

**PJH Employment Law Update - 24 April 2015**

**Redundancy Update Session:**

1. This session will update on events in the last 12 months that have impacted on redundancy law.
  - a. A case law reminder in [Sefton Borough Council v Wainwright](#) of how the Maternity and Parental Leave Regulations 1999 are engaged in a redundancy situation.
  - b. The publication of the [Advocate General's opinion](#) in the Woolworths redundancy case.

**[Sefton Borough Council v Wainwright:](#)**

2. Those of you familiar with Maternity and Paternity Leave Regulations 1999 will know that dismissing an employee who is on maternity leave is a difficult exercise. Any detrimental treatment connected to maternity or maternity leave runs the risk of falling foul of the Regulations and also being discrimination on grounds of sex.
3. The case of Sefton Borough Council v Wainwright dealt with how Regulation 10 of Maple is engaged. Regulation 10 provides:

*10.—(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.*

*(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).*

*(3) The new contract of employment must be such that—*

*(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and*

*(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.*

4. The facts of the case are as follows: Mrs Wainwright's department was subject to restructuring in June 2012. Mrs Wainwright's post and an equally graded post, Mr Pierce's post, were both proposed to be deleted and a new post of Democratic Services Manager [DSM] was created which combined their roles.
5. Mrs Wainwright went on maternity leave on 16 July 2012. Her and Mr Pierce were put at risk of redundancy on 26 July 2012. Both were qualified to perform the new DSM role and both were invited to apply. Both were interviewed in December 2012 and Pierce was deemed to be the more suitable candidate and was offered the job. Mrs Wainwright was dismissed for redundancy in January 2013. She was notified of vacancies during her notice period but chose not to apply for any. She made an Employment Tribunal claim for automatically unfair dismissal and sex discrimination
6. The Employment Tribunal decided that the Council had breached Regulation 10 and had also by so doing committed an unlawful act of sex discrimination under the Equality Act. The Council appealed.
7. The Council's took two points at Employment Tribunal and on appeal. The first was that Regulation 10 was not engaged until after the re-structuring was complete and the Council had decided who was the best person for the DSM role. That was a proportionate way of proceeding and recognised both Mr Pierce's rights and Mrs Wainwright's. Following the conclusion of the restructuring there was no suitable vacancy. The DSM vacancy had been offered to Mr Pierce. Their second point was that a breach of Regulation 10 did not amount to sex discrimination under the Equality Act 2010.

8. The EAT disagreed with the Council and made the following points:
  - a. Regulation 10 was an absolute right. That right had been breached by not offering the DSM vacancy. It might not have been breached if another suitable and vacant post had been offered to Mrs Wainwright during her notice period. The obligation on the employer is to do that which is reasonably necessary to afford the statutory protection.
  - b. The Regulation 10 right was undermined if it was made subject to a competitive process.
  - c. The fact of a breach of Regulation 10 does not automatically lead to the conclusion that that breach was an act of sex discrimination under the Equality Act 2010. The Equality Act outlaws unfavourable treatment because of sex. A breach of Regulation 10 is not automatically because of sex, there could be other reasons for breaching Regulation 10. The finding of sex discrimination was overturned and sent back to the Employment Tribunal to re-consider.
9. Take away points from the case:
  - a. If you are having a competitive interview during re-organisation, there is a real risk of a breach of Regulation 10 if any of the candidates are on maternity leave.
  - b. You can have a competitive interview and not appoint the candidate on maternity leave provided that you have a suitable alternative vacancy that is offered without a competitive process.
  - c. There are usually two ways of effecting a staff reduction from 2 to 1.
    - i. Re-organise and invite the two at risk employees to apply for the new post. This is difficult where one of those employees is on maternity leave as Regulation 10 is engaged.
    - ii. Put both employees at risk and then apply redundancy selection criteria. If an employee is on maternity leave during the redundancy selection process, care has to be given to ensure that the selection criteria take account of the maternity leave but not in a way that disproportionately affects the employee not on maternity leave - see - [Eversheds Legal Services Limited v De Belin](#).

**Woolworths case update:**

10. Woolworths went out of business in the UK during the last recession in November 2008. All stores were closed with the loss of 1000s of jobs. The shop workers union, USDAW, took a claim against the administrators of the business to Employment Tribunal for a protective award and subsequently the EAT, regarding a failure to consult collectively under section 188 of TULRCA.
11. That case was decided by the EAT by saying that in order to comply with the corresponding EU Directive on collective redundancies the word "*at one establishment*" should be deleted.
12. Over 3500 employees were awarded 60 days pay each as a protective award. Following this case it was thought that employers were obliged to consult collectively where 20 or more redundancies were proposed, regardless of whether those redundancies were at one location or several. Consulting employee representatives regardless of any legal obligation to do so is sensible and good industrial and employee relations practice in any event.
13. The issue was referred by the Court of Appeal to the European Court of Justice to determine the following questions:
  - a. Does the phrase in the Directive of "at least 20 dismissals" refer to dismissals across all of the employer's establishments or the number in each establishment?; and
  - b. If it is the latter what is meant by each establishment?
14. The Advocate General has given his opinion on the issue and two other conjoined cases from Spain and Northern Ireland. In essence the opinion was:
  - a. It is up to member states to determine what unit constitutes an establishment.
  - b. He concluded that the number of employees dismissed across an employer's various establishments does not have to be aggregated in the UK.
15. Whether the ECJ follows the Advocate General's opinion remains to be seen, but the ECJ tends to go with the AG's opinion in the majority of cases, received wisdom is 80%.