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# Pregnancy discrimination at work
## A review

February 2004

**Grace James**
University of Reading

EUROPEAN UNION
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# Pregnancy discrimination at work: a review

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The University of Reading

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# EXECUTIVE SUMMARY

## Introduction

On 1 September 2003 the EOC launched a General Formal Investigation (GFI) into the discrimination faced by pregnant women at work. This Review is part of the initial stage of the investigation. Conducted between July and September 2003, it highlights the information and data available regarding the scope, nature and impact of pregnancy discrimination in the UK, concentrating on legal issues. It includes a comparison of the legal provisions available to pregnant workers in France and Sweden, and suggests possible avenues for research.

## The legal framework

The UK law relating to pregnancy discrimination and dismissal is a complex amalgam of domestic and European law, found in numerous pieces of legislation, statutory instruments and case law. Poor treatment of pregnant women at work may constitute sex discrimination and employers may also be liable under the employment rights and health and safety legislation. It is illegal for women to be discriminated against at work as a result of pregnancy or for a reason relating to pregnancy, for example, childbirth or the taking of maternity leave.

Where discrimination occurs women can pursue an action at an employment tribunal, and claims must be registered with the tribunal within three months of the act of discrimination taking place. Most claims are settled or withdrawn before they reach a full tribunal hearing, but as Acas settlements are not open to public scrutiny it is not possible to assess how many claims are settled in a woman's favour. Given that these claimants are pregnant or will have recently given birth, it cannot be assumed that the employment tribunal system is easily accessible to women who have experienced pregnancy related discrimination.

## European context

Maternity leave entitlement in the UK is generous but in 2002, the amount of maternity pay received was amongst the worst in the EU. There is little detailed cross country research regarding the legal treatment of pregnant workers in the EU but a comparison of the legal protection of pregnant women at work in France and Britain shows that the general level of rights available is similar in both countries. France provides particularly solid protection against dismissal during maternity leave but the usefulness of this absolute protection needs to be viewed in the context that most dismissals, in the UK at least, seem to occur prior to maternity leave. In France general maternity leave is only available for 16 weeks, compared with 26 weeks in the UK. However, there is no time limit for bringing a claim in France and employers

are liable to pay at least a minimum amount in compensation in the event of a pregnancy dismissal.

The legal position of pregnant women in Sweden is similar to that in the UK but Sweden, as a pioneer of equal opportunities, promotes a very different non-gender specific approach to parenting. This is reflected in generous parental leave entitlements which are available to both mothers and fathers at a high rate of income replacement and protection against dismissal during leave. Swedish employers with ten or more employees are obliged to produce an annual plan for ensuring equality in the workplace and this is monitored by the Equal Opportunities Ombudsman, which has the authority to initiate investigations.

**The scope and nature of pregnancy discrimination in the UK**

Thousands of women annually contact organisations for advice regarding pregnancy and maternity rights, many of whom have been dismissed or suffered other discriminatory treatment at work. Hundreds of women annually register pregnancy related unfair dismissal claims at employment tribunals but the reasons for the gap in numbers between those experiencing pregnancy related sex discrimination or unfair dismissal and those registering an action at a tribunal have not been investigated. Anecdotal information about the variety of discriminatory practices experienced by pregnant women at work includes experience of dismissal, selection for redundancy, being overlooked for promotion and training, refusal of time off for antenatal appointments, verbal abuse or changes in treatment and working conditions.

Studies of tribunal decisions suggest that discrimination is not confined to particular industries or occupations, that pregnancy related dismissal is more likely to occur to women with shorter service, and that most dismissals take place prior to maternity leave, some within days, even hours, of informing employers of their pregnancy. However, tribunal decisions may not reflect the wider picture of discrimination and the true scope of pregnancy discrimination in the UK labour market is still unknown.

**Reasons for discrimination**

It is crucial that employers' perceptions and attitudes to pregnancy in the workplace are understood, yet there is a paucity of detailed research in this area. Attitudinal research offers various explanations for discriminatory treatment. Pregnant women may be perceived as a financial burden or equated with invalids because of their association with medical treatment. It has been suggested that employers see pregnant women as less hard working, less committed, more emotional and irrational. Others argue that the whole pregnancy/workplace relationship is problematic because the workplace is primarily arranged for the male full-time worker and is, therefore, inflexible and inherently unresponsive to the needs of pregnant

workers. Furthermore, employers may fear the long term impact of pregnancy. Employers of working parents have been found to experience a variety of problems associated with their employees' childcare difficulties, including absenteeism, late attendance and staff being unable to work extra hours when needed.

**Implications of pregnancy discrimination**

Women now comprise 45 per cent of all those in employment and combining paid work and pregnancy is, for many women, an economic reality. It is estimated that women will account for 80 per cent of the growth in the employment rate between 1995 and 2006, illustrating their importance to the labour force. However, women who leave employment for any substantial length of time may suffer downward occupational mobility and financial disadvantage. Although there is little research focusing specifically on the impact of pregnancy discrimination, it appears likely that it will affect women's financial security, their health and, in some cases, even that of their unborn children. Further research is needed to quantify the impact on families as a whole including partners, existing children and other dependants.

Similarly, little is known of the implications of pregnancy related discrimination on the workplace. The cost of labour turnover to employers in the UK is calculated to be over £4,000 per leaver on average, but what are the costs of lost productivity to both an employer and the labour market in general, if a pregnant woman takes time off work or fails to return after maternity leave because of the negative way in which she has been treated? The expertise and skill of women who have been trained and would prefer to be in employment is often lost as a consequence of pregnancy discrimination, and this has implications in terms of recruitment, training costs and staff retention.

**The need for further research**

Pregnancy discrimination is occurring despite employment legislation that clearly makes it unlawful. This study was commissioned to inform the GFI by exploring what is known about pregnancy discrimination. It highlights existing research and identifies gaps in our knowledge. Only when the scope, nature of, and reasons for pregnancy discrimination are determined with hard evidence, can this problem be tackled in a meaningful way.

# 1 INTRODUCTION

Women are entering and participating in the workplace in greater numbers than ever before (Duffield, 2002). The trend is upward and predicted to continue (Armitage and Scott, 1998) and the greatest increase has been amongst women of childbearing age (Desai et al., 1999). Women with children are increasingly encouraged to join or return to the labour market by government policies which aim to help them reconcile work and family life. These policies are evidenced in the Labour Government's 'family-friendly' initiatives (DTI, 2003) which include improvements to maternity rights, the introduction of paternity leave, parental and emergency domestic leave provisions (for comment see McColgan, 2000 and James, 2001) and the new right to request flexible working (see Anderson, 2003 and James, 2003).

However, despite this policy background, thousands of women annually contact advice organisations in relation to their maternity or parental rights at work (Dunstan, 2001; EOC, 2001). Many have been discriminated against, including dismissal or selection for redundancy or denial of statutory rights, as a result of pregnancy or childbirth. In view of this, the EOC announced in September 2003 that it would conduct a General Formal Investigation (GFI) into pregnancy related discrimination in employment.[1]

## 1.1 Aims of the review

This small review is part of the first stage of the investigation. It aims to consolidate some of the different sources of information available in relation to a) the legal rights of pregnant workers and new mothers returning to work following maternity leave and b) the evidence available regarding the incidence and nature of pregnancy discrimination in the UK. It aims to identify problems that need to be tackled by considering the information available in the UK, but includes a comparative analysis of relevant laws in France and Sweden. Primarily it aims to highlight any gaps in the evidence available and suggests what further research might be useful.

## 1.2 Issues to be addressed

The review focuses on three broad issues.

The legal situation of pregnant women and new mothers in employment in the UK and Europe (especially France and Sweden). This includes an outline of:

- the general context within which the legal rights and responsibilities operate;
- the ambit and nature of the substantive legal rights and remedies available in the event of pregnancy related discrimination;
- the procedural requirements for bringing a claim.

The treatment of pregnant women and new mothers at work. Focusing on the UK, this includes an exploration of:

- the incidence of pregnancy discrimination / detrimental treatment;
- attitudes towards pregnant women in the workplace;
- why employers discriminate against pregnant employees;
- characteristics of women who have experienced pregnancy discrimination (occupation, industry, length of service etc);
- the relationship between pregnancy related illness and discrimination.

The implications of pregnancy related discrimination, including an examination of information available in relation to:

- the experiences of women who have faced this discrimination;
- the costs to employers and society in general;
- the adequacy of advice and support for pregnant women facing discrimination;
- the short and long term effects of dismissal or detriment on the women and their families, both from a health and safety perspective and in terms of women's attachment to the labour market.

### 1.3 Methods

This review was conducted in the UK between July and September 2003. It is a desk-based review of the legislation and literature available and involved locating, collating and presenting information relating to the various issues identified above. Research assistance was secured in relation to exploration of the relevant law in France (Dr Alban Salord) and Sweden (Ms Linda Stensdotter Selin). In addition to the author, Dr Tiha Simbeye helped collate and analyse information available here in the UK.

# 2 THE LEGAL FRAMEWORK

This chapter is not intended as an authoritative statement of the law but to show the framework within which the pregnancy and maternity related legal provisions operate.[2] The general law relating to pregnant workers is a complex amalgam of domestic and European legislation and case law. However, two main pieces of UK legislation apply in the event of pregnancy related discrimination. They are:

- the Sex Discrimination Act 1975 (SDA) (which is to be interpreted in the light of EC law – in particular, the Equal Treatment Directive (ETD));
- the Employment Rights Act 1996 (ERA) as amended by the Employment Rights Act 1999 and the Employment Act 2002.

Health and safety (e.g. the Management of Health and Safety Regulations 1999 and Workplace (Health and Safety and Welfare) Regulations 1992) and equal pay provisions (e.g. Article 141 of the EC Treaty of Amsterdam and the Equal Pay Directive, as amended) may also be relevant to pregnancy discrimination issues that arise in the workplace.

## 2.1 Sex discrimination

The SDA prohibits employers from dismissing a female member of staff or treating her less favourably because of her pregnancy or for a reason connected to her pregnancy, childbirth or maternity leave. Such behaviour constitutes direct sex discrimination under the Act and there is no need for a male comparator to be found.[3] It is however worth noting that, as McDonald states, comparisons may be useful to show that unfavourable treatment has actually occurred (McDonald, 2003: 52). She cites a case in which the European Court of Justice (ECJ) held that not allowing full pay to pregnant women who were sick prior to maternity leave, where other workers who were sick were entitled to full pay, was discriminatory.[4]

### Less favourable treatment

'Less favourable treatment' includes refusal to appoint because of pregnancy, refusal to promote or delay promoting, withdrawing training, demotion, dismissal, changing hours of work and pay, refusing sick pay, selecting for redundancy and general poor treatment at work. A pregnant worker is also protected from victimisation if she has issued legal proceedings, supported a claim against her employer or made an allegation under the SDA. Under s4 of the SDA an employer is prohibited from treating a woman less favourably for doing any of the above. Refusal to write a reference following a discrimination claim is victimisation but may also be direct discrimination.[5]

**Pregnancy related illness**

A woman is protected throughout her pregnancy and maternity leave entitlement from dismissal or detriment for sickness absence which is pregnancy related.[6] It is direct sex discrimination to dismiss a woman for pregnancy related sickness even if a man who was off for a similar time would also be dismissed. However, she is not protected from dismissal following the maternity leave period if a man absent for a similar time would also be dismissed, provided that any period of pregnancy related illness is not taken into account by the employer. This position has been described as 'a little unsatisfactory' and inconsistent (McDonald, 2003: 56) and criticised for limiting protection to 'artificial time limits' (Wynn, 1999: 435). Interestingly, the Employment Appeals Tribunal (EAT) in Scotland came to a different view of the law when a tribunal held that a woman dismissed due to pregnancy related illness that arose during the maternity leave period and continued following her maternity leave, was discriminatory.[7] McDonald is of the view that this decision may imply that national legislation provides more protection than European law in this situation (McDonald, 2003: 56), but the ECJ decision in *Hertz* casts doubt on whether the Scottish case was correctly decided.[8]

**Fixed term contracts**

Protection from discrimination applies to temporary staff on fixed term contracts. The ECJ has held, on a number of occasions, that dismissal of a pregnant woman because she is unable to work for a temporary period when recruited for an indefinite period is contrary to the ETD.[9] In *TeleDanmark*,[10] the ECJ held that protection also applies to workers who are on a fixed term contract, even if their pregnancy makes it impossible for them to attend work for a substantial part of the contract. It is possible that this would apply even if they are unable to attend throughout the whole of their contract. It used to be thought that the position of temporary workers was different from that of permanent workers and that they did not enjoy protected status but the ECJ appears to have ruled out any distinction. In *Jimenez Melger* [11] the ECJ held that if the non-renewal of a fixed term contract was motivated by the worker's pregnancy, this was unlawful direct discrimination contrary to the ETD.

