Key employment rights afforded to women on maternity leave

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Employment Law News

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In celebration of International Women's Day, Senior Associate, Emily Plosker examines one of the key employment rights afforded to women on maternity leave and looks at proposals to improve the position of pregnant women and new mothers in the workplace.

In our practice we often hear women start their stories with “when I announced my pregnancy, I noticed…” or “when I returned from maternity leave…” or worse “I am on maternity leave and my role is being made redundant”.

In March 2016, the Department for Business, Innovation and Skills and the Equality and Human Rights Commission report into pregnancy and maternity discrimination certainly painted a bleak picture for women in the workplace. The report found that one in nine mothers reported being subjected to such poor treatment that they felt they had to leave their jobs, being singled out for redundancy or just being dismissed where other colleagues were not. The survey research suggests that the redundancy rate among mothers at some point during pregnancy, maternity leave or on return from maternity leave is considerably greater than the redundancy rate among female employees as a whole. When one scales up these findings and applies them to the UK, it could mean as many as 54,000 mothers are subjected to potentially discriminatory treatment at work each year. What is more depressing is that only 1% of victims take legal action. The survey research suggests that redundancy rate among mothers at some point during pregnancy, maternity leave or on return from maternity leave is considerably greater than the redundancy rate among female employees as a whole with 11% saying they felt forced to leave their job.

These stark statistics have only been exacerbated by the pandemic, where numerous pieces of research demonstrate the disproportionate impact it has had on women in the workplace across a variety of areas (for example a disproportionate number of women have been placed on furlough, made redundant and/or have had to reduce hours or take unpaid parental leave due to childcare commitments, which will impact the gender pay gap in years to come).

Announcing your pregnancy and preparing to go on maternity leave can be daunting experiences, particularly if your

workplace has a bad track record in its treatment of working parents. It is for this reason that there is protective legislation in place for pregnant women and those on maternity leave to make sure that their jobs are secure on return to work.

The current position under the Maternity and Parental Leave Regulations

The right which this article is going to focus on is Regulation 10 under the Maternity and Parental Leave etc. Regulations 1999 (or the MPL Regs for short).

Regulation 10 grants women on maternity leave additional protection in the event that their role is placed at risk of redundancy (however, this right does not apply before maternity leave starts or after it ends). More specifically, if an employee's role is put at risk of redundancy while on maternity leave, the employee is entitled to be offered "suitable alternative employment". This duty extends beyond merely offering the opportunity to apply for a role – the role must be offered unequivocally. Crucially, an employee on maternity leave is given priority ahead of other employees who have been put at risk of redundancy but are not on maternity leave – in essence she gets "first dibs."

What is suitable alternative employment?

For a role to be "suitable" it needs to be: (i) suitable and appropriate for the employee to do in the circumstances; and (ii) on terms which are not substantially less favourable. Both these requirements must be considered together rather than as a sequential check list.

A dispute often arises as to what is or isn't deemed "suitable", which sadly can be driven by whether the employer actually wants the employee on maternity leave to return to work.

The factors that are usually taken into account when deciding whether a position is “suitable” include the role itself, the employee’s experience, geographical location and whether it will increase travel time or childcare costs.

Whether a role is suitable is determined from the point of view of an objective employer – not from the employee’s perspective. However, in practical terms it is often difficult for employers to reach a fair conclusion unless they consult with the employee. It’s at this stage (assuming that the employee on maternity leave has been made aware of the redundancy and given an opportunity to engage in the process – which is not always the case) that an employee will need to consider how flexible they are to other options and make the employer aware of this. Doing this may make it more difficult for the employer to deem a job unsuitable. Equally, no one wants to be shunted into a role which really is unsuitable and so it’s important to be as vocal as possible if the role proposed is not, in fact, suitable.

Failure to offer suitable alternative employment

If an employer fails to offer suitable alternative employment (either entirely or offers it to an employee who is not on maternity leave) which results in the employee being made redundant, the dismissal will be automatically unfair.

If, however, there is no suitable alternative employment available the employee’s employment (and maternity leave) will come to an end by reason of redundancy. The employer is still required to consult with the employee about the redundancy and this may include collective consultation depending on the numbers of redundancies involved. The employer is also required to give notice (or pay in lieu of notice).

It is worth remembering that an employer’s duty to offer suitable alternative employment continues until such a time as the dismissal takes effect. As such, even when an employee on

maternity leave is given notice of termination by reason of redundancy, if a suitable alternative vacancy becomes available during her notice period, the “first dibs” rule afforded by Regulation 10 continues to apply.

Even if a suitable alternative vacancy is not available, an employee may still have a separate right of action for ordinary unfair dismissal or discrimination on the grounds of sex/maternity/pregnancy. This might arise where the redundancy is a sham, if a fair procedure was not followed (for example, there was no consultation or the selection exercise was not objective), or the decision to dismiss was linked to the employee’s pregnancy, maternity leave or sex. With this in mind, it is vital that an employee on maternity leave engages with the consultation process and interrogates the employer’s decisions as much as possible – not an easy feat when sleep-deprived and juggling a baby.

Proposals for the future

There are concerns that some employers wait for women to return from maternity leave before announcing redundancies in order to avoid the Regulation 10 rights from being triggered. It is for this reason that in January 2019, the Department for Business, Energy and Industrial Strategy consulted about extending the protection afforded under Regulation 10 to apply from the point the employee **notifies** the employer that she is pregnant until 6 months after maternity leave has ended. The Government has since committed to introduce these changes, however, to date, no legislation has been brought forward.

In the meantime, Maria Miller MP proposed the Pregnancy and Maternity Redundancy Protection Bill in May 2019, with far more radical suggested solutions. The Bill failed to progress in May 2019 and was subsequently reintroduced in July 2020. It is due its second reading on 12 March 2021 – progress has certainly been slow.

One of the proposed changes is that it will be **automatically** unfair for an employer to dismiss an employee by reason of redundancy if the dismissal occurs either during pregnancy, maternity leave or up to 6 months on return from maternity (the model adopted in Germany). This would not apply where the redundancy amounts to a business closure or a cessation of work in that area.

It is likely that the German model will be viewed as too radical, with the Government sticking to its original plan of extending Regulation 10 protection, which many argue, does not go far enough.

Concerns have also been expressed that introducing an automatic unfair dismissal right for pregnant women and maternity leavers/returners, would elevate maternity leave above other forms of parental leave. A simple solution would be to extend the protection to all forms of parental leave. But perhaps a more pragmatic approach would be to look at the statistics which identify consistent unfair treatment experienced by pregnant women and those on or returning from maternity leave. It cannot be that legislation should not change on the (unfounded) basis that it may promote one type of parental protection over another – progress is never made if we stick to the status quo. Indeed, whilst this proposed legislation may, on the face of it, only protect pregnant women and those on or returning from maternity leave, if that protection subsequently assists in altering stereotypical and outdated perceptions of women in the workplace, then that can only be a good thing for everyone.

If you would like to discuss how your organisation can support staff on maternity leave, please contact Emily Plosker (emilyplosker@bdbf.co.uk) or your usual BDBF contact.

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