

Tribunal applies wrong legal test in case of maternity discrimination

June 29, 2017

In *Interserve FM Ltd v. Tuleikyte*, the Employment Appeal Tribunal (EAT) held that the Employment Tribunal (ET) had applied the wrong test in a case involving alleged discrimination of an employee because she was on maternity leave. In the circumstances, the ET should have applied the "reason why" test, and considered the conscious or subconscious thought processes of the alleged discriminator, but failed to do so.

Facts

Interserve operated a policy whereby employees who had not received any payments for three months were treated as leavers. Ms. Tuleikyte commenced her maternity leave in June 2013. She did not meet the earnings threshold for statutory maternity pay (SMP) and, as a result, received no pay from her employer once she had started maternity leave. After she had received no payment for three months, the leavers policy kicked in and in November 2013 she was issued with a P45 with a leaving date of June 2013. At the same time, six other employees were also treated as leavers, although it was not clear what the reason was for their lack of pay.

Ms Tuleikyte then told her manager that she was on maternity leave and it was agreed that she would complete a backdated new joiner form when she returned. However, she did not return from maternity leave and her leaving date was not amended, even though her actual termination date was May 2014. This resulted in Ms Tuleikyte losing her government benefits, including her accommodation.

The decision

Ms Tuleikyte issued proceedings in the ET, claiming pregnancy and maternity discrimination. The ET upheld her claim concluding that an automatic consequence of applying the policy was that she was treated unfavourably because she was on maternity leave. Interserve appealed to the EAT, which then held that this was not the correct approach.

Courts and tribunals have identified two types of maternity discrimination cases. The first are those where the facts are inherently discriminatory – "criterion" cases". The second are other cases where the reason for the discriminatory treatment is not immediately apparent and it is necessary to look at the employer's conscious or subconscious thought processes to see if the maternity leave was a significant influence – "reason why" cases. The EAT decided this was a "reason why" case. The policy was, on the face of it, neutral and was not targeted at women generally, whether or not on maternity leave. Women on maternity leave with sufficient earnings to qualify for SMP would be unaffected; on the other hand, employees on long-term sick leave, who did not qualify for statutory or contractual sick pay, would be caught by the policy. The ET should have considered the thought processes involved in the decision to have the blanket policy; the case was therefore sent back to the ET for this to be done.

What is the practical impact of this for employers?

The case illustrates that, even if being on maternity leave is the context for unfavorable treatment, this does not inevitably mean the treatment is "because of" maternity, hence amounting to unlawful discrimination. Unless a policy is inherently discriminatory, the courts must enquire as to the mental processes of the alleged discriminator. Notwithstanding this decision, employers should always tread cautiously when seeking to apply policies or practices that could potentially result in unfavorable treatment for women on maternity leave or other protected groups. Interestingly, Ms Tuleikyte did not claim indirect discrimination. The EAT acknowledged that an indirect sex discrimination claim may have been possible in this case. The application of the blanket policy may have had a disparate adverse impact on women because they take maternity leave and may not qualify for statutory maternity pay. Therefore, women may be more likely to be disadvantaged by such a policy than their male colleagues.

A key message for employers arising from this case is to ensure that policies and practices are kept under review so that they do not unlawfully discriminate against certain groups.

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