**Pay**

The ECJ has held that while a woman on maternity leave is not entitled to full pay, the benefit paid to a woman while on maternity leave does constitute pay for the purpose of Article 141. Hence she should benefit from any pay rises that occur during her leave[12] but the position regarding bonuses is a little uncertain (see IDS, 2003: 348-350). A woman on maternity leave will not receive a bonus if it is in place to encourage those in service to work harder (e.g. in order to meet a particular order) for a future period.[13] She is entitled to full pay during pregnancy related illness

absence prior to maternity leave if that is how other absent workers are treated when absent due to illness.[14]

**Other working conditions**

If a woman's working conditions are altered or affected by pregnancy it may also constitute discrimination. It has been held that a woman on maternity leave should not be deprived of the benefit of her normal working conditions, such as the right to a performance assessment which might have qualified her for promotion.[15]

**Standard and burden of proof**

It is for the applicant to show that the less favourable treatment would not have occurred 'but for' her pregnancy, or having given birth, or absence on maternity leave.[16] Motive is irrelevant, even if it is to protect the woman and/or her unborn baby.[17] In O'Neill, the EAT stated that it is 'an objective test of causal connection' and explained how this involved 'a simple, pragmatic and commonsensical approach' by which a tribunal ought to look for the 'effective and predominant cause' of the act complained of. This does not mean that every pregnant woman has a valid claim and arguably leaves tribunals with ample discretion to find that pregnancy was not the effective and predominant cause, unless the applicant has direct evidence. That tribunals may find in favour of the employer in such cases is highlighted in the Pagonis and James studies discussed below (Pagonis, 2002 and James, 2000 and 2004 forthcoming).[18]

It is generally agreed that direct evidence of discrimination is very rarely forthcoming.[19] However, once an applicant establishes (a) that she is pregnant and that this is known by the employer, or on maternity leave, and (b) that she has been treated less favourably, in the absence of an adequate explanation by her employer the burden of proof passes to her employer.[20] Once the burden has shifted in this way, the employer is required to show that the pregnancy or related-illness or absence on maternity leave, played no part whatsoever in the employer's treatment of the woman, otherwise they will be held liable for sex discrimination.[21] If a pregnant woman who is on parental leave wishes to shorten this and return to work, the ECJ recently held that there is no requirement for her to inform her employer of her pregnancy. This applies even when she knows that her current pregnancy will mean that she is not able to carry out all her duties under the contract, due to health and safety legislation.[22]

## 2.2 The Employment Rights Act

The ERA 1996 (as amended by the Employment Relations Act 1999 and the Employment Act 2002) outlines the relevant statutory maternity leave provisions and rights available in the UK during pregnancy and following childbirth.

**Maternity leave provisions**

Legislation provides that all women are entitled to 26 weeks ordinary maternity leave. This entitlement is not conditional upon length of service, type of contract or number of hours worked. An additional maternity leave allowance of a further 26 weeks is available to those who have 26 weeks continuous employment by the beginning of the fourteenth week before the expected week of childbirth.

**Antenatal classes**

The ERA 1996 provides that a pregnant employee is entitled to paid time off for antenatal classes (s55-57). It can include relaxation classes and parentcraft classes, if deemed necessary by a doctor, midwife or health professional (Palmer and Wade, 2001: 43).[23] The employee has a right to bring a claim before an employment tribunal if she is:

- unreasonably refused time off for antenatal classes;
- refused pay for the time off (ERA s57 – also likely to constitute unlawful deduction from wages);
- dismissed because she has taken time off (ERA s99 and MPLR Regs 20(3)(a) and this is also likely to be discriminatory);
- subjected to a detriment (falling short of dismissal) because she has attempted to take time off for antenatal care (MPLR 1999 SI No 33112 Reg 19 and this is also likely to be discriminatory).

**Unfair dismissal**

Under s.99 ERA 1996 it is automatically unfair to dismiss an employee because she is pregnant or for a reason connected with her pregnancy. 'Automatically unfair' in this context means that once the tribunal has found that the reason for the dismissal was pregnancy, it is not open to the employer to argue that it was still reasonable and therefore fair, whatever the surrounding circumstances. This right not to be unfairly dismissed on such grounds is not subject to any qualifying conditions and is therefore available to all pregnant employees. S.99 states that dismissal of an employee is automatically unfair when:

- the reason (or… principal reason) for the dismissal is that she is pregnant or any other reason connected with her pregnancy;
- her maternity leave period is ended by the dismissal and the reason (or principal reason) for the dismissal is that she has given birth… or any other reason connected with her having given birth to a child;
- her contract of employment is terminated after the end of her maternity leave period and the reason (or… the principal reason) for the dismissal is that she took, or availed herself of the benefits of, maternity leave;

- the reason (or…the principal reason) for the dismissal is a relevant requirement, or a relevant recommendation, as defined by section 66(2), (the health and safety grounds); or
- her maternity leave period is ended by the dismissal, the reason (or…the principal reason) for the dismissal is that she is redundant and section 77 has not been complied with (entitlement to be offered alternative employment).'

Such a dismissal is also likely to constitute sex discrimination under the SDA. Case law suggests that it is usually necessary for the applicant to show that the employer had knowledge of the pregnancy at the time the decision to dismiss or make redundant was actually taken.[24] A woman dismissed under these conditions also has the right to receive an accurate written statement of the reasons for the dismissal (ERA s92(4)).

**Standard and burden of proof in pregnancy related unfair dismissal cases**

Once it has been established that a dismissal took place and that it was pregnancy related, it is automatically unfair. A tribunal should consider the effective cause of the dismissal and give a wide meaning to the words 'reason connected with her pregnancy'.[25] As with discrimination cases, in pregnancy related unfair dismissal claims it is important not to take employers' explanations at face value. It is, once an assumption of wrongdoing has been raised, for the employer to prove that the dismissal was fair and not due to pregnancy. The problems of providing satisfactory evidence are therefore similar to those in sex discrimination claims. In reality the two claims will be heard together, so long as both are pleaded, and the same evidence used for both.

An awkward issue in relation to pregnancy dismissal situations is that of knowledge. The EAT has stated that knowledge of the pregnancy is necessary in order to find that the dismissal was 'connected to the pregnancy'.[26] However, a different approach to the extent of knowledge required by an employer was adopted in *Heinz* (a disability case) and the matter requires further clarification by Parliament or a higher court. [27]

**Protection from detriment**

Under the ERA 1996 (as amended) and the Maternity and Parental Leave Regulations (MPL) 1999, employees are protected from any detriment which may fall short of dismissal arising from their exercise of their right to leave. Examples include denial of training, allocation of a less interesting job and exclusion from business trips. Such behaviour is also likely to constitute sex discrimination.

**Right to return to work**

A woman has the right to return to work following maternity leave. She may also return earlier than the end of her leave as long as she provides the relevant notice to her employer, currently 28 days. Following ordinary maternity leave she has the right to return to the same job with the same terms and conditions (ERA s71(4)(c)). Failure to allow her to do so will constitute a dismissal and she may have a claim under s99 ERA and the SDA.

Following additional maternity leave an employee is entitled to return to the same job, but if this is not 'reasonably practicable' (e.g. due to re-organisation) she must be given another job which is 'suitable' and 'appropriate'. Whether an alternative is 'suitable' and 'appropriate' will depend on the facts of the case and her terms of employment. Failure to offer an alternative may be discriminatory and automatically unfair under s99. Indeed, she may resign as a result of the change and claim constructive dismissal. If, however, she unreasonably refuses a suitable alternative then she will lose her right to claim unfair dismissal under s99. She may still have a claim under the SDA or for ordinary unfair dismissal if she has one year's service. Small employers of less than 5 employees are exempt from having to offer a suitable alternative after additional maternity leave if it is not reasonably practicable for the employee to return to the same job.

If she simply fails to return on her due date following leave she should be treated in the same way as other absent employees, and the same disciplinary procedures should apply. Absence due to long term illness, even if related to the pregnancy or childbirth, may therefore result in disciplinary action that leads to dismissal, but the employer must not take the maternity leave period or any period of sickness absence which was pregnancy related prior to or during maternity leave into account when applying that procedure.

## 2.3 Health and safety

Employers are obliged under the ERA to provide full pay to employees who are suspended for health and safety reasons and, before suspending, to offer suitable alternative work (see below). Employers also owe a common law duty of care to all workers and are obliged under the Management of Health and Safety at Work Regulations 1999 to conduct risk assessments for all those in the workplace. This includes generally assessing risks posed to new and expectant mothers. Once an employer is informed of an employee's pregnancy in writing, s/he must then conduct a specific risk assessment which should take account of any particular issues raised by the pregnant woman's GP or midwife.

Should the risk assessment highlight any problems, the relevant working conditions should be adjusted. If this is not possible, the employee should be offered 'suitable alternative work' at the same rate of pay. If this is not possible, she should be suspended on full pay for as long as is necessary to protect her health and safety. Employers are also obliged to provide suitable, and suitably located, rest facilities for pregnant or breastfeeding workers under the Workplace (Health and Safety and Welfare) Regulation 1992. Failure to carry out a risk assessment is likely to constitute direct sex discrimination.[28]

## 2.4 Procedural issues

Rules outlining the procedure for bringing claims are set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI No 2001/1171). If legal action is sought, most claims in the event of pregnancy discrimination situations are heard at employment tribunals. For a full list of potential claims relating to maternity and parental rights and the different remedies available see the IDS Handbook (2003).

Internal procedures for dispute resolution are usually exhausted by the time a woman considers bringing a legal action against her employer. A woman who is dismissed has the right to a written statement of reasons for the dismissal (ERA s92) and, if claiming under the SDA, she can ask her employer to complete a questionnaire (SDA s74) which will help her to decide whether to proceed with a claim and how to present it (Palmer and Wade, 2001: 366-367). These questionnaires may be served on employers prior to or within 21 days of the claim being registered.

### Time limits

An employee who is dismissed and believes the dismissal to be connected to her pregnancy has three months from the 'effective date of termination' to register a claim for automatic unfair dismissal at an employment tribunal. This takes into account any notice she should have had, if applicable. Any other claim brought under the ERA, for example under s47 for detrimental treatment, must also be registered in three months. The time limit for ERA claims is only extended where the tribunal is convinced that 'it was not reasonably practicable for a complaint to be presented' within the three months (ERA s111) and this is very strictly adhered to.[29]

Claims under the SDA also have to be registered within three months from the act of discrimination. In practice, especially in the event of a dismissal, the claims under the ERA and the SDA would be made at the same time. However, it may be necessary to bring two claims if the act of discrimination is earlier than the dismissal.[30] The time limit can be extended by a tribunal if 'in all the circumstances of the case, it considers that it is just and equitable to do so' (SDA s76). This is more flexible and wider than

under the ERA[31] and, as a result, a woman bringing a late claim in the event of a dismissal under both the ERA and the SDA may be able to pursue one claim but not the other.

ET1 forms are also sent to the conciliation body Acas, which has a duty to attempt to promote a settlement without the need for a tribunal hearing. Discussions are confidential and if a settlement is reached it is usually recorded by Acas, the tribunal simply being told that the case has been settled. The employer will also be sent a copy of the ET1 form and will have 21 days to submit a reply (on a notice of appearance - ET3). The majority of cases brought to a tribunal are settled or withdrawn before they reach a tribunal. Data from the Employment Tribunal Service show that of the 39,882 unfair dismissal claims registered during 2002/03, 46 per cent of claims were settled and 27 per cent were withdrawn. Of the 7,912 sex discrimination claims registered during the same period, 27 per cent were settled and 48 per cent were withdrawn (ETS, 2003: 24).

The outcomes of sex discrimination or unfair dismissal claims which are pregnancy related are not specifically highlighted in the ETS data. Such information would, however, be of particular use and allow pregnancy discrimination litigation in the UK to be explored in more depth than is currently possible. Early indications from a ongoing project has found that 63 per cent of all the pregnancy related unfair dismissal claims registered at employment tribunals in England and Wales in 1996 and 1997 (1,842 in total) were either settled or withdrawn prior to a tribunal hearing (James, 2000 and 2004, forthcoming - the study is discussed in more depth in Chapter 4 below). These data are limited to unfair dismissal claims, are confined to a particular time period and adopt a method of data collection and analysis which is unique to that particular study. They are, therefore, of limited use for ongoing comparative purposes, for example, of other non-pregnancy related unfair dismissal actions.

In addition to conciliation attempts the tribunal procedure can include the following steps:

- Amendments to be made to the claim before or at the hearing, so long as such amendments will not cause hardship or injustice to either party.
- Seeking further and better particulars as thought relevant.
- An order from the tribunal that written answers be given to specific questions.
- An order for disclosure of relevant documents prior to the hearing.[32]

The procedure therefore provides a good opportunity, for those who are in a position to take advantage of it, to collect relevant documentation and prepare a case

thoroughly prior to the hearing. Various hearings might take place prior to the main tribunal hearing including a directions hearing, a pre-hearing review or a preliminary hearing at which issues relating to eligibility to claim and issues of law can be resolved. The main hearing will be in public, and the parties and their witnesses present evidence in front of a panel of three. Witnesses can be cross-examined and the tribunal panel can ask questions. Individual employment tribunals have the right to regulate their own procedure but it is meant to be informal. Increasingly though, as Palmer and Wade point out, the procedure is becoming more technical as parties are choosing to be represented by legal professionals (Palmer and Wade, 2001: 364).

Decisions are written, registered and available to the public. The content of the decision varies in format between tribunals. In sex discrimination claims they must be in extended form whereas those in unfair dismissal claims may be in summary form only. Thus there can be limited information available about the tribunal's application of the law in pregnancy related unfair dismissal decisions.

In England and Wales, Legal Services Commission funding, commonly referred to as Legal Aid, is not available to cover the cost of legal representation at employment tribunals.[33] Help is available for some, for example, low income families with little capital, which may cover the cost of completing an ET1 form and preparing a case. Other funding or free legal advice and, on a limited basis, representation, might be available from unions, law centres, Citizens Advice, Maternity Alliance or Free Representation Units. For most, the cost of bringing a claim is borne by the individual litigant but, as NACAB notes, even where cases are pursued, financial compensation is likely to be small and the greatest cost to women will be the loss of her job (Dunstan, 2001: 9). Appeals, but only on a point of law, must be lodged within 42 days of the full written decision. Tribunal decisions are not binding upon other courts or tribunals as far as the interpretation of the law is concerned.

