

Discrimination Advice

Pregnancy and Maternity case law

The law relating to maternity entitlements is an amalgam of domestic and European legislation and case law. Maternity rights are essentially health and safety in origin for the protection of the mother and her unborn, new born baby. Maternity and parental rights only apply to *employees* who work under a contract of employment. The relevant European law is the Pregnant Workers' Directive.

Euro law has supremacy and has the effect of extending national law.

Because pregnancy and maternity issues are gender-specific detrimental treatment can be challenged under the current Sex Discrimination Act (SDA), soon to come under a new single Equality Act. The relevant European law for discrimination is the Equal Treatment Directive (ETD), Framework Directive, Treaty of Rome and Article 141 re equal pay matters. The SDA and ETD have had the effect of extending maternity rights. Equality legislation crucially applies to a broader definition of employment, including self employed (barristers etc), vocational trainees, apprentices and agency workers.

The Human Rights Act and Convention can also impact on these issues in certain circumstances: Article 8 right to respect for private and family life and Article 14 prohibiting discrimination.

In the early days of the SDA, pregnancy discrimination cases had to be established with reference to how a man's sickness absence would be treated. However, the sickness comparison is not a helpful one. The Health and Safety Executive's approach is that pregnancy is not a sickness, but needs to be managed with positive measures. Case law has moved on. See case references.

We now have good maternity rights under general employment legislation: the Employment Rights Act (ERA). Pregnancy and maternity-related dismissals are unlawful (and there is no qualifying period for these rights). There is a basic entitlement to ordinary mat leave for all women employees (26 weeks) regardless of LoS. There are generous entitlements to leave (up to 52 weeks) and to statutory maternity pay for 33 weeks, based on qualifying service. A woman has to be consulted about changes which will affect her post on return, she

must precede all others for a post in a redundancy situation, she has right to return to her same job, or a suitable alternative one in the event that there has been a genuine reorganisation. She has good health and safety protection requiring a risk assessment, and actions to remove, or to reduce risks, and failing that a right to suspension on full pay.

Employers in the main are now quite knowledgeable about these rights and their responsibilities, except for health and safety management.

Despite good maternity protection, there continue to be real difficulties for pregnant women workers and new mothers. Discrimination tends to be less overt, though there are still instances of pregnancy apparently triggering less favourable treatment. The incidence of pregnancy/maternity-related discrimination is astonishing and it arises across sectors of industry to women in all levels of employment.

What are some of the main characteristics of pregnancy and maternity discrimination?

1. Pregnancy

- refusal to appoint or to promote
- hostility, generally adverse comments, criticisms of work, disciplinary action
- overloading work in the run up to maternity leave/long hours of work
- being denied access to training and development opportunities, or appraisal- affecting pay
- dismissal allegedly for capability reasons
- inappropriate work/exposure to health and safety hazards
- failure to follow health and safety procedures
- treating pregnancy-related sickness as a disciplinary matter
- altering hours of work, which affects earning ability and thus maternity pay

2. Maternity

- failure to pay bonus or pay rise, or maintain work-related benefits during maternity leave
- reorganisation during maternity leave and no consultation
- redundancy on the point of maternity return supposedly therefore outside the protected period
- loss of valued job on return to work/sidelining into a less demanding role without a career path/demotion - no desk/no line management structure on return etc

- no health and safety arrangements for the new mother
- hours of work or mobility requirements which are incompatible with childcare needs
- delays to/refusing to allow a maternity leaver to return to work (needing adjustments to accommodate breast-feeding).
- dismissal for failing to return owing to pregnancy related illness/post natal depression
- denial of flexible working

What is the standard of proof in discrimination cases?

Doesn't have to be the sole reason for the treatment, but it must be the substantial reason. *Owen & Briggs v James* (Race case CoA 1992)

"But for" pregnancy or having given birth or absence on maternity leave would not have been so treated. Motive is irrelevant, even if it is to protect the woman or unborn child. *James v Eastleigh Boro Council*

"The reason why" detrimentally treated *O'Neill v Thomas More School* (EAT 97)

Inferences

Evidence of discrimination is very rarely overt. Inferences must be drawn from the facts *King v Great Britain China Centre UK CoA 1991*

Look for inconsistencies in facts and evidence:

- Questionnaire responses/failure to respond
- not implementing the Code

Burden of Proof Regulations (implementing the Directive 98/52/EC) states in UK law that once a complainant has established an inference of wrongdoing, the claim must be upheld unless the employer can prove they did not discriminate.

