



Work and Families

Maternity Leave

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Introduction

In February 2005 the Department of Trade and Industry (DTI) issued a consultation paper on a range of proposals to help give workers more choice about how they balance their work and family life. The consultation led to the Work and Families Act 2006 (the "Act"), which received Royal Assent on 21 June 2006. The Act enables the Government to issue regulations that change the law on:

- maternity leave;
- adoption leave;
- paternity leave;
- parental leave; and
- the right to request flexible working.

The existing rights of employees to time off for the care of dependents are not changed by the Act.

Regulations which impact on maternity leave have been issued under the Act and came into force on 1 October 2006.¹ They apply to all employees whose expected week of childbirth is on or after 1 April 2007. They amend the existing regulations concerning maternity leave.²

This Guidance note provides information about the entitlement of women to maternity leave under the new regime.

Ante Natal Care

All pregnant employees are entitled to time off to keep appointments for ante natal care made on the advice of a doctor, midwife or health visitor.

Except in the case of the first appointment, the employee must be prepared to show her employer an appointment card or other document showing an appointment has been made.

¹ The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006 and The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 SI No. 2379

² The Social Security (Overlapping Benefits) Regulations 1979 The Statutory Maternity Pay (General) Regulations 1986 The Social Security (Maternity Allowance) Regulations 1997

The employee should be paid at her normal hourly rate during this time off and is protected from being dismissed as a result of asserting the right to take time off.

Any detrimental treatment of pregnant employees is likely to amount to sex discrimination. This can cause employers some problems when dealing with pregnant employees who suffer from pregnancy related-illness. Advice should be sought in difficult situations.

One legal question about the treatment of women who suffer from a pregnancy related illness has been answered recently with the case of *North Western Health Board v McKenna*.³ Most employers will be breathing a sigh of relief at the ECJ's decision in this case. The ECJ ruled that it is not contrary to EU law for a sick pay scheme to treat women who are off work with a pregnancy related illness in the same way as employees with an illness that is unrelated to pregnancy. Employers can count pregnancy related absences against sick leave entitlement and can reduce the pay of a pregnant woman off work ill, provided she is treated in the same way as male employees taking sick leave and so long as the level of pay is not so low as to undermine the objective of protecting pregnant workers.

There may also be circumstances where an employer will be obliged to suspend a pregnant employee on full pay where a significant risk exists of damage to the employee or her child. In these circumstances, the employer is required to consider whether or not it is able to offer the employee suitable alternative work, before placing the employee on suspension. If this is the case, and providing the alternative work is genuinely suitable, the employee is obliged to accept it.

This issues was considered in the case of *New Southern Railway v Quinn*.⁴ In this case the Claimant worked as a Station Manager Support Clerk. She accepted a promotion as a Duty Station Manager on a trial basis, but then informed her employer that she was pregnant. A risk assessment was carried out into the Station Manager role which highlighted some high and medium risks. As a result the Claimant was informed that she could not continue in this role and had to return to her original role, which resulted in a significant reduction in salary.

The Claimant complained to the Employment Tribunal which held that the risks were small and that the Managers had jumped to a conclusion that the Claimant could not continue as a Manager. The employers unsuccessfully sought to appeal a finding that this amounted to sex discrimination, constructive unfair dismissal and unlawful deductions from pay by contending that the transfer amounted to a suspension on maternity grounds.

³ [2005] IRLR 895

⁴ [2006] IRLR 266

The EAT in reaching its decision had to consider the construction of regulation 16 of the Management of Health & Safety at Work Regulations 1999 and the term therein “avoid the risk”. The EAT held that this was not an absolute term and it could not mean the complete avoidance of all risks. Instead it meant reducing the risk to its lowest acceptable level. They indicated that implementing regulation 16 involved the restriction on the right of a woman to carry out her ordinary job and in order to do that there must be a balancing exercise. They went on to indicate that it was necessary for an employer to show that Health & Safety reasons meant that it was necessary, effectively to behave in a discriminatory way. The EAT’s construction recognises that legislation which is designed to assist pregnant women should not be used to place them at a disadvantage.