The procedure applicable in the event of a pregnancy related dismissal or discrimination claim is the same for all pregnancy and non-pregnancy related disputes whether taken under the SDA or ERA. Yet it may be that women in pregnancy related disputes experience greater obstacles than other people pursuing an ET claim because of their particular situation (i.e. pregnant or having recently given birth). The practicalities of the tribunal system may be adversely affecting their ability to bring a claim. For example, it is generally agreed that cases ought to be processed as quickly as possible,[34] but how this affects pregnant women and their ability and willingness to pursue a claim has not been explored.

Studies suggest that most women who bring claims for pregnancy related unfair dismissal have been dismissed prior to maternity leave (James, 2000; 2004

forthcoming). They then have only three months to register an action and most cases are heard within four to five months of registration (James, 2000), implying that for many women the claim may be processed and/or heard during the latter stages of her pregnancy or when she has recently given birth. Whilst there is scope for adjournment of the tribunal process for childbirth, attending a tribunal is clearly going to be both stressful and inconvenient. However, the option of litigation comes at a time when she has other competing priorities and for women who have no family support or cannot afford legal assistance, legal action may simply not be a realistic option. We cannot assume that the tribunal system is easily accessible to women who have experienced pregnancy related discrimination. In the light of recent reform proposals (Leggatt, 2001), further research is required into its accessibility and what changes may be necessary to make it more accessible.

**Remedies**

Under the ERA a tribunal can order an employer to compensate for loss suffered and recommend reinstatement, although this cannot be ordered against the employee's wishes. Compensation under the ERA includes a basic award which is calculated by a strict arithmetical formula subject to an upper limit, and a compensatory award 'such amount as the tribunal considers just and equitable in all the circumstances', limited to £53,500 from 01/02/03. The average compensation awarded in unfair dismissal claims in 2002/03 was £6,776 whereas the median, which is often thought to be a better measure as it represents the midpoint between the highest and lowest awards, was £3,225 (ETS, 2003: 25). Unfortunately, the data do not provide a break down of compensation awarded for successful *pregnancy related* unfair dismissal claims.

If successful under the SDA a woman can receive compensation for financial loss suffered as a result of her treatment. This may include an award for injury to feelings and there is no limit on the amount that can be awarded under the SDA. A study of 188 sex discrimination cases heard at employment tribunals in 2001 found that the average compensation awarded was £9,035, while the median was £5,125 (EOR, 2002:8).[35] The distribution of compensation awards for sex discrimination is summarised in Table 2.1. This does not include awards for injury to feelings.

The average compensation award for pregnancy related dismissal cases brought under the SDA was £9,871, and the median £7,699. However, it is notable that the average award for injury to feelings in sex discrimination cases involving pregnancy related dismissal was only £2,762 with a median of £2,000, compared with an average award of £4,911 and median of £3,750 for non-pregnancy related dismissal cases (EOR, 2002: 14-15). This difference in compensation and the amounts received through Acas settlements are worthy of further investigation.

**Table 2.1 Compensation awards in sex discrimination cases, 2000 and 2001**

| Total award | 2000 | *2000 %* | 2001 | *2001 %* |
|---|---|---|---|---|
| £1-199 | 1 | *0.5* | 0 | *0* |
| £200-399 | 3 | *1.6* | 3 | *1.6* |
| £400-599 | 6 | *3.1* | 3 | *1.6* |
| £600-799 | 5 | *2.6* | 5 | *2.8* |
| £800-999 | 3 | *1.6* | 1 | *0.5* |
| £1000-1,499 | 8 | *4.3* | 10 | *5.3* |
| £1,500-1,999 | 9 | *4.7* | 10 | *5.3* |
| £2000-2,999 | 23 | *12.0* | 25 | *13.3* |
| £3000-3,999 | 22 | *11.5* | 17 | *9.0* |
| £4000-4,999 | 17 | *8.9* | 15 | *8.0* |
| £5000-9,999 | 40 | *20.9* | 48 | *25.6* |
| £10,000-19,999 | 34 | *17.8* | 32 | *17.0* |
| £20,000+ | 20 | *10.5* | 19 | *10.0* |
| **Total** | **191** | ***100*** | **188** | ***100*** |

Source: EOR No 108, August 2002:12

## 2.5 Summary

The law relating to pregnant workers is very complex and found in an amalgam of domestic and European legislation and case law.

Transparency and scrutiny of the scope and nature of pregnancy related discrimination litigation is limited because:

- Generally available statistical analyses of tribunal claims do not specifically highlight or analyse pregnancy related claims.
- Tribunal decisions vary in format and detail and unfair dismissal claims, even when pregnancy related, do not require extended tribunal decisions.
- Acas settlements and ET forms generally (e.g. ET1 forms) are not available for public scrutiny.

# 3 EUROPEAN CONTEXT AND COMPARISONS

## 3.1 Introduction

The general rise in female employment in the UK (Duffield, 2002) is mirrored across the EU. It is estimated that women occupy six million of the ten million jobs created in the EU since 1997 (European Commission, 2001), although the number of women inactive due to family responsibilities varies between member states. In Spring 2001 14 per cent of women in the UK were inactive for this reason, compared with 2 per cent in Sweden, 15 per cent in France and 29 per cent in Ireland (Eurostat, 2003). This increase in employment has important implications for women, their families and the way in which they are able to balance their home and work commitments.

Differences in maternity leave and benefit entitlement between the EU member states is clearly influenced by different social policy agendas, views of the parent/workplace relationship and workplace demographics. Table 3.1 is based on information from Mercer Human Resources Consulting 2002/03 guidelines (2003). Their research compared the leave entitlements of women with at least one year's employment history, and the total pay accumulated after six months maternity leave by a woman who earns £15,000 per annum (based on exchange rates as of 3 December 2002). It illustrates the complexity of arrangements across the EU member states. In Austria and the Netherlands for example, women were entitled to 16 weeks maternity leave on full pay. Italy offered 21 weeks on full pay plus an additional 26 weeks on 30 per cent of pay whereas in Greece, women were entitled to 17 weeks maternity leave with just one month of salary paid during the first month of leave. UK maternity leave entitlement was more generous than many EU countries but the amount of maternity pay a woman would receive during her leave in 2002 was one of the worst in Europe. Given that women often cite financial motivation as the reason why they return to work early following leave (Callender et. al., 1997: 151), high leave entitlement without adequate pay is of little benefit to substantial numbers of women.

Unfortunately, very little information is currently available regarding the diversity of laws relating to pregnant workers in all the member states and it is beyond the scope of this review to consider all the countries in detail. Some information is available in a European Commission Report on the implementation of the Pregnant Workers' Directive (COM,1999) in Member States but is limited in scope and is now four years out of date. Detailed and recent EU wide cross-country comparisons of the law relating to pregnant workers are needed which should ideally include details of the law available in the 10 countries set to join the EU in 2004.

**Table 3.1 Comparison of maternity leave and benefits, EU 2002**

| Country | Leave entitlement after one year's employment (in weeks) | Benefits earned after first 6 months of leave based on £15,000 salary (£s) |
|---|---|---|
| Austria | 16 | 4,615 |
| Belgium | 15 | 3,358 |
| Denmark | 50 | 6,756 |
| Finland | 44 | 5,544 |
| France | 16 | 4,909 |
| Germany | 14 | 4,038 |
| Greece | 17 | 1,250 |
| Ireland | 18 | 2,677 |
| Italy | 47 | 6,058 |
| Luxembourg | 16 | 1,845 |
| Netherlands | 16 | 4,615 |
| Portugal | 17 | 4,239 |
| Spain | 16 | 4,615 |
| Sweden | 96 | 6,000 |
| UK* | 40 | 2,458 |

Source: Mercer Human Resources Consulting (2003) Worldwide Benefit and Employment Guidelines.

Notes: * Leave entitlement was extended to fifty-two weeks from April 2003, and the benefits awarded would now amount to £3,558.

**Comparators**

In order to provide a useful comparison for this review, the relevant legal provisions in France and Sweden have also been examined and are discussed below. (See the Appendix for a summary of the relevant provisions.) They provide different approaches to the legal regulation of pregnant workers and are sufficiently different in terms of their general maternity rights as well as the status they give to parenting in society, to provide a number of useful points for comparison.

Most women in Sweden are in employment (SCB, 2002: 43). Indeed, the employment rate for women is only three percentage points lower than that of men (Duffield, 2002: 608) and in terms of family-friendly provisions, Sweden is one of the most advanced countries in the world. It is therefore a natural focus for comparative analysis in relation to pregnancy discrimination. It pioneered paid maternity leave entitlement, introduced in 1955 (Haas, 1992), and currently provides parents with the opportunity of 480 days paid leave, to be taken before the child is eight years old. Women take the bulk of parental leave entitlement, on average eleven months leave

(Haas, 1992), although a longitudinal study showed that during the early years of a child's life, 50 per cent of parents in couples shared leave entitlement. Where they did so, the fathers took an average of two months leave (RFV, 1994; discussed in Haas and Hwang, 1999: 56). The flexible provisions in Sweden are grounded upon a policy which seeks to advance the well-being of the child, to promote women's economic independence and encourage fathers' involvement in childcare and family life (Haas and Hwang, 1999). There is therefore a significant difference in policy emphasis between the UK and Sweden. In the UK relevant policy appears to be led more by the needs of the labour market than the needs of the employee and his or her family.

The general provisions available to women in France are not as advanced as those on offer in Sweden and its demographics and policy emphasis more closely matches those in the UK. Figures suggest that the majority of women in employment or seeking employment in France are, as in the UK, of childbearing age - 69 per cent in March 2002 (INSEE Résultats, 2002: 51). In France, maternity leave is also paid but available for only sixteen weeks, six weeks before and ten weeks following the birth of the child. Protection against dismissal is available during maternity leave and for four weeks after the leave period. Leave can be extended by the adoption of unpaid parental childcare leave until the child is three years old. Overall, France provides a useful comparator because the treatment of women in employment in France has been developed, as in the UK, with the aim of encouraging women to engage in full-time work whilst raising a family (Strasser, 2003; Fagnani, 1998). Similarly, the government in France is eager not to overburden employers with legislative obligations.

This study was unable to locate data regarding the incidence of pregnancy related discrimination in France and Sweden, or evidence of how much relevant legal activity there is in this area. The unavailability of this basic data, which is reflected in the UK, further suggests a need for a detailed European wide investigation of pregnancy related discrimination.

### 3.2. France [36]

**Pre-leave**

Employers are prohibited from taking pregnancy into account when recruiting for a post (Article L 122-25) and a woman is under no obligation to reveal her state of pregnancy during the interview.[37] During employment, pregnant women are entitled to paid time off for up to seven medical examinations before and one after the birth (Article L 122-25-3) and are entitled to appropriate resting places to be made available for them at work during pregnancy (Article R 232-10-3). A pregnant worker is prohibited from carrying out certain tasks, which are considered to risk her health

or that of her unborn child.[38] Employers have to ensure that she is not required to do something inappropriate for a pregnant woman and the responsibility for risk assessment lies with the company doctor. Each employer in France must have a doctor who can be consulted on company matters (Article L 241-1 and R 241-48). If a task is deemed inappropriate then the pregnant woman should be transferred to another job on full pay and be re-instated to her former post on return from maternity leave. If a transfer is not possible, she must be suspended from employment with full pay.

These provisions are similar to the provisions available to women in the UK, hardly surprising given that member states of the EU will have implemented Council Directive 92/85/EEC. In France, protection of the health and safety of a pregnant worker and her foetus are fairly strong (Liasons Sociales, 2000: 5). The inclusion of obligatory risk assessments by company doctors, as opposed to employers themselves, may potentially be a useful way of promoting the general well-being of the pregnant employee and her unborn baby during the time prior to leave, if it functions effectively across all industries.

In France a woman is protected from pregnancy related discrimination at work during this pre-leave period and is protected against pregnancy related dismissal. The law in relation to protection against dismissal is however limited in three ways. Firstly, if her employer can show that the dismissal was related to the pregnant employee's misconduct (which must be serious - a 'faute grave') rather than her pregnancy the dismissal will be lawful (Article L 122-25-2 al.1). Here, the burden of proof is on the employer to show that the dismissal was not pregnancy related, but the court may find that the 'faute grave' was due to or is easily explained by the pregnancy and is thus pregnancy related.[39] Secondly, an employer can lawfully dismiss a pregnant employee if there is a redundancy situation. Decisions in the French courts suggest that for the employer to justify the dismissal of a pregnant employee on the grounds of redundancy it must be impossible for the employer to maintain the work contract.[40]

Thirdly, an employer can dismiss on the usual grounds if the employer has not been informed of the pregnancy. The employee must have informed her employer prior to the dismissal or within fifteen days of the dismissal, notification should then be accompanied by a doctor's certificate.[41] If she can prove that her employer had constructive knowledge of her pregnancy i.e. without formal notification, this will be sufficient for her to benefit from the protection.[42] If informed of the pregnancy during the fifteen days following the dismissal, and as long as the reason for the dismissal is neither redundancy nor serious misconduct, the dismissal is automatically annulled. The employee may then choose to be reinstated or be treated as unfairly dismissed. If she chooses the latter, she is entitled to compensation for her loss.

