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Power Hour July 2022

Maternity rights in redundancy, family, pregnancy related rights and menopause

7th July 2022

Topics

- Maternity Rights
- Rights of new mothers in the workplace
- Pregnancy loss
- Rights during IVF
- Menopause
- Menstrual Leave

Maternity Rights

Maternity Rights: Current Position

Entitlement to Leave

- 26 weeks “*Ordinary Maternity Leave*” (OML)
- 26 weeks “*Additional Maternity Leave*” (AML)

Return to Previous Job

- OML – “same job in which she was employed before her absence”
Regulation 18(1) MPL Regs
- AML - Same job or if not “reasonably practicable”, a different job that is suitable and appropriate, on no less favourable terms

Maternity Rights: Current Position

Entitlement to Statutory Maternity Pay:

- 39 Weeks' pay
- Six weeks at 90% of average pay over previous eight weeks
- 33 weeks of 90% of average pay subject to cap of £156.66

SMP and Dismissal

- Right to SMP after dismissal
- Rights if changing employer.
- PILON

Enhanced Maternity Pay

- Conditions for enhanced maternity pay
- Repayment & Clawback must be limited to enhanced elements

77% of mothers said they had been subject to a negative and possibly discriminatory experience during pregnancy, maternity leave, or after their return from maternity leave

**Equality and Human Rights
Commission (EHRC) Survey (June
2017)**



**Equality and
Human Rights
Commission**

A protected characteristic

Equality Act 2010 - Section 18

It is unlawful for an employer to **discriminate** by treating a woman **unfavourably** because:

- Of her pregnancy during the protected period (section 18(2)(a);
 - Of an illness she has suffered as a result of her pregnancy during the protected period (section 18(2)(b));
 - She is on compulsory maternity leave (section 18(3));
 - She is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave (section 18(4))
- No comparator
 - Overlap with direct discrimination

The protected period

- Section 18(6) Equality Act 2010
- Starts when a woman's pregnancy begins and ends:
 - If she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; or
 - If she does not have that right, at the end of the period of two weeks beginning with the end of the pregnancy.

Maternity & Redundancy

- Must offer suitable alternatives roles within organisation
- Suitable in circumstances: capacity, place of work, other T&C's
- Applicable to selection not pooling
- Sex discrimination claims by men:- section 13(6)(b) EqA
- Permitted positive discrimination

(1) *This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable **by reason of redundancy** for her employer to continue to employ her under her existing contract of employment.*

(2) *Where there is a **suitable available vacancy**, the **employee is entitled to be offered** (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and **takes effect immediately on the ending of her employment under the previous contract**).*

(3) *The new contract of employment must be such that—*

*(a) the work to be done under it is of a kind which is **both suitable in relation to the employee and appropriate for her to do in the circumstances**, and*

*(b) its provisions as to the capacity and place in which she is to be employed, and as to the **other terms and conditions of her employment**, are not substantially less favourable to her than if she had continued to be employed under the previous contract.*

Regulation 10 The
Maternity and Parental
Leave etc. Regulation
1999

Maternity Right: Proposal & Reform

- Extend the period of protection under Regulation 10:
 - Employee informing employer of pregnancy in writing
 - Six months after return from maternity leave (or adoption leave)
- Reform is still considered timescale still unknown

Case study

- Serena is a manager within your organisation she is due to go on maternity leave and has recruited Rafa to cover her maternity leave.
- Serena returns to work after 12 months maternity leave. Your organisation has decided to retain Rafa.
- Shortly thereafter a redundancy situation arises and Rafa and Serena are both at risk.
- There is one management role available which would be suitable alternative employment for both Rafa and Serena.
 - What are your current obligations to Serena?
 - How will these change if the proposed reforms come into force?

