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MANAGING REDUNDANCIES AFFECTING WOMEN ON MATERNITY LEAVE

EMPLOYMENT

UK plc appears to be emerging from the worst effects of the downturn, but the fact remains that a large number of businesses have been compelled to restructure their operations over the last few years. In many cases, that has meant a reduction in headcount. Most HR departments are now highly skilled in managing redundancy processes, whether they involve relatively small numbers of employees, or are large enough to trigger collective consultation obligations. We have looked in previous eBulletins at some of the trickier areas of redundancy law, but now want to focus in this note on a recent case that looked at the position of women on maternity leave who are caught up in restructurings.

Recognising that new mothers might well be disadvantaged in a redundancy situation, for instance by an inability to attend interviews or to devote time to searching for alternative roles, the law provides special protection lasting for the whole of maternity leave (whether ordinary or additional). The protection is triggered where a woman's role is redundant while she is on leave, and it requires her employer to offer her a suitable alternative position in priority to other at risk staff. This effectively amounts to preferential treatment in redundancy situations - one of the very few instances where this is permitted in English law. A woman who is made redundant while she is on maternity leave, or who is not given that preferential treatment, can bring a claim.

It is important to remember exactly how the statute defines redundancy. A redundancy will arise where a company closes the part of the business where the person worked, or closes their place of work, or where the need for people carrying out the person's particular kind of work diminishes. Even though restructurings and redundancies are often two parts of the same overall management process, it is essential to keep the two types of reorganisation conceptually distinct.

In the very recent case of *Sefton Borough Council v Wainwright*, the Employment Appeal Tribunal had to assess whether a senior employee had been treated unfairly when she was made redundant in 2013. In mid-2012, the Council had decided to combine two senior posts, Mrs Wainwright's and Mr Pierce's. Both employees were put at risk of redundancy and, in December 2012, both were invited to apply for the new combined post. Mr Pierce was assessed as being the stronger candidate, and was duly given the job. Mrs Wainwright on the other hand was put on the Council's internal redeployment register, but was eventually made redundant in early 2013. Had this been a standard redundancy process, the Council's procedures might well have been fair. However, Mrs Wainwright was on maternity leave from mid-2012 until her dismissal.

The Council argued that the right to preferential treatment only arose in December 2012 when Mr Pierce was appointed to the new role and Mrs Wainwright was put on the redeployment register. They suggested that merely putting her at risk of redundancy was not enough to give rise to any duty, and it was only after the combined role had gone to Mr Pierce and a firm decision had been made as to Mrs Wainwright's place in the wider restructuring that she could be properly said to be redundant. Since there was, at that point, no suitable alternative role, there had been no breach.

That argument was rejected, with the Judge holding that Mrs Wainwright was redundant as soon as her old role was deleted. She should have been offered the combined post without competitive interview, and the eventual redundancy was therefore an unfair dismissal.

In our view, the decision is unsurprising. The obligation to offer a suitable alternative is mandatory, and would be severely restricted if employers could determine when a woman becomes redundant simply by internal labelling. The prudent approach must be to regard the moment a woman is put at risk as triggering the obligation.

The judgment is also worthy of note for two other reasons:

- The statute requires an employer to offer a suitable vacancy. It does not explicitly force an employer to offer every suitable vacancy. The Judge in this case offers the view that offering a single suitable alternative role, where many possible alternatives exist, would be enough to satisfy the duty. That is probably right from a technical perspective, but many employers will feel that employee relations might be damaged by such a narrow approach, and prefer to give the affected woman some say in which alternative is offered to her.

- Mrs Wainwright also alleged the failure to offer her the combined post was an act of discrimination - i.e. less favourable treatment because of her decision to take maternity leave. That claim was returned to the Employment Tribunal for a further hearing, the Judge noting that a breach of the preferential treatment in redundancy rule was not necessarily discriminatory (although it might well be in many cases).

As a final point, it is worth bearing in mind that men and women who avail themselves of the new right to take shared parental leave (which comes into force next week and is available in respect of children born after 5 April 2015) benefit from exactly the same preferential treatment on redundancy regime already in existence for women on maternity leave. Businesses conducting restructurings or redundancy processes in the coming months should plan carefully how these new rights might affect the procedures in their organisations.

CONTACT DETAILS
If you would like further information or specific advice please contact:

SEÁN LAVIN
DD: +44 (0)20 7849 2695
sean.lavin@macfarlanes.com

HAYLEY ROBINSON
DD: +44 (0)20 7849 2969
hayley.robinson@macfarlanes.com

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MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com