Hence, during the period before maternity leave the pregnant worker is fairly well protected against dismissal. The employer can dismiss only if s/he can show that the dismissal is not connected to the pregnancy i.e. due to serious misconduct or redundancy. The true effectiveness of the protection clearly depends upon the application of this law in the French courts and detailed study of this is beyond the ambit of the review, but we can see how lack of knowledge of the pregnancy can undermine a potential claim in both France and the UK.[43] However in France, employers are strongly encouraged to reassess any decision to dismiss if they learn of the pregnancy within fifteen days of the dismissal. In the UK, studies suggest that the majority of pregnancy related dismissals take place during this pre-leave period and that unawareness of the pregnancy is often and successfully cited as a reason for dismissal. If UK employers were encouraged to reassess dismissals in the light of awareness of the pregnancy and perhaps given a 'window' of opportunity to do so, it might help reduce the number of pregnancy related dismissals. This issue clearly warrants further investigation and the area would also benefit from a Europe-wide comparison of the legal implications of claiming unawareness of the pregnancy at the time the decision to dismiss was made.

**During leave**

A pregnant woman in France is entitled to sixteen weeks maternity leave, eight weeks of which are compulsory and protected by criminal sanctions (Article R 262-7) which apply if an employer knowingly disregards the employee's rights. During this time her contract is suspended but her employment rights continue, including holiday entitlement and continuity. Maternity leave is paid for by the state and she is reimbursed for any medical costs relating to the pregnancy or birth. If longer rights are available through collective agreements between employers and employees then employers are obliged to supplement the state benefits for the extended period. There is an absolute protection against dismissal during this period and the employer cannot justify the dismissal under any circumstances. Even if a redundancy situation occurs during the sixteen weeks, resulting in the dismissal of the employee on maternity leave, the employer is prohibited from notifying her until the leave entitlement has ended.

France therefore provides stronger protection against dismissal during the maternity leave period than is available in the UK, but this absolute protection has to be viewed in context: France's maternity leave entitlement is only sixteen weeks, just above the minimum required under European law. The protection is not of prolonged duration although it does extend to the first four weeks after she returns to work. In addition, according to UK research, most dismissals of pregnant employees occur before maternity leave (James, 2000), which undermines the usefulness of this protection.

In France all parents with at least one year's continuous employment at the time of the birth are also entitled to parental leave of up to three years, renewable annually. This is unpaid but some benefits are available for those who wish to exercise this right although no absolute protection from dismissal applies during this extended period. New mothers without the necessary continuity of experience can however terminate their contract without notice and, if they do so, they have, for one year, a right to be re-employed when a suitable post becomes available (Article L 122-14-4 al.l).

The right to extended leave is similar to the UK's additional maternity leave entitlement, which is available to women with 26 weeks continuous employment by the fourteenth week before the expected week of childbirth. As in the UK, this extended entitlement, being unpaid, is of limited use to parents where financial necessity is the main reason women return to work early following leave (Callender et al.,1997).

**Return to work**

In France, a woman is entitled to return to the same post following her 16 week maternity leave. The absolute protection from dismissal extends for a four-week period following her return to work. If she takes holiday entitlement at the end of her maternity leave the 'protected' four-week period begins on the day she returns from holiday.[44] This reflects the ethos behind the measure, which is to help women re-adjust to the workplace following leave.

France thus provides stronger protection against dismissal during the four weeks following return than is available in the UK. However, its applicability has again to be considered in context, as the duration of maternity leave entitlement is less than that which is available in the UK. Indeed, the need for protection against dismissal is arguably stronger for those women who have been away from the workplace for longer. In France, women returning from the longer parental leave entitlement are entitled to return to the same post (Article L 122-28-1) but those who are not eligible for parental leave (under Article L 122-28) are not protected in this way - they only have a right to be given priority consideration should a suitable post arise within one year. This may be of benefit to those employed in larger firms but is of little benefit to those working for small businesses.

**Procedural issues**

Unlike the UK, there is no formal time limit for bringing a claim in France, and claims can be brought years after the discriminatory event. A tribunal (Conseil des Prud'hommes) composed of representatives from both employers and employees hears all employment disputes in private work contracts. Disputes between civil

servants are heard at administrative tribunals, although the substantive law varies very little.

It is compulsory for an attempt to be made to conciliate before the tribunal hears the case. The Conseiller Rapporteur will initially hear the case if a settlement cannot be reached privately. Emphasis is still placed on reaching a settlement at the hearing. If no settlement is reached here a judgement board will hear the case and the decision of the majority of the board is legally binding on the parties. Appeal is possible to the Court of Appeal.

Parties can represent themselves or be represented by unions, legal professionals, colleagues, friends or spouses. The tribunal procedure is free. Unlike the UK, the Legal Aid equivalent (Aide juridictionnelle) is available for tribunal hearings and includes representation. According to government statistics the average period of time for a decision to be reached is 11.2 months, although there is enormous regional variation; in Paris and Versailles cases take, on average, up to 18 months.[45] France has been criticised several times by the European Court of Human Rights for undue delay in reaching decisions in employment cases.[46]

Procedurally then, women who wish to bring a claim in France are not hampered by short time limits as they are in the UK. As in the UK parties in France are encouraged to settle the dispute out of court, but the availability of Legal Aid for tribunal representation is an improvement on the UK approach. The speed of the system in France has been criticised and progression to a hearing is slower than the average time for cases heard in the UK. It is unknown whether this is detrimental for women bringing a case or whether, given that they will be pregnant or have recently given birth in these cases, the slower time frame is preferable. Further research is needed to explore how the tribunal system could be more accessible to pregnant women and new mothers bringing an action. This might involve a comparison of the experiences of women taking claims in different jurisdictions.

**Remedies**

In the event of pregnancy related discrimination an employer can be fined and will have to pay damages (Articles R 152-3, L 122-30 al.1). These are at the discretion of the judge but an employer will always have to pay the equivalent of six months salary in the event of a dismissal that is found to be pregnancy related.

In addition, if a dismissal takes place prior to the maternity leave period and is annulled, the employer will have to pay the pregnant woman her full wage during the period of protection of 16 weeks, even if the pregnant woman starts another job during this period (Art. L 122-30 al.2).[47] In cases where a pregnant woman is offered

re-employment and chooses not to go back to work, for example, when her employer learns of her pregnancy during the fifteen days following dismissal, she will still be entitled to damages.[48] There is no information available regarding the average compensatory award in the event of a dismissal or poor treatment in France. However unlike in the UK, minimum sanctions are automatic and of a substantial amount in some instances, for example, six months salary payable in the event of pregnancy related dismissal.

### 3.3. Sweden

**Pre-leave**

Prior to leave a pregnant woman is protected from direct discrimination on the grounds of sex, and hence pregnancy, under the Equal Opportunities Act 1991 (EOA) s15. Provisions are also in place to protect workers from indirect sex discrimination (s16). The prohibition against sex discrimination applies to job selection and employment procedures, decisions regarding promotion and training, terms of employment, the management and distribution of work and the dismissal of an employee (s17). Although employees can normally be legally dismissed during 'trial periods', it is discriminatory if the reason is pregnancy (Employment Protection Act s6). It is up to the employer to show that the reason for the dismissal was objective.

Employers have a responsibility to ensure that the working environment is adapted, where necessary, to suit the employee's characteristics (Working Environment Act 1977). This legislation aims to protect all workers and includes the implementation of general risk assessments. More specific provisions are set out in the Parental Leave Act 1995 (PLA ss19-20), which provides that a pregnant employee who cannot carry out 'physically demanding duties' is entitled to be transferred to other work while retaining her employment benefits, from the sixtieth day prior to the expected date of delivery (s19). Where such a transfer is not possible the woman is entitled to leave and retains employment benefits during that leave (s20). Paid time off for antenatal care is provided for under the Pregnant Workers Directive 92/85/EEC Article 8 but, unlike in the UK, antenatal care provisions are contained in collective agreements rather than legislation (Government bill, Prop. 1994/95:207).

Thus the position of pregnant employees in Sweden is similar to those in the UK prior to maternity leave. As in the UK women are protected against pregnancy related discrimination and there are equivalent health and safety provisions which protect her and her unborn baby from any workplace risks. If she needs to be suspended from her employment during this period, for example where a transfer is not possible, she is also entitled to paid leave.

**During leave**

The right to leave is set out in the PLA and applies to all parents, both male and female. Maternity leave is viewed as one part of this general entitlement (see Haas and Hwang, 1999). Under the Act all women, regardless of employment history, have the right to seven weeks paid maternity leave prior to the birth and seven weeks after the birth. Both sexes are entitled to 480 days leave up until the child's eighth birthday, if they have six months employment history or twelve months over the previous two years. This is shared between the mother and the father, who can choose who will take the leave and when it will be taken. There are however, sixty days which are tied to each parent i.e. thirty days each which are known as 'mamma month' and 'pappa month'. These are designated in order to encourage fathers to take leave and cannot be transferred between the parents. Parental benefit is paid at a high rate of income replacement by the state during this time.

The employment contract continues during this period and parents cannot be dismissed for using the right to leave (PLA s16). However, apart from the seven weeks maternity leave immediately after a child's birth, any additional leave taken by mothers is parental leave. Any discrimination that occurs as a result of taking this is not viewed as sex discrimination and the EOA is not relevant in the same way as it would be for maternity leave, unless it can be shown that the indirect discrimination provisions apply. Poor treatment and dismissals that stem from the 'gender-neutral' leave entitlements are not viewed as being based on sex.[49]

The difference in approach to the whole pregnancy/workplace relationship is significant. What we would term maternity related discrimination is, in Sweden, often considered and tackled as a non gender-specific issue because of the policy focus and approach to childcare. There is an ongoing debate as to the merits and problems with this approach but it is not a debate that is flourishing in the UK where pregnancy and maternity are viewed quite narrowly as female issues, rather than the broader approach adopted in Sweden. The Swedish approach warrants further investigation as it may provide a useful alternative to the policy emphasis currently promoted in the UK with regard to pregnancy and childcare/workplace relations as a whole.

Indeed, a notable feature of the Swedish system is that fathers are encouraged to take a share of the parental leave entitlement and to participate more in the care of the child. Unlike in the UK, this is an important aspect of the government's policy and is widely publicised (Haas, 1992). Research suggests that some Swedish employers view parental leave taking by fathers as very positive for their business as it enables fathers to learn new skills and they, as individuals, benefit greatly from the experience (Haas and Hwang, 1999:51). Studies also suggest that participation helps change fathers' attitudes to childcare and that, where they do take leave, the division

of household chores becomes more equal (Haas, 1992). This is an initiative that has not been promoted and encouraged to the same degree in the UK. (See O'Brien and Shemilt (2003) for a fuller discussion of this issue.)

**Return to work**

As stated above, employers are prohibited from dismissing an employee who exercises the right to parental leave (PLA s16). An employee does not have to accept less favourable treatment or a transfer as a result of their absence (s17) and they have the right to return to the same or similar employment on their return.

**Procedural issues**

The procedure for handling labour disputes that arise in Sweden varies according to whether or not the employee is a member of a trade union. Most employees are; statistics suggest that 84 per cent of women and 77 per cent of men were union members in 2002.[50] Parties will attempt to reach a settlement, but if they cannot do so, the case will be heard by a Labour Court.[51]

In discrimination disputes non-union members, or members who cannot secure union involvement, may be represented by the Equal Opportunities Ombudsman. Otherwise the employee may bring a case to the District Court herself (Labour Disputes Act section 4:12). She can then appeal to the Labour Court if necessary. Most of the time employees will be represented by their union or the Ombudsman, and Legal Aid is available.

Time limits vary under Swedish law. If a woman wishes to initiate proceedings to have a notice of termination or a summary dismissal declared invalid she must notify her employer of her intention not later than two weeks after notice of termination was given or summary dismissal has occurred (Employment Protection Act s.40). If a woman wishes to claim damages she must do so within four months. Local and central negotiations must be exhausted before a case goes to court (Employment Protection Act s.41).

**Remedies**

An employer can be liable to pay damages for economic loss or for any violation under the PLA (see s22-23 and s34) or the EOA (s24-25) and any termination of the contract or summary dismissal can be declared invalid. If the employer refuses to accept the invalidation they will be liable to pay damages (at a fixed rate under EPA s39).

**Other issues**

Under the Equal Opportunities Act 1991 (EOA), employers in Sweden with ten or more employees are obliged to prepare an annual plan for ensuring equality in the workplace. The Report must include a plan to facilitate the combination of employment and parenthood for female and male employees. The plan is reflective in that it should include an evaluation of the current situation and the results of the previous year's plan, but it is also prescriptive in that it must include measurable goals for the following year (EOA section 13 and 5). The Equal Opportunities Ombudsman monitors the plans and has the authority to initiate investigations, which check compliance with the EOA.

There is no similar obligation on employers in the UK and although the benefits of such a responsibility would need to be measured against the administrative costs and implications for employers, it is an option that may deserve further consideration. Indeed, it is a reflection of the difference between Sweden's and the UK's commitment to ensuring equality in the workplace. By placing the onus on the employer to comply with the annual obligation, this procedure could provide the government with an opportunity to monitor and assess its policy goal of achieving 'a society where being a good parent and a good employee are not in conflict' (DTI, 2003).

## 3.4 Summary

There are wide variations in maternity leave and benefit entitlements across the EU but more research is needed regarding the situation of pregnant women in Europe.

Maternity leave entitlement is generous in the UK, but the amount of maternity pay woman receive during leave is amongst the worst in the EU.

A comparison of the legal position of pregnant women in France showed that laws are similar to those in the UK, but in France:

- Women are entitled to only sixteen weeks maternity leave, compared with twenty-six weeks in the UK.
- Women with one year's continuous employment at the time of birth are entitled to extended unpaid parental leave of up to three years.
- Health and safety protection includes a risk assessment to be conducted by the company doctor.
- To be protected from pregnancy related dismissal a woman's employer must have knowledge of the pregnancy at the time, or within fifteen days, of the dismissal.

