that the question of the job's suitability was one for the employer and there was no requirement that the employee be involved in this process. Whilst the employer would have to consider what it knew about the employee's personal circumstances and work experience, it was ultimately up to the employer, knowing what it did about the employee, to decide whether or not a vacancy was suitable.

Whilst this decision provides welcome clarification for employers, they should still consider alternative vacancies in these circumstances very carefully since, in many cases, suitability and the favourableness of terms will not be clear cut.

Authors

Melissa Paz

SENIOR ASSOCIATE | LONDON

Employment

+44 20 7597 6100

melissa.paz@withersworldwide.com