

# Pregnancy and maternity Discrimination



## Pregnancy and maternity discrimination

### A separate provision

The Equality Act 2010 has separate provisions with regard to discrimination against a woman which occurs because of her pregnancy or in connection with her maternity leave.

### Discrimination because of pregnancy or pregnancy-related illness

The provision regarding pregnancy and maternity discrimination defines a period called the 'protected period'. That period:

- o begins when the relevant woman's pregnancy begins, and
- o ends:
  - at the end of the additional maternity leave period, or when she returns to work after the pregnancy (if that is earlier), in cases where the woman has the right to ordinary and additional maternity leave, or
  - two weeks after the end of the pregnancy, if she does **not** have the right to ordinary and additional maternity leave

A person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably:

- o because of the pregnancy, or
- o because of illness suffered by her as a result of it

Where a decision is taken during the protected period to treat a woman unfavourably because of her pregnancy or related illness, but the treatment occurs after the end of the protected period, it will be deemed to have occurred during the protected period, and hence will constitute discrimination.

### Discrimination because of maternity leave

A person discriminates against a woman if he treats her unfavourably because she is on compulsory maternity leave.

A person discriminates against a woman if he treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

### No overlap with direct discrimination protection

The woman must bring her claim under section 18, and may not also claim direct discrimination under section 13, if the treatment which gives rise to her complaint:

- o is in the protected period in relation to her, and occurs because of her pregnancy, or because of illness suffered by her as a result of it, or
- o occurs because she is on compulsory maternity leave, or because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave

### No comparator required

Note that there is no requirement to consider any form of comparator in order to establish this sort of discrimination.

## Treating someone 'unfavourably'

There is as yet no caselaw discussing what types of behaviour would constitute 'unfavourable' treatment.

It seems clear that it is not the same thing as treating someone 'less favourably' (as is required for direct discrimination), because 'less favourable' invites a comparison, and the intention in drafting this provision was to remove the requirement for a comparator.

What is not clear is whether 'unfavourable' treatment would encompass situations where someone fails, in effect, to treat a woman **more** favourably than he would treat others who are not pregnant, or not on maternity leave etc. In some circumstances, one might expect, for example, an employer to accord a pregnant worker special (superior) treatment because of her pregnancy; it is unclear whether or not a failure to accord that special treatment would amount to 'unfavourable' treatment.

## Potential problems with the pregnancy and maternity discrimination provision

Indeed, the law sometimes creates a positive obligation on an employer to do certain things, which it would not have to do if the worker were not pregnant.

For instance, where there are women of child-bearing age in a workforce, and the nature of the work is such that it might cause risks to the health and safety of a pregnant worker, the employer is obliged to do a risk assessment, and, in certain circumstances, must alter the working conditions or hours of work of a pregnant worker to avoid such risks.

References: Management of Health and Safety at Work Regulations 1999, SI 1999/3242, regs 16, 18

Taking into account those legal obligations, consider this example:

- o an employer of a pregnant woman fails to carry out any risk assessment. The woman makes a claim of discrimination on grounds of pregnancy
- o the employer, in its defence, argues that it never under any circumstances carries out any risk assessments, irrespective of whether some of its relevant workers are pregnant
- o the pregnancy and maternity discrimination provision under the Equality Act 2010 requires the employer not to treat a woman 'unfavourably' because of her pregnancy  
References: EqA 2010, s 18
- o problems may arise when applying this wording to examples, such as this risk assessment obligation, where there is a positive duty on the employer to treat pregnant workers **more** favourably than others:
  - o it is perhaps an unusual choice of words to describe a failure to accord special treatment to a pregnant employee, which treatment would not be accorded to non-pregnant workers, as treating her 'unfavourably'
  - o rather, it is a failure to treat her *more* favourably, in the way that the law requires, which is, perhaps, not the same thing

In *Johal*, the EAT considered the meaning of section 3A of the Sex Discrimination Act 1975, which is predecessor of section 18 of the Equality Act 2010. They held, in the light of European and domestic caselaw, that section 3A should be interpreted in such a way that the proper test should:

References: *Johal v Commission for Equality and Human Rights* (UKEAT/0541/09/DA)

SDA 1975, s 3A

- o avoid any sort of comparison, and
- o simply pose the question 'Why was the claimant treated in the manner complained of?'