- There is an absolute prohibition against dismissal during maternity leave.
- Following extended parental leave a woman has no right to return but has a right to be given priority consideration should a suitable post arise.
- If a tribunal finds that a dismissal is pregnancy related an employer will, as a minimum, always have to pay the equivalent of six months salary to the employee.
- There is no formal time limit for bringing a claim; they can be brought years after the discriminatory event.

A comparison of the legal position of pregnant women in Sweden showed that:

- In terms of family-friendly provisions Sweden is one of the most advanced countries in the world.
- Swedish laws are grounded upon a policy which seeks to advance the well-being of the child, to promote women's economic independence and encourage father's involvement in childcare and family life.
- Maternity leave entitlement of fourteen weeks is viewed as one part of the general parental leave entitlement, which provides parents with up to 480 days paid leave which can be taken up until the child's eighth birthday.
- Sixty days of the parental leave entitlement are tied to each parent, i.e. thirty days each known as 'mamma month' and 'pappa month'.
- Employers in Sweden are obliged to produce an annual plan for ensuring equality in the workplace.

This study was unable to find any information about the incidence of pregnancy related discrimination in France and Sweden, nor evidence of how much legal activity there is in this area. The unavailability of this basic data, which is reflected in the UK, suggests a need for a detailed European wide investigation.

# 4 THE TREATMENT OF PREGNANT WORKERS IN THE UK

## 4.1 The scope of the problem

There is a paucity of knowledge regarding the full scope of pregnancy related discrimination in the UK. Every year, tens of thousands of women and men contact NACAB alone seeking advice on maternity and parental rights at work (Dunstan, 2001: 25) while many women contact the EOC and advice organisations about pregnancy/workplace issues. However, the true scope of the problem has never been fully quantified.

If thousands of women are experiencing pregnancy related discrimination then only a fraction of these pursue claims at employment tribunals, although the number initiating claims on this ground is still high. Evidence from an ongoing study (James, 2004 forthcoming) shows that on average, over a thousand women annually registered complaints of pregnancy related unfair dismissal at employment tribunals in England and Wales over a seven year period; a breakdown of the number of claims registered between 1996 and 2002 is provided in Table 4.1.

**Table 4.1 Pregnancy related unfair dismissal claims registered at employment tribunals in England and Wales, 1996-2002**

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total |
|---|---|---|---|---|---|---|---|---|
| **Total claims** | 778 | 1064 | 1274 | 1314 | 1019 | 1055 | 957 | 7461 |

Source: James, 2004 (forthcoming)

This research also suggests that the majority of pregnancy related unfair dismissal claims pursued are settled or withdrawn prior to full hearing. However, it is not possible to determine the outcome of these settlements due to the fact that the employment decisions do not provide details of the settlements and Acas settlements are not open to public scrutiny. At the time of writing, data were available for 1996 and 1997 claims and these showed that 63 per cent of all claims registered in that period were settled or withdrawn. Of the 378 cases which went on to a full, as opposed to a preliminary, tribunal hearing the majority of applicants (64 per cent) were unsuccessful (James, 2000). The ongoing study is examining the outcome of claims registered between 1998 and 2002, which also considers the reasons why so many of these women are unsuccessful at tribunal (James, 2004 forthcoming).

There are a number of potential reasons for this lack of success. For example, it is possible that the strongest claims are successfully resolved through Acas

conciliation, leaving the weaker cases for tribunal hearings. Indeed, as stated in Chapter 2, further research is necessary to explore the extent, content and nature of these settlements. It is possible that women are unable to present a strong case given that they are pregnant or have recently given birth, poorly prepared and often without legal representation whereas employers may present a stronger case by securing legal representation. Alternatively, tribunal panels may be ignoring the spirit and general aim of the legislation. Although these issues will be considered in more depth by the above mentioned study, this is limited to unfair dismissal claims and cannot access settlements reached through Acas conciliation.

In terms of investigating the true incidence of pregnancy related discrimination in Britain, the research available is limited in a number of ways. James's study concentrates on tribunals in England and Wales and only considers claims pursued under the ERA, not those pursued under the SDA. In practice, claims are likely to be registered under both jurisdictions, but if they are registered under the SDA and not the ERA there may be more claims than this study indicates. In addition, it only covers pregnancy discrimination that results in litigation and is not able to explore the number of women who do not register their complaint with the tribunals. Further systematic research is clearly necessary in order to explore the true scope of the problem across the UK (see Chapter 5).

### 4.2 The nature of pregnancy discrimination

Anecdotal evidence suggests that women experience different types of pregnancy related discrimination in the workplace, but again there has not been a thorough investigation of the variety and nature of the treatment suffered. The largest number of complaints received by the EOC (EOC, 2001) and NACAB (Dunstan, 2001) are from women who believe they have been discriminated against because of their pregnancy. Maternity Alliance has raised concerns regarding the increasing number of calls they receive from women who feel they have been selected for redundancy because they are pregnant (Stirling, 2002). As well as dismissal, evidence also suggests that pregnant workers are often overlooked for promotion or training courses (O'Grady and Wakefield, 1989) and are refused paid time off for antenatal classes (Low Pay Unit, 2002; Dunstan, 2001).

Calls to the EOC Helpline since the launch of the investigation in September 2003 provide anecdotal evidence of a multitude of problems experienced by pregnant women at work, as follows:

- A university lecturer, employed for 12 years in the same department on a series of fixed term contracts (all of one year or less) reported how she had had to

'grovel' for a contract extension for benefits because her contract was due to expire the day she started maternity leave.

- An accountant reported how, when she told her employer she was pregnant, she was accused of under performing and told that 'people' had complained about her conduct. When she returned to work with another employer following a second pregnancy, she was given a pay rise which was substantially less than that given to her colleagues.

- A shop worker at a national retailer was refused time off for an antenatal appointment. When absent due to pregnancy related illness she was told by her manager that they were ‘starting to lose compassion for her’ and wanted her to come in as they ‘had a shop to run’. She did not have adequate breaks during a shift and was made to sit on a backless chair that caused her back problems. She was eventually made redundant.

NACAB also provide ample examples of derogatory treatment (Dunstan, 2001: 26). These include the case of a pregnant shop assistant in Lancashire who upon dismissal was told by her employer that ‘a pregnant woman is not an attractive sight to customers’, and a part-time worker employed at a travel agents in North Yorkshire who was pressured to reduce her hours or resign, because, her employer said, her pregnancy was evidence of unreliability.

Examples of discriminatory treatment can also be read in the tribunal decisions. There is evidence of women being pressured into resigning when they inform their employer of their pregnancy, or given the ultimatum of either resigning or aborting the baby. Others are verbally abused, ignored or had their working conditions altered as a result of pregnancy or childbirth, including drastic reductions in their working hours or increased workloads (James, 2004 forthcoming). Particular examples of derogatory treatment include the applicant in *CL Dowson v Darling & Stephenson Solicitors*[52] who described how her employers informed her that it was her choice to get pregnant within the two year period, suggesting, incorrectly, that she had no right to claim unfair dismissal. In *CD Spratt v National Deposit Friendly Society*[53] the applicant was told to accept a ‘lesser’ position or be dismissed. The applicant in *MK Khatoubi v St James Realty*[54] was asked to sign a letter of resignation when she insisted that she wanted to continue with the pregnancy and in *T Clifford v The Gatehouse Hotel Ltd*[55] the applicant was simply handed her P45 in an envelope and her job was soon advertised in the local paper. The applicant’s supervisor in *SL Bower v Eldersteels Limited t/a GME Steels*[56] told her, in the presence of witnesses (including the Managing Director who, incidentally, took no action), that they did not want 'a pregnant split arsed cow’ working in their office, and in *MT Cheesman v I*

*Spicer & R Spicer t/a Sunnybank House Residential Care Home*[57] her employer simply suggested that it might not be in the baby's best interests if she continued to work.

### 4.3 Characteristics of women

#### In employment

Before examining what is known about the characteristics of women who experience pregnancy related discrimination, it is helpful to set the context by looking at the general characteristics of women in employment. More women than ever are now in employment in the UK; in Spring 2002, women comprised 45 per cent of all those in employment (Duffield, 2002: 605). The majority of economically active women are employees (93 per cent) and 90 per cent of jobs taken by women are in the service industry. This includes employment in public administration, education and health (35 per cent), distribution, hotels and restaurants (26 per cent) and finance and business services (19 per cent). The service industry has increased in size in recent years, providing part of the explanation for the general growth in female employment (Wilson, 1994: 24). In contrast, less than one in ten women are employed in the manufacturing industry.

Most women are employed in traditionally 'female' roles (Duffield, 2002; ONS, 2002). In Spring 2002, 97 per cent of those in secretarial and related occupations, 91 per cent of those in personal and caring occupations and 68 per cent of those in sales and customer services jobs were women. Less than a third of all managers and senior officials are women; they are generally full-time employees and, more often, women without children. Table 4.2 provides a breakdown of the occupations of women in employment during Spring 2002 and highlights the percentage both with and without dependent children and those working full-time or part-time.[58]

These general data can mask variations. The Census shows that women's employment varies according to geographical location: the highest percentage of women in professional jobs is found in the City of London; the highest incidence of women looking after the family or home is in the London Borough of Tower Hamlets; whereas 55 per cent of women of working age in North East Lincolnshire work part-time. Overall, women are far more likely than men to be in part-time employment: 43 per cent of female employees compared with only 9 per cent of males. (ONS, 2003).

Women's employment status also varies according to age. Their employment rate increases by age up to the age band of 35 to 49, then falls to retirement age. The difference between the employment rate of men and women is greatest for those aged 25 to 34 (88 and 72 per cent respectively) (Duffield, 2002). In addition, women in ethnic minority groups have lower employment rates than white women. Around three in five Indian women compared with one in five Bangladeshi women are in

employment, while almost two-thirds of Black Caribbean and just under half of Black African women are employed.

A number of factors impact on the rate of female employment. These include marital status, partnered women are more likely to be employed than single women, and qualifications, women with higher qualifications are most likely to be in employment. Women with dependent children are less likely than those without to be employed. This is particularly true for those with children under school age; the employment rate for women with children aged four and under is 53 per cent, compared with 73 per cent for those with dependent children aged five and over. The number of economically inactive women of working age fell from 17 per cent in 1992 to 12 per cent in 2002 (Weir, 2002) and those that do become economically inactive do so for a shorter period of time than was previously the case.

**Table 4.2 Employment by occupation, UK, Spring 2002**

Per cent

| | **Men** | **Women** | | | | |
|---|---|---|---|---|---|---|
| | | All | With children | Without children | Full-time | Part-time | *As a % of all in employment* |
| Managers and senior officials | 18 | 10 | 9 | 11 | 15 | 4 | *31* |
| Professional | 12 | 11 | 11 | 10 | 14 | 6 | *40* |
| Associate professional and technical | 14 | 14 | 14 | 14 | 17 | 10 | *45* |
| Administrative and secretarial | 5 | 23 | 22 | 23 | 24 | 21 | *78* |
| Skilled trades | 3 | 2 | 2 | 2 | 2 | 2 | *8* |
| Personal service | 2 | 13 | 16 | 12 | 11 | 16 | *85* |
| Sales and customer service | 4 | 12 | 11 | 12 | 7 | 19 | *68* |
| Process, plant and machine operatives | 13 | 3 | 2 | 3 | 4 | 2 | *15* |
| Elementary | 12 | 12 | 13 | 12 | 6 | 21 | *45* |

Source: Duffield, M 'Trends in Female Employment 2002' *Labour Market Trends* November 2002:615
Note: these data have not been re-weighted to post-2001 Census interim revised population estimates. Not seasonally adjusted. Women aged 16-59, men aged 16-64.

The studies referred to above analyse the trends in female employment as a whole but do not consider the specific situation of pregnant women. Analysis of the General Household Surveys of 1996-97, 1998-99 and 2000-01 (Wathan, unpublished) shows

that 3 per cent of women aged 16 to 49 were pregnant at the time of the surveys. Of these women, a little over half were employees and two out of five were economically inactive. In contrast, around two-thirds of women who were not pregnant were employees and only a quarter were economically inactive, illustrating how pregnant women are more likely than non-pregnant women to be out of the labour market. The analysis also shows that young pregnant women are less likely to be in employment and more likely to be economically inactive than older pregnant women. Just over half of those aged 16 to 25 were economically inactive compared with a little over a third of pregnant women aged 26 to 49.[59] Overall, around a quarter of a million female employees are pregnant at any time.

Further analysis of the GHS suggests that a pregnant woman who has a partner or is a graduate is more likely to be in paid work than a non-pregnant woman who does not have a partner, or a degree, or dependent children. Having dependent children, especially below school age, decreases the likelihood of being in paid work. However, the analysis also shows that pregnancy does depress the likelihood of a woman being in paid employment, over and above these other factors (Wathan, op. cit.).

**Facing pregnancy discrimination**

A pregnant woman's experience of working life is affected by many diverse factors including whether she is suffering a pregnancy related illness and the extent of that illness, or whether it is her first pregnancy. Indeed, it is important not to assume that all pregnant women experience their pregnancies in the same way. Although there is a lack of research into these differing circumstances, it is possible that certain women because of their age, ethnicity, geographical location or job, or suffering a particular type of pregnancy related illness, are more or less likely to experience pregnancy related discrimination. The remainder of this section highlights the limited information we have relating to the characteristics of women who are known to have experienced such discrimination. It is clear that further study is necessary in order for us to fully understand the extent of differences between, and the commonality of, women's experiences of work during pregnancy.

