

Background

Over a period of 20 years we have represented 100s of women who have suffered pregnancy/maternity discrimination. We stopped litigating because we knew, from experience, that it is not the solution. What women want is to be able to protect themselves from discrimination and if they are dismissed to leave with a negotiated settlement – not litigation. At YESS, our focus is on resolving workplace disputes without litigation. Most recently we have been working with Maternity Action in a joint pilot project funded by the EHRC advising women who are being treated badly at work during pregnancy or maternity.

The main points we would make from our experience are that:

- Women suffering maternity discrimination are not able to enforce their rights in the tribunal because they do not have the time, energy or money. Even before fees, only 3% of those suffering discrimination brought a claim. Better enforcement and removal of tribunal fees, while important, would not be the solution for women suffering discrimination.
- The key focus should be on preventative measures which stop women being dismissed or treated unfavourably so feel they are being forced out.

Proposals from YESS

- **Prohibiting dismissal during pregnancy, maternity leave and 4 months after return**

In Germany women are well protected from loss of employment due to dismissal - from the beginning of pregnancy until 4 months following childbirth (*Schutzfrist*) through a *Kündigungsverbot*, Dismissal Ban. Only in extremely rare exceptions are employers permitted to dismiss a pregnant employee during this time. We recommend that this be adopted here.

For further information about German provisions see

http://www.howtogermany.com/pages/maternity_protection.html

If this was adopted in the UK the exceptions could be defined, for example where the company is in severe financial difficulty leading to multiple redundancies or where there has been gross misconduct by the individual. It is necessary to extend protection beyond the maternity leave period as employers now commonly put an employee at risk of redundancy on her first day back from maternity leave (or within the first few weeks).

The alternative is that an employer can only dismiss the woman if they get prior authorization from a regulatory body, which could be ACAS.

At the very least, an employer should be obliged to contact ACAS before dismissing a pregnant woman or a woman on maternity leave, so that the employer understands their legal obligations. But the consequences of failing to apply to dismiss could be that compensation is increased in cases of an adverse tribunal finding. This would, at least, make the employer stop and think.

- **Regulation 10 should be expanded to the period of pregnancy 6-12 months after the end of maternity leave**

This is an alternative to (1) above. Reg 10 provides that an employee who is made redundant during maternity leave, is entitled to any existing suitable alternative work in preference to other employees, including those at risk of redundancy.

Employers who understand the law now make a woman redundant after her return so that Regulation 10 does not apply.

- **Higher rate of SMP subsidy**

One way of alleviating the extra (actual or perceived) 'burden' on SMEs would be to increase the % recovery rate of SMP from 103% to 110-115% which would cover the extra training costs for a locum and for a maternity returner. This could apply if the woman is still employed for a period after her return.

- **There should be an ACAS/EHRC Code of Practice setting out key issues with examples**

The current EHRC Code of Practice could be expanded to cover more examples of how employers should treat employees. This could be along the lines of the joint Guidance on handling redundancies when there are employees who are pregnant or on maternity leave. We also drafted FAQs for the EHRC on pregnancy/maternity discrimination for the EHRC website. These should be expanded to cover shared parental leave and disseminated more widely. Apparently the EHRC website is not well known or visited.

- **Advice and ADR**

There needs to be better access to affordable advice for both employers and employees. Disseminating information could be done by:

- Providing leaflets – with a separate section for employer and employee – at advice centres, health centres, hospitals (eg ante natal clinics);
- Videos at health centres and hospital explaining key maternity rights;

Employees need more advice about how to avoid being treated badly and what to do if they are. At YESS, we coach employees how to protect themselves (see attached leaflet) and if dismissed how to negotiate a better exit package. The reality is that employees do not want to litigate, because it is expensive, uncertain, stressful, time-consuming and often career suicide. Employers are also more willing to speak to us about possible disputes because we never litigate. However the threat of litigation does make

negotiations more even handed. And to be a real threat, there does need to be effective enforcement. Not only should ET fees be abolished, but a system of enforcement established free of charge to complement more accessible advice & so employees have somewhere to go which will act for them (& to which we can refer when negotiations do not work)

- **More flexible & paid Shared Parental Leave and a 'take it or leave' period for partners**

The take up of SPL by fathers is very low, probably because it is not paid but also because it is still not well known. There is higher take up in countries where the leave is on replacement pay and it is reserved for the father/partner.

- **Flexible working should be a Day 1 right**

It should be Day 1 right and there should be financial incentives for SMEs who offer flexible working, whether part-time, remote working, compressed hours etc.

We endorse the recommendation of the recent report on the gender pay gap by the Parliamentary Women and Equalities Committee that '[a]ll jobs *should be available to work flexibly unless an employer can demonstrate an immediate and continuing business case against doing so.*'

- **Reporting**

There needs to be a mechanism for recording when women leave employment while pregnancy or on maternity leave. Reporting mechanisms should be considered for all employers, similar to the gender pay gap.

We agree with the other proposal such as extending time limits for making a claim, reduction or waiving of fees, proper enforcement mechanisms for awards.

- **Enforcement**

Even if a woman is successful in her tribunal claim against her employer, whether she will be paid the monies awarded to her is uncertain. Anecdotally it is well known that many phoenix companies fail to pay the awards. Further, even companies which subsist often fail to pay. Although there is now a financial penalty payable if a company fails to pay the award the enforcement scheme is not known to many and is yet another legal hurdle for women to overcome at a time they can little afford it.

Conclusions

We suggest that research is carried out into how other countries protect women who are pregnant or on maternity leave, such as EU and OECD countries including Australia to ascertain whether any of measures which have been successful could be adopted in the UK.