Rights of New Mothers in the Workplace



Compulsory Leave

- Two weeks from day of childbirth (section 72(1) ERA & Regulation 8 MPL Regulations)
- Four Weeks for factory workers
- Criminal Offence if you allow employee to work

Flexible Working Request

- Employees only
- 26 weeks or more of service
- One request per 12 month
- Refusal for prescribed reason (Section 80G(1)(b) ERA 1996)

New Mothers in the Workplace: Rest & Breastfeeding

- No statutory right paid breaks or facilities to breastfeed, express milk or store milk.
- Health and Safety
 - **The Law:** Suitable risk assessment. Consider providing suitable facilities
 - **Health and Safety Executive Guidance**
 - Private, healthy, safe environment for breastfeeding & storage of milk
 - Somewhere to lie down if necessary
 - Toilets are not a suitable place for breast feeding
- ACAS Guidance “*Accommodating breastfeeding employees in the workplace*”
- McFarlane & Ambacher v EasyJet Airline Co Ltd 2016
 - Indirect sex discrimination
 - Right to temporary suitable alternative work

Pregnancy Loss

Pregnancy Loss

Miscarriages:

- Loss during first 23 weeks of pregnancy
- Estimated 1 in 8 pregnancies. (250,000 a year)
- No statutory right to bereavement leave

Still births and Neonatal death:

- Loss after 24 weeks
- 1 in 200 births
- Right to statutory bereavement leave & pay
- Right to maternity leave and pay

Pregnancy Loss: Parental Bereavement Leave

Existed since April
2020:

Death of a child
before they turn
18

Or a stillbirth
after 24 weeks of
pregnancy

Day one right for
employees

Two weeks' paid
leave

If on other leave,
start after

£156.66 a week
or 90% of average
weekly earning

Pregnancy Loss: Reform



England & Wales:

- Miscarriage Leave Bill 2021-2022
- Bereavement Leave and Pay (Stillborn and miscarried Babies) Bill 2021 – 2022
- March 2022 debate: No Government proposal

Scotland:

- Proposal for public sector employees to receive three days of paid leave

Northern Ireland:

- Two week's paid leave from April 2026

IVF and Fertility Treatment

Related Employment Rights

IVF and Fertility Treatment

NHS Stats:

- 1 in 7 couples have trouble conceiving
- 16% do not conceive within first year
- 53,000 people underwent IVF in 2019

Medical side effects of treatment include:

- Hot flushes
- Feeling down or irritable
- Headaches
- Restlessness
- Ovarian hyperstimulation syndrome

Disability? Sick leave? Medical Appointments?

- *"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a **substantial and long-term adverse effect** on her ability to **carry out normal day-to-day activities**".*

IVF and Fertility Treatment

- No statutory right to leave
- Outside scope of antenatal appointments (ss 55/56 ERA 1996)
- EHRC Code:

*“It is good practice for employers to **treat sympathetically** any request for time off for IVF or other fertility treatment, and **consider adopting a procedure** to cover this situation. This could include allowing women to take annual leave or unpaid leave when receiving treatment and designating a member of staff whom they can inform on a **confidential basis** that that they are undergoing treatment.”* **Para 17.29 EHRC Code**