Research which is confined to employment tribunal case-analysis and thus only represents women who choose to litigate, provides some limited information about the characteristics of women who claim to have experienced some form of pregnancy related sex discrimination or unfair dismissal. Two studies provide relevant, but limited, information. One is a small in-house study by the EOC in which 203 pregnancy related sex discrimination claims heard at employment tribunals between November 1999 and April 2002 were reviewed (Pagonis, 2002). The second is ongoing research, referred to above, which investigates pregnancy related unfair

dismissal claims registered at employment tribunals in England and Wales between 1996 and 2002 (James, 2004 forthcoming). This focuses on claims that went to a full tribunal hearing [60] and some initial findings arising from the 378 cases in 1996 and 1997 that went to a full hearing are currently available (this is the dataset is referred to below as James, 2000).

Both studies suggest that pregnancy discrimination is not confined to particular occupations or industries. Pagonis (2002) found that of the women claiming to have been discriminated against, similar proportions were employed in administrative and secretarial occupations, associate professional and technical occupations, managerial and senior posts (mostly, functional managers in marketing or sales posts), or in personal service occupations. These findings are not hugely surprising, given that women tend to be located in these particular sectors. James (2000) also found that those alleging pregnancy related unfair dismissal were located across all occupations where women are employed.

There is evidence that those who claim to have been unfairly dismissed and/or to have suffered discrimination that is pregnancy related are more likely to have shorter service. Just under half the women in both studies had less than one year's service at the time of the dismissal or discrimination. This confirms earlier findings (McRae, 1991) and suggests that length of time in employment may be an important factor in a woman's treatment at work when pregnant.

Age was mentioned in only a quarter of the claims reviewed by Pagonis but of these, more applicants were aged under 25 than between 25 and 34, with only a few applicants aged 35 or over. This may be an indication that younger women are more often victims of pregnancy related discrimination. The same study also found that in the three-quarters of claims that mentioned employment status, 72 per cent of the women worked full-time at the point of the alleged act of sex discrimination. Given the percentage of women in part-time employment this is perhaps surprising and again, should be explored further. However, it may indicate that full-time workers are more likely to pursue actions at tribunals rather than suggesting that they are more vulnerable to discrimination.

In pregnancy related dismissal cases there is some evidence that the majority of women are dismissed prior to commencement of their maternity leave, over two-thirds of women in the James study (2000). In 22 per cent of cases the woman was dismissed within days, sometimes hours, of informing her employer of her pregnancy and a further 47 per cent were dismissed prior to commencing leave. This may indicate that employers are attempting to avoid paying SMP, but requires further investigation of employers' motives. Only a small percentage of claimants were

dismissed during maternity leave and 12 per cent on returning to work (relevant information was unavailable in the remaining cases). This suggests that women are most vulnerable during the pre-leave stage of pregnancy.

### 4.4 Reasons for pregnancy discrimination

Employers very rarely admit to sex discrimination and this review has been unable to locate any major studies specifically focusing on the reasons why employers flout the relevant law. Employers presented a number of explanations for the dismissal of pregnant employees in James's study, including their conduct (40 per cent of cases), lack of capability (28 per cent), redundancy (25 per cent), that the employee resigned (21 per cent) and that he or she was unaware of the employee's pregnancy at the time of the dismissal (15 per cent) (James, 2000). This will be explored in more depth (James, 2004 forthcoming) but these reasons are presented in the context of litigation and do not provide an adequate explanation for the existence of pregnancy related discrimination as a whole.

**Employers' experiences of employing pregnant women and new mothers**

When seeking to explain the reasons for pregnancy related discrimination in the workplace it is useful to consider employers' experiences of employing pregnant employees and female staff with dependent children. The latter is important not least because it highlights employers' potential fears and assumptions about the impact of pregnancy on their business in the long term. A MORI survey of Britain's big employers (MORI, 2002) found, for example, that employers of working parents experience a variety of problems:

- 70 per cent reported that childcare problems meant staff were unable to work extra hours or work late when needed;
- 66 per cent reported absenteeism due to childcare problems;
- 55 per cent found that childcare problems resulted in late attendance or leaving work early;
- 44 per cent had difficulties recruiting and retaining the staff they need;
- 42 per cent felt that childcare problems meant their staff were tired, irritable or stressed, and;
- 40 per cent said that childcare problems lead to female staff not returning to work after maternity leave.

This MORI research highlights employers' experiences of employing parents with dependent children. While this may provide an explanation or, at least, a partial explanation for discrimination of pregnant employees in the UK, the link between these experiences and the types of discrimination outlined above deserve further

investigation. It also illustrates the need for employers to offer good flexible working arrangements to their staff.

Earlier research (Callender et al., 1997) which includes findings from a specially commissioned survey of employers (1,485 interviews), found that almost a quarter of employers had had a pregnancy amongst their staff in the 18 months prior to the survey (23 per cent). Of these only 1 in 20 reported having experienced any disputes with their pregnant staff. Where disputes occurred, mainly amongst those in the distribution, hotels and restaurant industry, they were mostly over maternity pay entitlement, holiday pay and annual leave (Callender et al., 1997: 78).

**Table 4.3 Problems with employees' right to take statutory maternity leave (then of 14 weeks) by size of establishment**

Per cent

| Problems | All | Size of establishment (employees) | | | |
|---|---|---|---|---|---|
| | | 1-24 | 25-99 | 100-499 | 500+ |
| No problems | 64 | 54 | 74 | 73 | 86 |
| Any problems | 35 | 46 | 26 | 26 | 14 |
| Problems covering absence | 28 | 38 | 20 | 21 | 8 |
| Other | 10 | 11 | 12 | 6 | 7 |
| Don't know if had problems | 1 | 1 | - | 1 | - |
| Unweighted base n= | 732 | 96 | 200 | 257 | 183 |
| Weighted base n= | 206 | 101 | 70 | 28 | 5 |

Base: Establishment with women taking maternity leave in 18 months prior to the survey
Source: Callender et al. (1997) *Maternity Rights and Benefits in Britain 1996* (Research Report No 67) HMSO London: p. 124 Table 6.1.

In only 21 per cent of employers had a woman been absent on maternity leave during the 18 months prior to the survey. Of these, 35 per cent reported experiencing problems as a result. Table 4.3 indicates the frequency of problems connected with an employee's right to maternity leave broken down by the size of the establishment. It suggests that smaller firms are more likely than larger employers to experience problems, perhaps because the absence of a member of staff cannot be so easily absorbed into the remaining workforce or because of the specialisation of tasks that restrict the number able to cover absenteeism effectively (Callender et al., 1997: 125). Interestingly, NACAB note that employers who discriminate are often small enterprises employing fewer than ten employees, with low profit margins and little capital investment (Dunstan, 2001: 8). Small firms frequently raise concerns about the level and variety of legislation relating to individual employment rights (Blackburn and Hart, 2003), thus supporting the findings of the Callender study (1997).

Callender et al. (1997) also found that establishments in the finance sector (37 per cent) and production and communications industries (30 per cent) were most likely to report problems covering absenteeism during maternity leave, and that such problems were reported more often in the private sector (30 per cent) than in the public sector (19 per cent). The survey also considered how employers coped with an employee's right to return to work following leave and asked employers to comment on any problems they had experienced. Only 17 per cent of those who had experienced a member of staff taking leave during the 18 months prior to the survey reported any problems: these included covering absence (6 per cent), financial implications (3 per cent) and uncertainty over the date of return (2 per cent) (Callender et al., 1997: 127).

The research suggests that employers' experiences of employing pregnant women and new mothers varies during the pre-leave, leave, return to work and post-leave periods. It is worth noting that the rights of pregnant employees, and hence the legislative burden on employers, have grown since the 1996 study. The problems faced by employers may also be compounded by the fact that around a third of women fail to return to work at the end of their maternity leave (DTI, 2003: 20). Given that the average cost of labour turnover in 2002 was £4,301 per leaver this represents a considerable sum (CIPD, 2003). There is, it seems, a paucity of recent research regarding the experiences of employers both positive and negative. The specific financial impact and burdens associated with employing pregnant women, for example in terms of absenteeism or replacement costs for maternity leave, need to be researched further as they are likely to be a key to our understanding of the reasons for pregnancy related discrimination. In addition, just as women's experiences of the workplace during pregnancy might vary according to their individual characteristics, employers' experience of employing pregnant women and new mothers will differ, according to the size and nature of their workplace, the number of women who are pregnant at any one time and the childcare facilities they offer. These factors deserve further research in order to provide a complete, multi-layered picture of pregnancy/workplace relationships in the UK.

**Attitudinal studies**

Although there is little specific and recent research relating to the effects of employing a pregnant woman which might help explain pregnancy related discrimination, some attitudinal research has been conducted which provides an interesting insight. For example, one survey of 212 female employees concluded that employers often perceive women workers who become pregnant as a burden (Low Pay Unit, 2002:1).

According to Pattison and Gross, pregnant women are often perceived as expensive to employ and equated with invalids, because of the association of their condition with medical treatment (Pattison and Gross, 1996: 80). In their review of the literature relating to pregnancy, work and women's well-being, they cite studies which suggest that women who work during pregnancy are perceived as less hard working (Bistline, 1985) and not worthy of training and promotion (Collinson et al., 1990; Halpert et al., 1993). Fellow employees sometimes view pregnant workers as less committed, more emotional and irrational (Halpert et al., 1993). One study suggests that certain stereotypical expectations of pregnant workers are held, including an expectation that they will be more caring and passive. Employers are, therefore, more critical of them when they fail to meet expectations or behave in an authoritarian way (Corse, 1990). Pattison and Gross (1996) suggest that, overall, 'pregnancy and working are inconsistent with each other in terms of the attitudes and expectations of others, and sometimes pregnant women themselves' (Pattison and Gross, 1996: 84). Yet overall, little systematic research has been conducted in this area (Pattison, Gross and Cast, 1997: 303).

To improve the situation of pregnant workers in the UK we need, primarily, to understand why employers ignore the relevant law and discriminate against employees who are pregnant. It would appear that employers are generally aware of the legislation relating to maternity rights (DTI, 2002; see too Callender, 1997: 35). However, an earlier study found that there was a difference in understanding between the public sector, who were better informed, and the private sector (McRae, 1991).

Pregnancy related discrimination may occur because of negative stereotypical attitudes, or because employers simply view pregnant employees as an expensive liability (Pattison and Gross, 1996; Low Pay Unit, 2002), and/or view pregnancy as an illness (Pattison and Gross, 1996). The persistence of discrimination may also reflect more widely held traditional images of motherhood as incompatible with paid employment. Perhaps some employers still view children as a mother's constant and exclusive responsibility – an image which, as McRae points out, can impact upon systems that are supposed to support working parents (McRae, 1993). One possible reason for our continued failure to adequately integrate pregnancy and motherhood into the workplace is that work is generally arranged to fit the ideal of a 'worker', who is a man working full-time supported by a partner at home. This masculine construct of the workplace is incongruous given the number of women in employment and the differing household structures now evident (see for example, Pateman, 1988; Wajcman, 1999; Cockburn, 1991; Acker, 1990; Morris and Nott, 1995 and discussed further in HREOC, 1999:11). All these potential explanations need to be explored in

greater depth, with particular focus on the differences between, as well as the commonality of experiences amongst, pregnant women and employers.

We know that women are more likely to return to work if they feel supported by their employers and work colleagues. An American study showed how work experiences during pregnancy influenced women's identities as workers and mothers. It found that the women whose workplaces supported their multiple roles and identities were more likely to retain their worker identity and hence strengthen their loyalty and commitment to their employer (Fursman, 2002). Similarly, a UK study shows how planning and workplace support during pregnancy has a positive impact on a woman's decision to return to work following the birth (Houston and Marks, 2003).

Following from this research there is a need to explore why there is a lack of support in some workplaces and why in others, the workplace/pregnancy relationship works very successfully. Lessons need to be drawn from both the positive and negative experiences of the employers and women concerned. This is crucial not only to improve the pregnancy/workplace relationship and prevent discrimination from occurring, but also for allowing women to return to work post childbirth, a policy that the government is actively promoting (DTI, 2003).

Attitudinal research is also important because it provides an opportunity to locate and explore any differences and similarities in the attitudes of employers and other non-pregnant employees, whether based on gender, age, class, religion or cultural background. Research suggests that the maternal age of a worker influences some of her attitudes to work (Berryman and Windridge, 1997) and it is likely that the age and status of a pregnant employee has an impact on employers' and fellow employees' attitudes towards her. Attitudes may also vary between small and large firms and between industries. Further research is necessary to explore whether negative attitudes towards employment legislation in general, and maternity rights in particular, necessarily means that employers are more likely to discriminate against pregnant workers.

### 4.5 Summary

Thousands of women annually contact the EOC and other organisations seeking information about pregnancy and maternity rights and complaining of poor treatment, but the full scope of pregnancy related discrimination in the UK has never been quantified.

Hundreds of women annually register complaints of pregnancy related unfair dismissal and sex discrimination at employment tribunals. Between 1996 and 2002 7,461 pregnancy related unfair dismissal claims (under the ERA) were registered at

tribunals in England and Wales. Most claims are settled or withdrawn prior to a full tribunal hearing.

Reasons for the gap between the number of women experiencing discrimination and the number registering an action at a tribunal have not been fully investigated.

Anecdotal evidence about the variety of discrimination experienced by pregnant women and new mothers at work is available and includes dismissal, selection for redundancy, being overlooked for promotion and training, refusal of time off for antenatal appointments, verbal abuse and changes in treatment and working conditions.

Some information is available regarding the characteristics of the women who have experienced discrimination, originating from studies of tribunal decisions. These suggest that it is not confined to particular industries or occupations and that pregnancy related dismissal is more likely to occur to women with shorter service, with most dismissals occurring prior to maternity leave.