Why use equality legislation?

- European law has supremacy over national legislation. **The Equal Treatment Directive (76/207/EEC)** The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. The principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or

family status. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

- no length of service qualification
- Sex Discrimination Act/equal legislation It covers a broader group of workers/wider definition of "employment"
- Sex Discrimination Act/equality legislation covers wider context of employment-related situations
- protection against victimisation (incl. post employment situation re provision of a reference *Coote v Granada Hospitality* (ECJ 1999))
- legal procedures: the Questionnaire process which is unique to the equality enactments and enables inferences of discrimination to be drawn from responses, or failure to respond.
- There are better remedies: injury to feelings (not for Equal Pay issues) and in theory no upper limit to financial compensation. (see *Vento v Chief Constable of West Yorkshire Police* CoA for guidance on the assessment of damages for discrimination cases)
- in theory you can take an in principle claim (as distinct from a financial remedy). The right to a declaration is unique to discrimination law, and ask the tribunal to make a recommendation.

The Sex Discrimination Act prohibits employers from treating a female member of staff less favourably because of her pregnancy or for a reason connected with her pregnancy or child birth. - automatic unlawful discrimination without more i.e. no need for a comparator. At the root of pregnancy/maternity cases is causation "but for" the pregnancy/ "reason why".

Recruitment/promotion/dismissal & less favourable treatment

Dekker v Stichting Vormingscentrum voor (ECJ 1991) – refusal to recruit owing to pregnancy and associated costs. Financial considerations relating to pregnancy cannot be a consideration. Intro's. The concept of automatic unlawful discrimination.

Webb v Emo Air Cargo (ECJ 1994) - maternity cover dismissal case (fixed term and indefinite contracts). Pregnancy-related dismissal unlawful following Dekker principle.

Rees v Apollo Watch Repairs (EAT 1996) maternity dismissal owing to maternity cover being more efficient was unlawful discrimination.

McGuigan v T G Baynes and Son (EAT 2004) Failure to consult during maternity leave re redundancy, reorganisation etc is discriminatory

Failure to inform a woman of a job vacancy/ criteria for promotion on pay spine *Visa International Service Association v Paul* (EAT 2004). *Athis v Blue Coat School* (EAT 2005)

CNATVS v Thibault deprivation of an annual performance assessment owing to maternity leave is unlawful discrimination

Blundell v The Governing Body of St Andrew's Catholic Primary School (EAT 2007) unsuccessful in regard to loss of valued job *in this case*. Concerning reception class teacher returned to a floating teaching post .. The practice in her school was for teachers to teach a particular class every two years and then rotate - to give them a breadth of experience. EAT decided her role was that of primary school teacher, not specifically reception class teacher. Loss of valued job can be a detriment under SDA, depending on facts of case.

Health and Safety

Mahlburg v Land Mecklenburg (ECJ 2000) health and safety provisions provide positive protection and cannot be used for detrimental purposes. M applied for operating theatre posts while pregnant. Both posts involved preparation of medicines and instruments and the handling of instruments during operations. However, German legislation intended to protect the health and safety of pregnant women would prohibit M from working in the operating theatre while she was pregnant. Although the unequal treatment afforded to her was not directly based on her pregnancy, it was based on a statutory prohibition on employment attaching to that pregnancy.

Day v Pickles Farms (EAT 1997). breach of pregnancy/maternity-related health and safety regulations, failure to conduct a risk assessment, where it results in a detriment, is automatic unlawful discrimination. Affirmed in *Hardman*

Hardman v Mallon (EAT 2002) care assistant offered a cleaning job at the rate for the cleaning job. No risk assessment was carried out. – It is

unlawful discrimination if a pregnant employee/new mother suffers a detriment as a result of a failure to carry out a risk assessment.

New Southern Railway v Quinn (EAT 2006). Unlawful discrimination to alter a woman's working conditions, or suspend her because of health and safety concerns where there are no objective grounds for doing so.