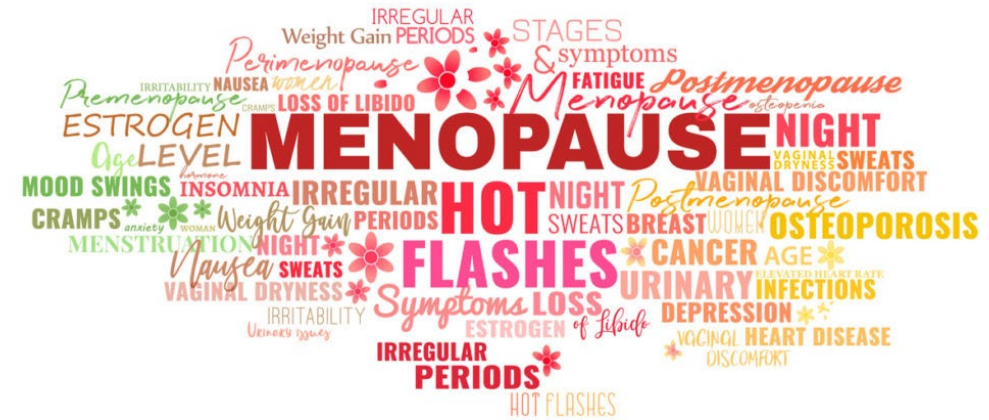
IVF and Fertility Treatment

- Sex Discrimination:
 - Following follicular puncture (collection of the ova)
 - *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG C-506/06 [2008] IRLR 387 (ECJ)*
 - *Sahota v Home Office and Pipkin [2010] ICR 772 (EAT)*
- Pregnancy Discrimination & “*Protected Period*”
 - Starts at point embryo is implanted and ends two weeks following point embryo implantation is unsuccessful
 - Unlawful to discriminate during protected period because of IVF treatment:

IVF and Fertility Treatment: Employment Law Reform

- Fertility Treatment (Employment Rights) Bill 2022
- Employer announcements:
 - Kellogg's October 2021
 - Aviva PLC
 - NHS England

Menopause



Research Studies

- The Women and Equalities Committee
- The Fawcett Society
- Office of National Statistics

31% of women have missed work due to symptoms

20% were unclear who they should talk to about adjustments

370,000 women between 50-64 have left or considered leaving their career due to symptoms

14 million working days per year = £1.88 billion lost in productivity

Menopause

Current Legal Position

- No paid leave
- No blanket statutory protection from discrimination
- Health & Safety at work Act 1974

Potentially a disability within the EqA 2010

- Davies v Scottish Courts and Tribunal Service
- Ms A McMahon v Rothwell & Evans LLP and R Pundick: 2410998/2019

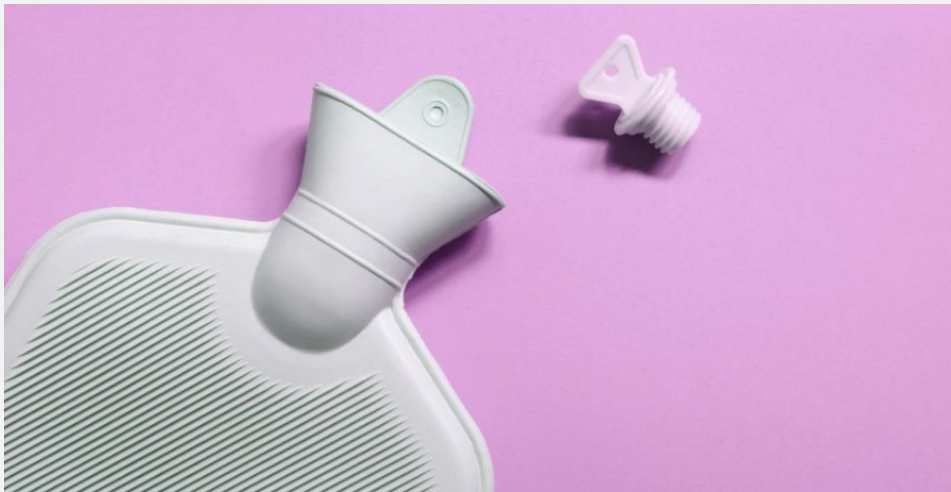
Uniform requirement, Indirect sex discrimination

- Sokolova v Humdinger Limited ET/1805866/2020

What can an employer do?

- Menopause Policy;
- Adjustments;
- Education and training;
- Additional breaks; and
- Risk assessments (consider environmental changes, desk fans, adequate ventilation, temperature control)

Menstrual Leave



Disability Discrimination

- Related Health Conditions and disability:
- Endometriosis
- Fibroids
- Pelvic Inflammatory disease

Duty to Make Reasonable Adjustments

Discrimination arising from disability

Health and Safety at Work Act 1974

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Thank You

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