Attitudinal research suggests that pregnant women are often perceived as a financial burden and equated with invalids because of their association with medical treatment. They may also be viewed as less hard working, less committed, more emotional and irrational.

Studies also argue that the whole pregnancy/workplace relationship is problematic because working arrangements have historically been based upon a concept of the ‘worker’ as a man working full-time. As a result, the workplace can be inflexible and inherently unresponsive to the needs of pregnant workers.

# 5 IMPACT OF PREGNANCY DISCRIMINATION

## 5.1 Introduction

Combining paid work and pregnancy is, for many women, an economic reality in today's society (see also Callender et al., 1997) and it is estimated that women will account for 80 per cent of the growth in the employment rate between 1995 and 2006 if the growth in the service industry continues and remains female-dominated (Callender et al., 1997:10 citing Ellison et al., 1996: 197). Pregnancy amongst the workforce, with its repercussions in terms of health and safety and employment rights legislation, is likely to become increasingly common and the persistence of pregnancy related discrimination cannot be ignored. In this concluding chapter, the potential implications of discrimination on women and their families and employers are explored, followed by some suggestions for further research.

## 5.2 Women and their families

Research tells us that women who leave the workforce for any substantial length of time suffer downward occupational mobility, which has implications for their career progression and can result in financial disadvantage in the long run (McRae, 1993; Rake, 2000; Houston and Marks, 2003). Rake illustrated how the amount of potential lifetime earnings lost by mothers increases with the number of children they have and decreases with the skill level of the mother. For example, across her lifetime a mid-skilled mother of two is likely to be £140,000 less well off than a woman without children who has similar qualifications, whereas for a low skilled woman the lifetime cost of being a mother is calculated to be even higher, £285,000.

Whereas there is ample research highlighting the financial loss suffered by women in employment in general, more research is needed in order to explore the implications of pregnancy related discrimination, especially dismissal, on her situation. This is important because women who are dismissed during pregnancy may suffer even greater financial hardship than other mothers - especially as they may find it difficult to secure new employment. In addition, given the increase in the employment of lone parents which has risen from 46 per cent in 1970 to around 54 per cent in 2002 (LFS, 1999-2002 cited in DTI, 2003: 8) and the government's policy of encouraging lone parents into the workforce, the impact of pregnancy discrimination on their financial well-being needs to be explored.

However, the likely implications of pregnancy related discrimination are not only financial. It is possible that women may suffer ill health as a result of poor employment relations during pregnancy, or ill health may be perpetuated as a result. Those experiencing discrimination may suffer from anxiety or stress, and the impact of discrimination on the woman's health and that of her unborn baby deserves

investigation. Studies suggest that negative attitudes towards their pregnancy encountered by women can impact on the pregnancy/workplace experience as they may feel that they have to work harder to counter the stereotypical assumptions of their employers and work colleagues (Rodmell and Smart, 1982; O'Grady and Wakefield, 1989). A negative response to the pregnancy can also make women reluctant to admit that they are experiencing difficulties at work (Tabor, 1983). In extreme cases, discrimination can risk the health of the woman and her foetus. Harriet Davies-Taheri, a solicitor, genuinely believed that she had lost her baby as a result of the stress and anxiety caused by discrimination at work. Although medical opinion did not establish a connection,[61] she was recently awarded £31,000 at an employment tribunal (see Gibson, 2003).

It is not always the employer's direct action per se that can cause women to become ill but the lack of opportunity to enter and participate in the workplace. US research suggests that there is a high rate of depression amongst women who would like to be employed but are not and this is a situation which may arise if a woman leaves her job because she faces a difficult employer, especially following maternity leave (Spitze, 1988; Ross et al., 1983 and Benin and Nienstedt, 1985; discussed in McRae, 1993: 131 and see Maternity Alliance study, reported by MacErlean, 2002). Another US study suggests that children are happier when their parents have control over their work-life balance (Galinsky, 1999 cited in DTI, 2003:13). Thus, dismissal during pregnancy or following childbirth or refusing to allow a mother to return to work following leave, which in effect removes a woman's control of her preference to be in employment, could detrimentally impact on a women's physical and mental well-being and that of her child(ren). This is an area of employment relations that is in need of research.

### 5.3 Employers

Pregnancy discrimination wastes the expertise and skill of women who have been trained and would prefer to be in employment. The average cost of labour turnover in the UK is £4,301 per leaver and a recent study of 577 personnel professionals reported that turnover has a negative effect on performance in organisations (CIPD, 2003). In addition, an employer who discriminates against or unlawfully dismisses an employee can be liable to pay large amounts in compensation (see EOR, 2002 and ETS, 2003).

There is however a lack of research regarding the real costs of pregnancy discrimination to employers and the labour market in general. For example, the relationship between pregnancy related illness and poor, unsympathetic workplace practices needs to be fully researched. To what extent is such illness, which results in a loss of productivity, caused by negative attitudes? Where employers promote

flexible working practices general employer/employee relations improve. For example, staff turnover and absenteeism decrease, staff are easier to recruit and morale improves (Work and Parents Task Force, 2001). In contrast, poor treatment can lead to illness, which may result in long term absenteeism and, potentially, to large compensation payments (as with the recent case of Harriet Davies-Taheri, discussed above).

At a different level, it is also worth keeping in mind that we live in an ageing population and this has implications for the importance that we should attach to the future employment and retention of female workers of childbearing age. The ageing population means, as Weir comments, that in time 'there will be a much higher population of women in the labour market of child-bearing age' (Weir, 2002: 578). Female employees are therefore a valuable resource to employers and should be catered for in the labour market. Otherwise, if women choose not to return to work following childbirth, and if the birth rate continues at its current rate, the population levels will become 'unsustainable' and 'the UK workforce will have to tap into alternative sources of labour supply' (Weir, 2002: 578). Indeed, there are at present around 2.2 million women of working age in the UK who cite family and home responsibilities as the reason for their non participation in the labour market (Weir, 2002: 579), some of whom may be persuaded to become economically active given the right incentives. These might include supportive employers, stronger flexible working rights and adequate and affordable childcare facilities (see Paull, Taylor and Duncan, 2002 and Daycare Trust Report, 2003).

### 5.4 Suggestions for further research

The number of calls received by the EOC and other helplines suggest that pregnancy related discrimination is impacting on the lives of thousands of women every year and, although hundreds are pursuing claims at employment tribunals, many choose not to do so. Small-scale research of tribunal decisions suggests that pregnancy/ workplace problems are not exclusive to any particular industry or occupation. Discrimination can affect shop workers and lawyers alike.

The law protecting pregnant women which is contained in numerous pieces of legislation, is failing to prevent pregnancy discrimination from occurring and many employers are not being legally held to account for their actions. Moreover, the reasons why employers discriminate against pregnant women and the true impact of pregnancy in the workplace for example, on production, have not been fully explored. Suggestions for further research are outlined below.

**Scope of pregnancy related discrimination**

Our knowledge of the real scope of pregnancy discrimination is limited in several ways and would benefit from further systematic research. This might include the following:

- The number of pregnancy related sex discrimination and unfair dismissal claims pursued at tribunals across the UK. Ongoing research into claims registered at employment tribunals in England and Wales under the ERA is limited both geographically and in terms of legal jurisdiction. We have yet to uncover the true extent of legal activity which responds to alleged pregnancy related discrimination.
- The outcomes of claims settled through Acas or withdrawn before they reach a full tribunal hearing. Is an adequate settlement reached or does either party feel forced into an unsatisfactory settlement rather than continuing to a hearing?
- What happens to the women who complain to advice centres such as Citizens Advice, EOC or Maternity Alliance about their treatment by employers when pregnant or returning to work after maternity leave, but who do not register claims at employment tribunals.
- Why women who have been dismissed or suffered discriminatory treatment as a result of pregnancy do not bring a claim to an employment tribunal.
- How many other women have experienced pregnancy related discrimination, but do not complain to tribunals or seek advice from organisations such as Citizens Advice, EOC, Maternity Alliance, or their own solicitor.

**The pregnancy/workplace experience and impact of discrimination**

The experiences of women who face pregnancy related discrimination will be very different. Further research is needed to consider the diversity and commonalities of experience between, and impact of discrimination on, for example:

- women from different cultural/racial and religious backgrounds;
- women with different income levels;
- women in different occupations and industries;
- women in different geographical locations;
- women with and without a disability;
- single women and those with partners;
- first time mothers and those with children;
- older and younger workers;
- casual workers and employees;
- part-time and full-time workers.

The impact of pregnancy related discrimination on other family members: partners, children and other dependants; the household finances and her future employment opportunities, should also be studied. This would help us gain a fuller picture of the wider effects of pregnancy related discrimination.

**Knowledge of the law**

Research suggests that employees and employers are generally aware of the law relating to pregnancy and maternity rights in the UK (Callender et al., 1997: 29-52), but is knowledge as accurate and widespread as we assume? It is possible that there are differences in understanding between the various industries for example, between small and large firms, between those who have 'experienced' pregnancy in the workplace and those who have not, and by occupation. If, on the other hand, understanding of the law is fairly widespread, then the relationship between knowledge of the law and behaviour which is discriminatory deserves investigation.

**Attitudes to pregnancy and the workplace**

As stated above, there has been little systematic research of perceptions and attitudes towards pregnant employees. Do these, for example, differ amongst women and men, employers and employees? Do attitudes vary according to the industry, geographical location, age of the employer or employee or pregnant worker, marital status of the worker or her length of service? And, again, what is the relationship between attitudes and behaviour towards pregnant workers? Such research would help us to understand why pregnancy discrimination still persists in Britain.

**Concerns raised by procedural issues**

Lack of transparency regarding the various forms and procedures affects the level and quality of information that is available to researchers. ET1, ET3 forms and the Acas conciliation outcomes are not open to public scrutiny. In addition, general statistical analysis does not highlight the particular pregnancy/workplace demographics; the ETS statistics only explore the outcome of unfair dismissal and sex discrimination cases in general. The tribunal decisions provide some information about the characteristics of litigants but reporting varies in standard and tribunals do not have to give an extended account of the reasons for their decision in unfair dismissal cases, unlike SDA cases. This lack of data and transparency makes it difficult to fully research what is really happening in terms of workplace demographics and at 'litigation' level in society. Further research of this area is crucial to our understanding of the women who are choosing to litigate, where discrimination is occurring and the outcomes of proceedings.

Employment tribunals 'aim to provide speedy, accessible and relatively informal justice' (ETS, 2003: 4). The relevance of these and other tribunal system

performance indicators need to be assessed from the perspective of women who bring pregnancy related discrimination actions; we cannot assume that the procedural aims of tribunals are of benefit to pregnant women. Further research is needed into whether the system is accessible to pregnant women and new mothers and what changes may be necessary to make it more accessible.

The availability of legal or professional representation or advice on a woman's decision to litigate or to settle once she has begun litigation would benefit from further study. Research is considering the impact of legal/professional representation once the cases reach a full tribunal hearing (James, 2004 forthcoming) but this is only part of the picture and neglects to take account of the influence of representation in Acas conciliation and case preparation.

### 5.5 Concluding comments

This small scale review into the legislation and literature covering pregnancy related discrimination has revealed huge gaps in our knowledge and understanding of the relationship between employers and pregnant employees. Employers in the UK are increasingly reliant on female participation, and many women choose to remain in the workplace for as long as possible during pregnancy and to return to work after maternity leave. However, pregnancy discrimination is occurring despite employment legislation that clearly states the unlawfulness of such behaviour. Problems do not appear to be specifically located in particular occupations and industries, but seem to be more prolific in the pre-maternity leave period and amongst those with under a year's service at the time of pregnancy. The type of discrimination suffered by women in employment during pregnancy ranges from denial of opportunities, for example in promotion and training, to hostility, verbal abuse and dismissal, all of which can have a detrimental impact on her health and well-being.

The reasons why some employers discriminate against pregnant women are multifaceted and require further research. We need to understand the true scope and nature of the problem, including an exploration of the reasons why some women choose to litigate and others do not, and the experience and outcome of that litigation process. If women continue to be discriminated against as a consequence of pregnancy and childbirth, the expertise and skills of a significant and increasingly important proportion of the UK's workforce will be lost. This is important for the individuals involved and society as a whole because, until we learn to manage pregnancy constructively in Britain's workplaces, gender equality can never be achieved.

