



CLOISTERS

PREGNANCY DISCRIMINATION...



...STILL A BUMPY ISSUE

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Bumps in the workplace?

Remit of focus on pregnancy discrimination

- Still a problem? Why?
- Solutions? – legislative, cultural....



Why a perceived need to investigate?

- Why consider the employment experiences of pregnant women and mothers returning to work
- How given the law in force since the Sex Discrimination (Northern Ireland) Order 1976 is this still a pressing issue?
- Legal perspective- awareness of rights & access to justice

ECNI investigation

Terms of reference

- To consider workplace experiences of women following pregnancy.
- To consider experiences of employers in managing pregnancy and maternity leave, and returning mothers.
- To identify types of good /unfair treatment or discrimination.
- To identify barriers to equal treatment in employment for women as a result of pregnancy and motherhood.
- To identify good practice which provides women with equality of opportunity in workplace.
- To make appropriate recommendations under Art 60(1) SDO as appear to ECNI to be necessary / expedient in light of findings
- To prepare /publish investigatory report under Art 60(2) SDO

Equivalent reports in Australia

- 2014 Australian Report: *Supporting Working Parents: Pregnancy and Return to Work National Review*
 - identified that strategy with highest impact in reducing pregnancy discrimination is to address gap between law and its proper implementation within organisations
 - Resources being developed on employers' legal obligations, employees' rights and leading strategies on how to best manage / support working parents through pregnancy, parental leave, and on return to work after parental leave.

Current research by EHRC

- Pregnancy, maternity and mothers: Research on the experiences of employers and mothers in the 21st Century
- BIS and EHRC currently working to explore mothers and employing organisations experiences of pregnancy, maternity and returning to work

2014 initiatives for pregnancy discrimination

TUC 2014 publication “**The Pregnancy Test**” made 5 recommendations aimed at ending pregnancy related discrimination -

1. Remove barriers to justice – abolishing ET fees (Eng/Wales)
2. Publish return-to-work rates -
3. Better leave for fathers -
4. Stronger right for flexible working – first day rights + more substantive rights of challenge. Huge factor in non-return rates.
5. Learn lessons from complaints – recommendations with broad remit which are enforceable

Research showed bullying sidelining and sacking commonplace

See further www.tuc.org.uk/publications

Bump and post-bump balancing...



Detriment caused by **absence** from the workplace concerning –

- Sickness
- Career damage
- Bonuses
- Redundancy



Sickness during and after pregnancy

- Detriment / dismissal for pregnancy-related sickness is unlawful Art 5A(1) & Art 8(2)(b) SD (NI) Order 1976; and automatically unfair Art 131 ER (NI) Order 1996 & Reg 20 MAPLR (NI) 1999
- No special protection for pregnancy-related sickness **after** maternity leave (eg post-natal depression once back at work) since:
 - outside protected period;
 - comparator is with sick man



Absences outside the protected period

Lyons v DWP Job Centre Plus [2014] ICR 668

Dismissal for post-natal depression related absences
not unlawful-

- This was unfair treatment for pregnancy-related illness
- But no less favourable treatment compared to man
- Maternity leave period had ended

Implications- remaining argument: that a post-protected period detriment is an implementation of a decision taken *during* the protected period: *Paquay* [2008 ICR 420 CJEU

Career damage - Causation and pregnancy detriment

Metropolitan Police v Keohane [2014] ICR 1073

- Pregnant police dog handler had her search dog taken away from her as she was non-operational since pregnant
- Nunki Pippin taken away permanently: less overtime, risk of deferred career progression
- Enough that pregnancy was material influence on decision
- Removal was directly discriminatory as application of removal policy had inevitable result that a woman would suffer disadvantage. ITF £9K, lost overtime £2.5K
- When considering causative test, breadth or narrowness of test not necessary step- see use of words “because of” in s18 EqA
- S18(2) EqA versus SDO 1976

Nunki Pippin



Career damage on maternity leave

Napoli v Ministero della Giustizia [2014] ICR 486 CJEU

- National leg. which excluded a woman on maternity leave from a course which was necessary for promotion equated to the loss of a chance of improved working conditions and thus less favourable treatment under Art 15 of Equal Tm Dir 2006/54.
- Provisions of Art 14(1)(c) and Art 15 Eq.Tm.Dir have direct effect.
- Implications - how to deal with fact of absence?

Bonuses and maternity leave

- No loss of entitlement to bonus for work already done, simply due to absence on maternity leave on date bonus paid.
- Employer must pay any pay rise / bonus when due, and not wait until woman gets back from leave.
- Scope to claim discrimination for lack of non-discretionary bonuses is limited to claims for a pro rata 'discretionary' bonus.
- No obligation to extend discretionary bonus to woman on maternity leave. Bonus = remuneration.



Employment law The Observer

One in seven women are
made redundant after
maternity leave

'Sad and shocking' poll reveals maternity
leave can mean demotion, stress or the sack

Redundancy and maternity leave

Maternity and Parental Leave Regulations (Northern Ireland) 1999

- No requirement to create a vacancy / role
- But must offer vacancies if:
 1. Suitable and appropriate
 2. Not substantially less favourable
 - Capacity
 - Location
 - Ts & Cs



See *Simpson v Endsleigh* [2011] ICR 7

Redundancy and maternity leave

Sefton Borough Council v Wainwright [2015] IRLR 90

- Breach of Reg 10 MAPLR 1999 does not necessarily equate to section 18 EqA discrimination
- Section 18 directed at showing less favourable treatment because of pregnancy or maternity leave
- Reg 10 gives special protection without having to show reason for treatment – intend to compensate for disadvantage of absence during redundancy process.

Recap on parental leave

Existing provisions

- Maternity leave, SMP, MA
- [Ordinary] Paternity leave: flat-rate level, co-parents too, not day-1 right – just 2 weeks (scope for increase post General Election may bring later change in NI?)
- Shared Parental Leave regime from April 2015.
- [Unpaid] Parental leave- from April 2015: 18 weeks unpaid leave per child up to 18th birthday.

Likelihood of genuine cultural change?

- *The Work and Families Bill* – in law from April 2015
- Leave without long-term career prospects being damaged?
- Prospect of early years childcare become more balanced?
- Likely take up of shared leave?



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