Home Farm Trust Ltd v Nnachi (EAT 2007) care support worker exposed to aggression from residents, noxious smells and heavy lifting. Risk assessment had identified a series of potential risks as headings on the risk assessment form. EAT held that list of potential risks to be assessed was a tool to enable risks to be assessed, rather than an end in its own right.

Squillaci v Atkins (ET 1997) unlawful indirect discrimination in unjustifiably refusing part-time work to a maternity returner, the flexibility being for breastfeeding purposes. H & S issues were not raised. - Plead direct and indirect in case of this kind.

Sickness

A woman is protected throughout her pregnancy and maternity leave entitlement from dismissal for sickness absenteeism which is pregnancy-related:

Hertz v Aldi (ECJ 1991) established that a "protected period" exists from the start of pregnancy until the end of maternity leave. Post maternity leave, sickness absence has to be treated on a comparative basis with how a member of the opposite sex would be treated. However, inconsistency in UK decision with *Caffrey* where the protected period was viewed as an arbitrary distinction.

In post protected period cases, try to establish the root cause of the treatment is maternity-related.

Brown v Rentokil (ECJ 1998). Dismissal during pregnancy for pregnancy-related sickness is 'automatic direct discrimination without more'. This position has been criticised for limiting protection to 'artificial time limits' (MacDonald - national leg.)

Handels-og/Pedersen v Kvickly Skive (ECJ 1999) failure to pay full pay to a pregnant woman who is sick prior to maternity leave, where other employees received full pay for sickness absence is discriminatory.

However, *North Western Health Board v Mckenna* (IRLR 895) 2005. It is not discrimination to stop paying sick pay during pregnancy where a non pregnant employee would not be paid. – However, payment should not be so low as to undermine purpose of protecting preg workers (Gillespie)

NB post natal depression can be a disability for the purposes of protection under the Disability Discrimination Act. This is likely therefore to extend protection available post maternity leave.

IVF

Mayr v Backerei und Konditorei Gerhard Flockner (ECJ 2008) Dismissed when she took time off to undergo IVF. Her eggs had been fertilised and embryo created, but not yet implanted. This was not a pregnancy dismissal as she was not pregnant. However, dismissal at an advanced stage of IVF is automatic unlawful discrimination (under ETD) owing to this being gender specific issue.

Pay and other contractual terms

Gillespie and Os v N IH SSB (ECJ 1996). Case challenging reduced pay during maternity leave. The claimants were in receipt of Stat Mat Pay. Case established that EC law does not require a woman on maternity leave to receive her full pay. It is only required that her level of pay is not so low as to jeopardise her health and safety and that of her baby. She must benefit from pay rises or bonuses that occur during her maternity leave.

Alabaster v Woolwich Building Society (ECJ 2004). The amount of wages/salary used as the base for calculation of the earnings related element of statutory maternity pay must take into account pay increases made before the end of the woman's maternity leave even if they were not back dated.

Gendered inequality in pay and contractual terms have to be brought under the Equal Pay Act 1970. This case establishes that there is no need for the woman concerned to first establish like work/work evaluated as equal under a JES/equal value with a male comparator.

Lewen and Denda (ECJ 2000) entitlement to bonuses during the paid part of her maternity leave, the only exception being where it is paid for future period to encourage harder work/output.

Hoyland v Asda Stores (EAT 2006). A worker who takes maternity leave during a bonus year must be paid contractual bonus for the periods she is at work and the two weeks of compulsory maternity leave (4 weeks if factory work), but a proportionate reduction to reflect period of absence is lawful.

Land Brandenburg v Sass (ECJ 2004) women on maternity leave are entitled to have all their rights connected with their employment contract

protected throughout their statutory maternity leave, with the exception of their normal pay.

Discrimination relating to parental/paternity/adoptive leaves

Where leaves are not gender-specific and either gender can take them, discrimination is more likely to be indirect discrimination. Women are generally the primary or sole carer of children and could raise a claim of indirect discrimination if suffering a disadvantage owing to failure to allow flexibility in hours, or imposed changes of hours.

www.equalityhumanrights.com > Advice and Guidance: resources for advisers

Questionnaire guidance. Guidance and example questions for the statutory questionnaire process.

Palmer/Wade Maternity and Parental Rights handbook

Equality and Human Rights Commission