Maternity Leave Framework

There are three types of maternity leave:

- compulsory maternity leave;
- ordinary maternity leave (“OML”); and
- additional maternity leave (AML).

Compulsory Maternity Leave

For health and safety reasons, all employees must take two weeks compulsory maternity leave beginning on the day following the day of childbirth. An employer who permits a woman to work during these two weeks is guilty of a criminal offence and potentially liable on summary conviction to a fine.

The two weeks run concurrently with ordinary maternity leave. Other health and safety regulations provide for longer periods of compulsory maternity leave for certain types of occupation where there is considered to be greater risk.

Ordinary Maternity Leave (“OML”)

OML lasts for 26 weeks.

To qualify for OML, an employee is required to give her employer notification, as set out below. OML usually therefore begins on the date the employee includes in her notification, which can be any date from the beginning of the 11th week before the expected week of childbirth (“EWC”) up to the date of childbirth.

OML is deemed to start automatically where:

- a pregnant woman is absent from work due to a pregnancy related illness at any time in the 4 weeks before her EWC; or
- if the woman has not started her leave and therefore gives birth while she is still working (although hopefully not actually in the workplace!), OML begins on the date of the childbirth

Additional Maternity Leave ("AML")

AML is for a period of 26 weeks beginning straight after the end of OML.

Previously, women needed to have worked for their employer for a certain length of time in order to qualify for AML. This requirement has now been removed and women who qualify for OML (any woman who notifies their employer as set out below) will automatically qualify for AML. Effectively this entitles women to a year off work on maternity leave (i.e. 26 weeks OML followed by 26 weeks AML).

Notification to be Eligible for Leave

Normal Situations

A woman must notify her employer, of the following:-

- that she is pregnant;
- the date of her expected week of childbirth; and
- the date on which she intends her OML to start - as stated above this can be any date from the beginning of the 11th week before her EWC.

The notification must be given no later than the end of the 15th week before the woman's EWC or, if that is not reasonably practicable, as soon as is reasonably practicable thereafter.

The above notification must be in writing if the employer so requests. The woman's employer can also request that she produces for inspection a certificate from a registered medical practitioner or midwife confirming her pregnancy and her expected week of childbirth.

Providing this notification is given the woman will be entitled to OML and AML.

After giving her initial notification, a woman will be entitled to change her mind regarding the start date of her maternity leave, providing she gives notice no later than 28 days before the earlier of the original date notified or the proposed new start date.

To help employers, the Government has published model letters for notification and response purposes which cover all the information legally required to be given by employee and employer in relation to maternity leave.

Unusual Situations

As stated above, if an employee is unable to attend work wholly or partly because of pregnancy at any time after the 4th week before her EWC, her OML will be deemed to begin automatically on the first day of such absence. In this case, the employee is required to notify her employer, as soon as is reasonably practicable, that the reason for her absence is pregnancy-related.

Where an employee has not commenced maternity leave before childbirth occurs, her OML will be deemed to begin automatically on the day of childbirth. In this case, the employee must notify her employer as soon as is reasonably practicable that she has given birth.

Statutory Maternity Pay

Previously OML could start on any day of the week but the statutory maternity pay (SMP) and maternity allowance (MA) periods were measured in complete weeks from Sunday to Saturday, starting on the Sunday after the employee stopped working. The new regulations remove this anomaly and provide for the SMP or MA period to start on any day of the week concurrently with OML.

The SMP and MA periods now last 39 weeks. This is an extension from the previous 26 weeks. The Government is committed to further increasing this to 52 weeks in the future.

Treatment of Women During Maternity Leave

OML

During OML, an employee has a statutory right to continue to benefit from the terms and conditions of employment which would have applied to her had she been at work, with the exception of her right to remuneration. The term “remuneration” refers to sums payable by way of wages or salary.

