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Legal update ——— November 2017

Employment
Maternity protection and whether to enhance shared parental pay

According to a report published by the Women and Equalities Committee (WEC) on pregnancy and maternity discrimination last August the number of expectant and new mothers forced to leave their jobs has almost doubled since 2005. Meanwhile, another report published following research carried out by the Department of Business, Energy and Industrial Strategy (BEIS) and the Equality and Human Rights Commission (the EHRC) found that 77% of women reported negative experiences at work related to their pregnancy or maternity.

Although the report produced by the WEC made a number of recommendations, the Government, in its response, stated that it considered, on the whole, women's rights are adequately protected by existing law and decided not to adopt the majority of the recommendations. However, it did commit to working with the EHRC on a campaign 'Working Forward', which is designed to make British workplaces the best they can be for pregnant women and new mothers. It also stated that it would review the protections in place for those who are pregnant or returning from maternity leave in relation to redundancy.

Interestingly, the government is now being urged by Maternity Action, which has just published a report on the impact of unfair redundancies on pregnant women and new mothers, to act urgently on its commitment to review redundancy protection. The charity advocates the adoption of a German model which permits employers to make pregnant women and new mothers redundant only under specified circumstances, such as closure of the business. These protections apply throughout pregnancy, maternity leave and six months after return to work.

Meanwhile the Government has committed to commissioning further research on pregnancy and maternity discrimination to be concluded by 2020.

And now for a brief recap, when exactly is a woman protected from dismissal or detriment by reason of her pregnancy or her maternity leave?

The protected period

A woman is protected under the Equality Act 2010 from the time she becomes pregnant. This protected period ends:

- If she has the right to ordinary maternity leave (OML) and additional maternity leave (AML), at the end of the AML period or, if earlier, when she returns to work after the pregnancy.
- If she does not have the right to OML and AML, at the end of the period of two weeks (the compulsory maternity leave period) beginning with the end of the pregnancy.

In the UK the general position is that a woman will not benefit from statutory protection from either discrimination or dismissal by reason of her pregnancy until her employer is made aware that she is pregnant. However, a recent Advocate General Opinion suggests that a pregnant worker will qualify for protection before she has even informed her employer of her pregnancy.

Does the employer need to have been informed of the pregnancy?

Advocate General Sharpston has given an Opinion in the case of Porras Guisada v Bankia SA and others. In her view the Pregnant Workers Directive (PWD) should protect workers against dismissal from the moment they become pregnant, even before they have notified their employer of the pregnancy.

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Ms Porras Guisado was dismissed by Bankia SA, a Spanish bank, as part of a collective redundancy exercise. She was selected for redundancy as a result of her low score in the agreed assessment process. She was pregnant when she was dismissed but Bankia claimed to be unaware of this at the time of dismissal. She challenged her dismissal and some questions were referred to the European Court of Justice (ECJ) for a preliminary ruling. Bankia claimed that the PWD was not applicable to Ms Porras Guisado because she had not informed them that she was pregnant.

The PWD provides for a protected period from the beginning of pregnancy to the end of a worker's maternity leave, though in order to meet the definition of a "pregnant worker" the worker must have informed her employer of her pregnancy. The Advocate General held that the PWD could be interpreted as conferring protection from the beginning of the pregnancy, regardless of when the employer is informed. This was on the basis that at the very beginning of a pregnancy the worker herself will not know that she is pregnant and so cannot comply with the requirement to notify her employer.

According to the Advocate General, although an employer may unwittingly dismiss a pregnant worker whom they ought not to have dismissed, they would have the opportunity to rectify the damage (either via reinstatement or by reopening the dismissal procedure) once they were notified of the pregnancy. In order to be fair to the employer the dismissed employee would be under a duty not to delay unreasonably in notifying the employer of her pregnancy and making her claim.

It will be interesting to see what the ECJ has to say on the matter. If it follows the Advocate General's reasoning then employers will be faced with potential discrimination claims against which they will have little protection, other than hastily having to rectify their actions once they have been informed of the employee's (or ex-employee's) pregnancy. It would remain the case that an employer discussing an employee on the basis that she might be or might become pregnant (whether or not she is) would have committed an act of direct sex discrimination.

Shared parental pay

Another issue which is up in the air at the moment is whether or not a failure to enhance shared parental pay will amount to sex discrimination?

There is nothing in the Shared Parental Leave Regulations 2014, or in the ShPP (General) Regulations 2014 which entitles someone taking shared parental leave to enhanced shared parental pay or that requires employers to match enhanced maternity pay. The Government's guide, 'Employers technical guidance to shared parental leave and pay' states that it is up to the employer to top up statutory shared parental pay (ShPP) at a higher rate if it wishes, and that this topped up amount "may or may not be the same as the employer offers to mothers on maternity leave". It is left to the employer's discretion.

Interestingly, two relatively recent cases have come up with conflicting views on whether a failure to enhance shared parental pay will amount to discrimination. In Hextall v Chief Constable of Leicestershire Police the tribunal held that a police force's policy of giving a period of full pay to mothers on maternity leave, but paying only statutory ShPP to partners, was not discriminatory. By contrast in Ali v Capita Customer Management Limited the tribunal held that a man was entitled to compare himself with a women receiving enhanced maternity pay for the period following her two week compulsory maternity leave period and that the failure to enhance his ShPP amounted to direct sex discrimination.

Mr Ali's employer operated a maternity policy entitling female employees with 26 weeks' service the option of 14 weeks' enhanced maternity pay, followed by 25 weeks at the rate of statutory maternity pay. When Mr Ali's wife gave birth she was diagnosed with post-natal depression and was advised by her doctor that returning to work would assist her recovery. Mr Ali was informed that he was entitled to shared parental leave which would be paid in line with the statutory rate.

The tribunal held that Mr Ali could not compare himself to a woman who had given birth for the 2 week compulsory maternity leave period. However, it went on to find that he could compare himself to a woman who had taken leave to care for her child after the 2 week compulsory leave period, even though he hadn't given birth, for the purposes of claiming the further 12 weeks' pay to which such a woman would be entitled under the employer's maternity policy.

The employer sought to argue that the 14 week pay period (during which a woman was entitled to enhanced pay under the maternity policy) was the right period of

time for the woman to receive special treatment (in accordance with the PWD). The tribunal disagreed. It found that Mr Ali was best placed to perform the role of caring for the newborn baby given his wife's post-natal depression (she had been advised to return to work for her well-being).

The tribunal concluded that if the employer had considered any complaint "on a case by case basis they could have ensured that Mr Ali was treated consistently and fairly and in a non-discriminatory manner."

The decision in Ali has been appealed to the Employment Appeal Tribunal (EAT) and is due to be heard towards the end of December. The decision in Hextall has also been appealed and is due to be heard in January. It will be interesting to see, following the outcome of both these decisions, whether there are still conflicting views on the issue of whether or not it is discriminatory to fail to enhance ShPP.

Summary
Although currently a woman will not benefit from statutory protection from either discrimination or dismissal by reason of her pregnancy until her employer is made aware that she is pregnant, we need to wait for the ECJ's decision in Porras Guisada to see if this remains the case.

Meanwhile, the EAT will be separately considering two conflicting decisions on whether a failure to enhance ShPP in line with enhanced maternity pay amounts to discrimination.

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