The relevant phrase in s 3A of the SDA 1975 reads 'on the ground of the woman's pregnancy, the person treats her less favourably'. This contrasts with s 18 of the Equality Act 2010, which reads 'treats her

unfavourably... because of [her] pregnancy'. It is therefore debatable whether and to what extent the reasoning in *Johal* might apply to s 18 of the Equality Act 2010.

However, on the assumption that that reasoning does apply, if one applies the *Johal* test to the risk assessment example discussed above then, on posing the question 'why did the employer fail to carry out a risk assessment in relation to the claimant's work?':

- o the answer will not be 'because the claimant was pregnant'
- o rather, the answer will be 'because the employer never carries out risk assessments'
- o hence, it would seem, on that basis, that this example claimant's case would fail

### **No associative discrimination or discrimination on the basis of perception**

This provision expressly relates to treatment of a woman who is herself pregnant, or is herself on maternity leave etc. Hence, unlike direct discrimination, there is no possibility of associative discrimination claims being made under it. This provision also expressly requires that the woman relying on its protection is in fact pregnant. Hence, unlike direct discrimination, there is no possibility of claims of discrimination on the basis of perception being made under it.

### **Meaning of 'because of'**

The pregnancy and maternity discrimination provision requires the unfavourable treatment to have occurred 'because of' pregnancy, maternity leave etc. This is something it has in common with the direct discrimination provision, which requires that the less favourable treatment be done 'because of' a protected characteristics (sex, race etc).

### **Relationship with pregnancy and maternity equality of terms provisions**

The pregnancy and maternity equality of terms provisions operate only in relation to employees, and those holding a personal or public office.

In addition, employees and holders of personal and public offices are protected against 'discrimination' as to the terms of their employment or the terms on which they hold their office. The word 'discrimination' in this context covers many different types of prohibited conduct.

As regards terms of employment (or terms on which an office is held) which relate to **pay**, an employee or office holder is not entitled to bring a claim, in relation to the effect of that term, alleging discrimination with regard to the protected characteristic of pregnancy or maternity. This restriction applies whether or not a maternity clause or rule would operate in relation to that term.

Equality Act (Amendment) Order 2010, SI 2010/2622, Art 2

The purpose of this restriction is to ensure that where contractual terms relating to pay adversely affect employees or office holders in relation to pregnancy or maternity, the only potential route of legal redress will be an equality of terms claim, with no possibility of a prohibited conduct discrimination claim also arising in relation to the same facts and circumstances.

Note that this restriction does not apply in relation to pay which is non-contractual. Hence, where there is discrimination with regard to the protected characteristic of pregnancy or maternity in relation to pay to which there is no contractual right:

- o a prohibited conduct claim may still be brought by an affected office holder
- o in some circumstances, a prohibited conduct claim may still be brought by an affected employee. Employees and applicants for employment are more limited in the claims they can bring in this regard, on account of other separate special exceptions which restrict discrimination claims by them in relation to non-contractual payments.

## Non-contractual payments: women on maternity leave who are in or seeking employment

The Act provides that it is not discrimination, so far as relating to pregnancy and maternity, to deprive a woman employee, or a woman applying for employment, who is on maternity leave of 'any benefit from the terms of her employment relating to pay' (as defined, see below). This accords with European case law.