## APPENDIX

### The legal protection of pregnant women at work in the UK, France and Sweden

### During the pre-leave period

| UK | FRANCE | SWEDEN |
|---|---|---|
| • Protection from sex discrimination ('less favourable treatment') (SDA).<br>• Protection from dismissal for a pregnancy related reason. (ERA)<br>• Paid time off for antenatal classes.<br>• Health and safety protection – includes risk assessment<br>• Suspension on full pay if necessary i.e. health and safety risk and no suitable alternative work. | • Protected from pregnancy related discrimination at work.<br>• Protected from pregnancy related dismissal.<br>• Employee must have informed her employer of her pregnancy prior to the dismissal or within fifteen days.<br>• Paid time off for medical examinations.<br>• Health and safety protection - includes risk assessment to be conducted by the company doctor<br>• Suspended from employment with full pay if necessary. | • Protected from pregnancy related discrimination at work, which includes dismissal.<br>• Paid time off for antenatal classes.<br>• Health and safety protection - includes risk assessment<br>• Suspended from employment with full pay if necessary. |

## During maternity leave

| UK | FRANCE | SWEDEN |
|---|---|---|
| • All entitled to 26 weeks maternity leave.<br>• During this time her contract is suspended but her employment rights continue.<br>• Paid by the employer which is recouped from the state - earnings related for first six weeks then at statutory maternity pay rate.<br>• Additional unpaid maternity leave of up to 26 weeks is available for those with 26 weeks continuous service by the end of the 14th week before childbirth.<br>• Protection against dismissal on grounds of pregnancy or a related reason i.e. being on maternity leave (ERA – as above). | • All entitled to 16 weeks maternity leave.<br>• During this time her contract is suspended but her employment rights continue.<br>• Paid for by the state and she is reimbursed for any medical costs relating to the pregnancy or the birth.<br>• Absolute protection against dismissal during maternity leave.<br>• Parents with at least one year's continuous employment at the time of the birth are also entitled to unpaid parental leave of up to three years (renewable annually).<br>• There is no absolute protection from dismissal during an extended period of leave.<br>• Women without one year's continuous employment can resign without providing notice. | • Maternity leave entitlement of 14 weeks is viewed as one part of the general parental leave entitlement, which is available to both parents.<br>• 480 days parental leave entitlement is available up until the child's eighth birthday.<br>• Sixty days of parental leave entitlement are tied to each parent (known as 'mamma month' and 'pappa month').<br>• During leave parental benefit is paid at a high rate of income replacement by the state.<br>• A parent's employment contract continues during this period.<br>• It is unlawful to dismissal a parents for exercising the right to leave. |

## On return to work

| UK | FRANCE | SWEDEN |
|---|---|---|
| • Right to return to same job with the same terms and conditions following ordinary maternity leave.<br>• Right to return to the same job following additional maternity leave so long as 'reasonably practicable'.<br>• If not 'reasonably practicable' must, where possible, be given another 'suitable' and 'appropriate' job. | • Right to return to same job with the same terms and conditions following maternity leave.<br>• Absolute protection from dismissal for four weeks following return.<br>• Following extended parental leave she has a right to return.<br>• Where she has resigned she has no right to return but a right (for one year) to be given priority consideration should a suitable post arise. | • S/he has the right to return to the same or similar employment on her or his return from parental leave.<br>• Less favourable treatment due to her/his absence on parental leave is unlawful. |

**Remedies and procedures applicable in the event of pregnancy related discrimination or dismissal**

| UK | FRANCE | SWEDEN |
|---|---|---|
| • In the event of pregnancy related discrimination / unfair dismissal an employer will have to pay compensation.<br>• A successful SDA claim may include compensation for injury to feelings.<br>• Time limit of three months for bringing a claim against her employer (under both ERA and SDA – can be extended).<br>• Promotion of private settlement is encouraged.<br>• Legal Aid is not available for legal representation at the tribunal hearing.<br>• Appeal is possible to the Employment Appeals Tribunal. | • In the event of pregnancy related discrimination an employer can be fined and may have to pay damages.<br>• An employer will always have to pay the equivalent of six months salary in the event of a dismissal that is found to be pregnancy related.<br>• If a dismissal takes place prior to the maternity leave period and is annulled, the employer will have to pay the pregnant woman the equivalent of her full wage for the period of protection.<br>• No formal time limit for bringing a claim in France.<br>• Promotion of private settlement is encouraged.<br>• State funding is available for legal representation as well as for preparing the case (and settlements).<br>• The average period of time for a decision to be reached is 11 months.<br>• Appeal is possible to the Court of Appeal. | • In the event of any violation of the PLA or the EOA the employer will have to pay damages and any termination of employment declared void.<br>• Time limits vary under Swedish law from between two weeks (notice to her employer of intention to initiate proceedings to have a notice of termination or a summary dismissal declared invalid) and four months (to claim damages).<br>• Promotion of private settlement is encouraged.<br>• Some state funding is available for help preparing a case where necessary but not for legal representation although most applicants are represented by their union. |

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# ENDNOTES

[1] For further information about the GFI and for the investigation's terms of reference, see www.eoc.org.uk/

[2] For fuller information on pregnancy, maternity and parental rights, please see the pregnancy and maternity pages of the EOC's website http://www.eoc.org.uk/EOCeng/dynpages/Pregnancy_Maternity3.asp and the DTI's webpages for working parents at www.dti.gov.uk/workingparents.

[3] See *Dekker v Stichting Vormingscentrum voor Jong Volwassen Plus* CaseC-177/88 [1990] ECR I-3941; [1991] IRLR 27 ECJ; *Handels-og Kontorfunktionaernernes Forbund I Denmark (acting for Hertz) v Dansk Arbejdgiverforening (acting for Aldi Marked K/S)* Case C-179/88 [1990] ECR I-3979; [1991] IRLR 31 ECJ; *Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 [1994] ECR I-3567; [1994] 4 All ER 115 ECJ.

[4] *Handels-og Kontorfunktionaerernes Forbund I Danmark, acting on behalf of Hoj Pedersen v Faellesforningen for Danmarks Brugsforeniniger, acting on behalf of Kvickly (Skive) and other joined actions)* [1999] IRLR 55 ECJ.

[5] *Coote v Granada Hospitality* [1998] IRLR 656 ECJ; [1999] IRLR 452 EAT and *Jones v 3M Healthcare Ltd*. (House of Lords) 2003.

[6] See *Handels-og Kontorfunktionaernernes Forbund I Denmark (acting for Hertz) v Dansk Arbejdgiverforening (acting for Aldi Marked K/S)* Case C-179/88 [1990] ECR I-3979; [1991] IRLR 31 ECJ and *Brown v Rentokil* C-394/96 IRLR [1998] 445 ECJ).

[7] In *Caledonia Bureaux Investment & Property v Caffrey [1998] IRLR 110*, heard before the ECJ ruling in *Brown v Rentokill.*

[8] *Handels-og Kontorfunktionaernernes Forbund I Denmark (acting for Hertz) v Dansk Arbejdgiverforening (acting for Aldi Marked K/S)* Case C-179/88 [1990] ECR I-3979; [1991] IRLR 31 ECJ.

[9] *Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 [1994] ECR I-3567; [1994] 4 All ER 115 ECJ; *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] C-421/92 ECR I-1657; *Mahlburg v Land Mecklenburg-Vorpommern* Case C-207/98 [2000] IRLR 276.

[10] *Tele Danmark A/S v Handels-og Kntorfunktionfrernes Forbund i Danmark (acting on behalf of Brandt-Nielsen)* Case C-109/00) [2001] IRLR 853 para 27.

[11] Jimenez Melger v Ayuntamienti de Los Barrios [2001] IRLR 848 ECJ).

[12] *Gillespie and others v Northern Health and Social Services Board* [1996] IRLR 214 ECJ and *Lewen v Denda* [2000] IRLR 67 ECJ applied in *Gus Home Shopping Ltd v Green and another* [2001] IRLR 214.

[13] *Lewen v Denda* [2000] IRLR 67 ECJ.

[14] *Handels-og Kontorfunktionaerernes Forbund I Danmark, acting on behalf of Hoj Pedersen v Faellesforningen for Danmarks Brugsforeniniger, acting on behalf of Kvickly (Skive) and other joined actions) ([1999] IRLR 55 ECJ.*

[15] *Caisse Nationale Vieillesse des Travailleurs Salaries v Thibault* [1998] IRLR 399 ECJ).

[16] See *R v Birmingham City Council ex p EOC* [1989] IRLR 173 HL; *James v Eastleigh BC* [1990] ICR 554 HL.

[17] *James v Eastleigh BC* [1990] ICR 554 HL; *O'Neill v Governors of St Thomas More RCVA Upper School* [1996] IRLR 372 EAT.

[18] See also the EAT decision in *Ouston t/a Jo Ousten & co v Macintyre-Beon* EAT/0171/01/RN 10.12.02 cited in McDonald, 2003: 60.

[19] See *King v Great Britain China Centre* [1991] IRLR 513 CA.

[20] SDA s.63A implementing the Burden of Proof Regulations 2001, which in turn implement the Burden of Proof Directive 97/80/EC (as amended by Directive 98/52/EC).

[21] *Barton v Investec Henderson Crosthwaite Securities Limited* EAT 18/03/MAA.

[22] *Wiebke Busch v Klinikum Neustadt GmbH & Co Betriebs-KG* IRLR [2003] 625.

[23] See HC Standing Committee F, cols 291-292, 12 January 1993; HL Debates, cols 531-532, 25 March 1993 (Trades Union Reform and Employment Rights Bill 1993 and *Stachwell Sunvic Ltd v Secretary of State for Employment* [1979] IRLR 455 EAT.

[24] *Del Monte Foods Ltd v Mundon* [1980] IRLR 224, EAT and *Dentons Directories Ltd v Hobbs* DCLD 34 cited in Palmer and Wade, 2001: 49.

[25] *Brown v Stockton on Tees Borough Council* [1988] IRLR 445 HL and *Clayton v Vigers* [1990] IRLR 177 EAT.

[26] *Del Monte Foods Ltd v Mundon* [1980] IRLR 224.

[27] *HJ Heinz Co Ltd v Kenrick* [2000] IRLR 144 EAT.

[28] Hardman v Mallon [2002] IRLR 516.

[29] See *Noel v London Underground* [1999] EAT IRLR 621 and *Schultz v Esso Petroleum Company Ltd* (1999) CA IRLR 488.

[30] For more details see 'Maternity and parental rights – Time Limits', available from www.eoc-law.org.uk.

[31] See *BCC v Keeble* [1997] IRLR 336 EAT and *Hawkins v Ball and Barclays Bank Ltd* [1996] IRLR 258.

[32] For discussion of the type of documents which might be made available in discrimination cases see *West Midlands Passenger Transport Executive v Singh* [1988] IRLR 186 CA.

[33] In Scotland however, legal aid has been extended to cover legal representation at employment tribunals in 'complex' cases: The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001: Available at http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2001/20010002.htm.

[34] Indeed speed is an important performance indicator for the tribunal system and one of the motivations for reform proposals of the tribunal system. See Sir Andrew Leggatt's 'Review of Tribunals: One Service, One System' at www.tribunals-review.org.uk.

[35] Figures are also available in the Employment Tribunal Service Annual Report and Accounts 2002-2003 p.26 and at www.ets.gov.uk/generalinfo.htm.

[36] The relevant law is contained in the Code du Travail (Employment Code) 2003 unless otherwise stated.

[37] Cass. Soc. 23/02/72 n° 71-40.091 SA Boulanger c/ Guerin, Bull. Civ. V n°152.

[38] Décret du 23/10/2002 provides a list of the tasks.

[39] *Cass. Soc. 08/03/2000 n°97-43.797, Wojtowicz c/ Ambrosini, Bull. Civ. V n°93*.
[40] The economic justification argument was upheld in Cass. Soc. 04/10/95 n°94-41.162, Son c/ Trame Selection, and not upheld in Cass. Soc. 19/11/97 n°92-42.540, Trianonn Palace Hôtel c/ Rousseau, Bull. Civ. V n°382.

[41] It is sufficient that the certificate only provides that there is a presumption of pregnancy - Cass. Soc 6 Feb 1975 No. 73-40.674 *Ste Phinelec c/ Perona, Bull*. Civ. V No.58. If not confirmed by a doctor's certificate within the 15 days and the employer does not have actual or constructive knowledge of her pregnancy the woman is not protected against dismissal (Cass. Sco. 17 Juin 1971, No 70-40.357, *Ste Claude Bernard c/Baron*, Bull. Civ V, No 464).

[42] *Cass. Soc 27/09/89 n°86-41.450, SA Lemeunierc/ Botondi*.

[43] *Del Monte Foods Ltd v Mundon* [1980] IRLR 224, EAT and *Dentons Directories Ltd v Hobbs* DCLD 34 cited in Palmer and Wade, 2001; 49.

[44] *CA Besançon 18/05/90, Boully c/ Gabel*.

[45] *Les chiffres clés de la Justice,* Octobre 2002, Direction de l'Administration générale et de l'Equipement, Sous-direction de la Statistique, des Etudes et de la Documentation, found on the Ministry of Justice website: www.justice.gouv.fr - at p15.

[46] E.g. *Santoni c/ France* (requête n°49580/99) 29/07/2003).

[47] *Cass. Soc. 07/07/76 n°75-40.044, Sté Bouvet c/ Berneuc, Bull. Civ. V n°435*.

[48] Cass. Soc. 09/10/01, Bull. Civ. V, No. 314.

[49] For more information on the question of whether the leave entitlement ought to be gender specific or gender neutral see www.finans.regeringen.se/LU2003/pdf/lu2003_bilaga12.pdf.

[50] www.lo.se/raw/documents/464440_RoF-1-text.pdf.

[51] Regulated by the Labour Disputes (Judicial Procedure) Act (Lag om rättegången i arbetstvister 1974:371).

[52] Case No. 2503908/97 Newcastle 16 & 17/02/98.

[53] Case No. 1400472/97 Bristol 23/06/97.

[54] Case No. 37157/96 London North 13/02/97.

[55] Case No. 10700/96 Bury St Edmunds 02/05/96. See also *P Cross v Rosemount Nursing Home* Case No. 2501367/97 Newcastle upon Tyne 06/06/97 in which the tribunal stated that such a dismissal was 'flagrantly unfair'.

[56] Case No. 2802792/97 Sheffield 09/02/98.

[57] Case No. 4597/96 Southampton 30/05/96.

[58] For further figures relating to female employment participation see EOC Facts about Women and Men in Great Britain 2003 booklet at www.eoc.org.uk/cseng/research/factsgreatbritain2003.pdf.

[59] Although the number of pregnant women was relatively small (121 aged 16-25 and 159 aged 26-30), these differences are significant at the 5% level.

[60] For further information about this research please contact the author at c.g.james@reading.ac.uk.

[61] Case No. 2801787/02, Sheffield ET.