The Government’s guidance gives the following examples of contractual benefits which an employee should receive whilst on maternity leave:-

- participation in share schemes
- reimbursement of professional subscriptions
- the use of a company car or mobile phone (unless provided for business use only)
- health club membership

The Government’s guidance also makes it clear that on return from OML, the employee should be entitled to any general improvements to the rate of pay which may have been introduced for her grade or class of work while she has been away, and that her OML will count towards her continuity of service for the purpose of qualifying for statutory employment rights and should count when assessing seniority, pension rights and other personal length-of-service payments under her contract.

AML

During additional leave, the employee’s contract of employment subsists, albeit that only certain terms and conditions, as set out below, apply.

Employer’s Obligations

The employee is entitled to benefit from her employer’s implied obligation to her of trust and confidence.

The employee is entitled to receive whatever period of notice her contract provides for if her employment is terminated.

The employee is entitled to any contractual rights to compensation if she is made redundant.

Employee's Obligations

The employee is bound by her implied obligation to her employer of good faith.

The employee must give her employer the notice provided for by her contract of employment if she is terminating her employment

The employee is bound by any terms in her contract preventing her:

- disclosing confidential information
- accepting of gifts or other benefits
- participating in any other business

Both parties

Any terms and conditions in the contract of employment relating to disciplinary or grievance procedures will continue to apply.

The Government's guidance makes it clear that on return from AML, the employee should be entitled to any general improvements to the rate of pay which may have been introduced for her grade or class of work while she has been away. The period of AML will count towards her continuity of service for the purpose of qualifying for statutory employment rights. However in the case of assessing seniority, pension rights and other personal length-of-service payments under her contract, it need not count.

Although there is no statutory right to be paid during maternity leave, employees who qualify are entitled to receive either SMP or Maternity Allowance.

Annual Leave

The entitlement to annual leave under the Working Time Regulations 1998 continues to accrue throughout OML and AML. Any additional contractual entitlement will only accrue during OML.

Redundancy

In all redundancy situations, employers are under a duty to consider whether there is any alternative employment for the employees being made redundant. Women who are on maternity leave however, should be given priority and must be offered any suitable alternative vacancies which may exist.

Keeping in Touch

The new regulations enable an employee on maternity leave to agree with her employer to work for up to 10 days during the statutory leave period (i.e. OML and AML) ("SML") without bringing that period to an end as a result of carrying out the work. These are known as "Keeping in Touch Days" and they prevent the employee from losing any SMP.

The work may include training or any other activity undertaken to assist the employee in keeping in touch with the workplace. Any such work must be by agreement between the parties and there is no right for an employer to demand that an employee undertake any such work, nor for an employee to do such work. Employees are protected from suffering a detriment for undertaking, considering to undertake or refusing to undertake work during maternity leave and a dismissal for any of these reasons would be automatically unfair.

Any work carried out on any day shall constitute a day's work. Accordingly, if a few hours work is done on a day this will count as a whole day's work. As the purpose of the measure is to allow employees to do some work under their contract of service, the Government feels that employers should pay their employees for work done on Keeping in Touch days, although there are no statutory rules for how this should be calculated.

Reasonable Contact

The regulations also make provision for there to be reasonable contact between the employer and employee on maternity leave, for example to discuss an employee's return to work. Such reasonable contact will not bring the SML period to an end.

Case Law

A couple of recent cases, which have considered the treatment of women during maternity leave are set out below.

*Hoyland v ASDA Stores Limited*⁵

⁵ [2005] IRLR 438

The facts of this case are as follows: -

During 2002 Ms Hoyland was absent for 183 days, of which 18 weeks were OML and 8 weeks were AML. Also in 2002, ASDA introduced an annual bonus based upon profits.

Employees who were employed on 21 February 2003 with at least 6 months' service on 31 December 2002 were entitled to a bonus. This was pro-rated to reflect part-time employment and absences of 8 consecutive weeks or more during the year. Maternity leave was treated as absence.

Ms Hoyland expected to receive £189.47 but she was paid £94.48 to reflect 183 days of absence.

The Claimant brought a claim alleging that a pro-rata deduction from her share of the annual bonus was contrary to the Sex Discrimination Act because she was on maternity leave. The Employment Tribunal held that the Claimant had been subject to a detriment but only for the compulsory maternity period of two weeks and she was awarded £5.20.