Gillespie v Northern Health and Social Services Board [1996] IRLR 214

The starting point in defining what counts as 'pay' for the purposes of this exception is that it must be benefits:

- o that consist of the payment of money to an employee by way of wages or salary, and
  - o that are not benefits whose provision is regulated by the woman's contract of employment, apprenticeship or other contract to do work personally (ie the benefit must be non-contractual)
- References: EqA 2010, Sch 9 para 17(4)

However, the following are excluded from the definition of 'pay' in this context, and so the exception does not apply in relation to any of them, with the result that depriving a woman employee (or applicant for employment) of any of them may provide the foundation for a discrimination claim:

References: EqA 2010, Sch 9 para 17(2)

- o maternity-related pay, ie pay to which a woman is entitled:
  - as a result of being pregnant, or
  - in respect of times when she is on maternity leave
- o maternity-related pay that is increase-related, ie that is calculated by reference to increases in pay that the woman would have received had she not been on maternity leave
- o pay in respect of times when she is not on maternity leave, and
- o increase-related pay (ie that is calculated by reference to increases in pay that the woman would have received had she not been on maternity leave) in respect of times when she is not on maternity leave, and
- o pay by way of bonus in respect of times when she is on compulsory maternity leave

These exceptions accord with European case law.

Gillespie v Northern Health and Social Services Board [1996] IRLR 214

Alabaster v Woolwich [2004] IRLR 486

Furthermore, in this context, 'terms of her employment' is defined in the Equality Act 2010 as 'terms of her employment that are not in her contract of employment, her contract of apprenticeship or her contract to do work personally' and so are limited to non-contractual terms.

It follows that this exception only prevents discrimination claims by women employees, or women applying for employment, who are on maternity leave, which fall into rather a limited category. For such a discrimination claim to be rendered impermissible by this exception, it must relate to a benefit that:

- o consists of the payment of money to an employee by way of wages or salary, and
- o is **not** a benefit whose provision is regulated by the woman's contract of employment, apprenticeship or other contract to do work personally (ie it must be non-contractual), and
- o does not fall into any of the exclusions from the definition of 'pay' in this context (listed above)

The effect of these provisions is to ensure that:

- o if a woman employee (or applicant for employment) on maternity leave is deprived of any of the elements of non-contractual pay referred to above, she may seek redress under the prohibited conduct provisions of the Equality Act 2010.
- o if the treatment relates to elements of pay that are contractual, she should seek redress under the equality of terms provisions of the Act instead.

### **Workplace assessments regarding risks that affect new or expectant mothers, or their babies**

As mentioned above, an employer must undertake an assessment of the risks (by reason of their condition) to the health and safety of new or expectant mothers, or to that of their babies, from any processes or working conditions, or physical, biological or chemical agents, where:

- o the persons working for them include women of child-bearing age, and
- o the work being done in the employer's undertaking includes activities which could involve risks of that nature

Under the pre-Equality Act 2010 law, the case of *Hardman* held that where the employer was under a duty to carry out such an assessment but fails to do so, that would amount to direct sex discrimination against any new or expectant mother in the workforce. However:

References: *Hardman v Mallon t/a Orchard Lodge Nursing Home* [2002] IRLR 516

- o that case predates the 1 October 2005 amendments to the Sex Discrimination Act 1975 which introduced the specific provision (section 3A) regarding discrimination on the ground of pregnancy or maternity leave, and  
References: SDA 1975, s 3A
- o the direct discrimination provision and the pregnancy and maternity discrimination provision of the Equality Act 2010 are mutually exclusive in their application (as noted above), and on the facts of *Hardman*, only the pregnancy and maternity discrimination provision might apply, which is quite different in its wording from the direct sex discrimination provision under the Sex Discrimination Act 1975
- o the pregnancy and maternity discrimination provision of the Equality Act 2010 requires 'unfavourable' treatment and, as noted above, there is as yet no caselaw discussing what types of behaviour would constitute 'unfavourable' treatment

Hence it is unclear whether or not the facts of *Hardman* would now give rise to a breach of the pregnancy and maternity discrimination provision of the Equality Act 2010.