*VISA International Service Association v Paul*⁶

This case provided a wake up call for employers to develop systems to ensure that women on maternity leave are not placed at a disadvantage. The EAT in this case upheld a finding that the company's failure to notify the employee, while she was on maternity leave, of a vacancy for which she would have applied had she been aware of it amounted to a fundamental breach of the implied term of mutual trust and confidence, entitling her to claim constructive dismissal. This was the case even though, in fact, she did not have the requisite experience to be short-listed for the post.

The employers then compounded their difficulties after Mrs Paul brought her claim, by making a counterclaim against her to recover enhanced maternity benefit because she had not returned from maternity leave. Both the Tribunal and the EAT found that this amounted to unlawful victimisation since the employers had not brought legal proceedings to recover the pay against women who had not returned to work after childbirth who had not made a claim against them.

⁶ [2004] IRLR 42

Return from Leave

Right to Return

Ordinary Maternity Leave

The employee is entitled to return to the job in which she was employed prior to commencing her leave, on terms and conditions (including remuneration) not less favourable than those that would have applied to her had she not been absent on maternity leave.

Additional Maternity Leave

The employee is entitled to return to the job in which she was employed prior to commencing her leave, but if this is not reasonably practicable, her employer must permit her to return to another job which is suitable and appropriate for her. The test of whether a job is suitable and appropriate is subjective, and depends upon the employees level of seniority and skills and qualifications. The employee is entitled to return on terms and conditions (including remuneration) not less favourable than those that would have applied to her had she not been absent on maternity leave.

The new regulations also clarify that the employee has the right to return to the same or a similar job regardless of the size of the organisation for which the employee works. If the employee is prevented from doing so, the dismissal will be automatically unfair.

The extended length of maternity leave means that women may become pregnant again before returning to work and be able to take a second period of maternity leave immediately following the first. In recognition of this the right to return to the same job only applies when a woman is returning to work from:-

- a single period of OML; or
- a single period of OML with up to 4 weeks parental leave added.

If the employee takes any combination of leave including a period of AML, additional adoption leave or parental leave of more than 4 weeks she will be treated as if returning from AML.

Notification of Return

The period of notice which the employee is required to give the employer of her intention to return to work earlier than the end of her maternity leave has changed from 28 days to 8 weeks.

If the employee fails to give her employer the correct notice, her employer may postpone her return to work until 8 weeks have elapsed. There is no other provision for either employers or employees to postpone the return to work after maternity leave, although employees may add annual and/or parental leave on to the end of maternity leave.

Although the Government had clearly drafted the new regulations with the aim of simplifying the rule on notification, it would appear that employers will still be left with some uncertainty regarding how long women will be away from work. When a woman first notifies her employer that she is pregnant, she does not have to state whether or not she intends to take her full entitlement to leave. The employer must respond by confirming the date on which, according to its calculations, the leave will end. There is no statutory framework for employee and employer to discuss when the woman actually wants to come back, although this can be addressed informally. Employers must assume that their women employees will take their full entitlement, unless they receive written notification (with 8 weeks warning) of a wish to return to work early.

If the employee fails to return to work without informing her employer that she is ill or without having given her employer the correct notice of annual or parental leave, she will be absent without authorisation and should be dealt with in accordance with the employer's normal disciplinary procedures.

Sickness

If the employee is ill on the expected date of return, the regulations and guidance state that her employer's normal rules of sick leave will apply

Protection from Detriment and Unfair Dismissal

The provisions protecting women from suffering a detriment at work as a result of seeking or taking maternity leave and the right to bring a claim of automatic unfair dismissal are not affected by the recent changes.

This briefing note is intended solely as an overview of the law. It was last updated on 06 November 2006. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

For further information please contact Stephen Jenkins, Rhian Brace, Kim Howell, Lowri Phillips, Emma Burns, Cher Jones or Helen Irons at our Cardiff office on (029) 2023 8239.