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**“UK and European Maternity Rights -
Success, Failure or a Confused Court?”**

Master of Jurisprudence 1999

University of Durham

Department of Law

1999

VOLUME II of II

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23 MAY 2000

CHAPTER 4 THE PREGNANT WORKERS DIRECTIVE

“While most women exercise whatever rights are available, the reality is that the limited income replacement and right to return to work which British law provides, combined with the enormous gap between supply and demand in terms of decent and affordable child care, leaves women with children in a significantly disadvantaged position in relation to the terms upon which they return to the workplace. The ‘working mother’ is still vulnerable to job loss during the period of her pregnancy and thereafter. She is still more likely to work part-time, and part-time work continues to be economically disadvantaged. She is also more likely to experience vertical mobility leading to lower pay and poorer working conditions. The constraints imposed by motherhood in an essentially unsympathetic working environment become another resource for employers to use in their increasing search for flexibility. A woman’s lack of bargaining power, directly consequent upon the absence of significant legal protection of her economic position during pregnancy and thereafter, makes her economic vulnerability easy to exploit.”⁵⁴

Against this type of background was introduced Council Directive 92/85, 19th October, 1992 "on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding". It is known as the Pregnant Workers Directive. Thus, pregnant workers, those who have recently given birth (i.e. within the last six months), or those who are breastfeeding have been specifically identified as an

⁵⁴ Conaghan, Joanne, Pregnancy and the workplace: A question of strategy?, (1993) 20 Journal of Law and Society 71, pp. 71 - 72

exceptional risk group in terms of health and safety, and possible discrimination as a result of their condition.

There has been considerable opposition to the EU's proposals on maternity and parental and family leave, and it should be remembered that it is only because of qualified majority voting (on issues relating to health and safety) that certain directives have been able to pass, for example Directive 92/85.

The directive began as a somewhat stronger measure than that which was introduced. The Commission had originally sought a 16 week period of paid maternity leave. As we know, that is far from what came into force. Additionally, those potential health and safety risks outlined in the Pregnant Workers' Directive were originally to be determined by the member states. That onus has now fallen to employers, but most employers are not even aware of their legal responsibilities here, never mind having undertaken any form of assessment relating to those covered by the Pregnant Workers' Directive.

This Directive was brought into U.K. law in October, 1994 by the Management of Health and Safety at Work (Amendment) Regulations, SI1994/2865, and provides for extensive protection for the defined groups. Other aspects of the Directive are to be found within the Employment Rights Act, 1996.

As mentioned above, those defined groups are those who are pregnant, those who have given birth within the last six months, and those who are breast feeding. Under the Directive, it is necessary for a person who falls within any of the three groups to inform the employer of her condition.

This is a very strange provision and, in the terms of this paper, it is suggested that this is a failure on the part of both UK and European maternity rights.

Two difficult examples can easily arise. Firstly, expectant mothers are often extremely loathe to inform anyone of their condition in the earlier months, and this can extend to prospective grandmothers, never mind employers. In addition, the matter can be further complicated because many employees (often rightly) fear detrimental treatment at the hands of their employers.

Secondly, expectant mothers may frequently be unaware of their condition, and it is doubtful if many employees would go to their employer in either month one or two to inform the employer of a likelihood of pregnancy.

Thus, when the female and foetus may well be at greatest risk, the employer appears to be able to sidestep legal responsibilities under both UK and European maternity law.

This is not to say that the employer would be completely absolved of any responsibility if some harm were to befall the mother or baby. There still remains the general duty under the Health & Safety at Work Act 1974, as well as the contractual and tortious duties of care towards employees.

In Day v. T. Pickles Farms Ltd [1999] IRLR217, there is support for this view.

Briefly, the appellant was employed in a sandwich shop, and one of her duties included roasting chicken. This made her nauseous whilst pregnant. Her doctor gave her a certificate to take time off work, and, at some stage, Mrs. Day's employers (erroneously) withdrew her Statutory Sick Pay.

Ultimately, the employee made a number of complaints including one for sex discrimination, one of the elements of which was that the respondents were in

breach of the MHSW (Amendment) Regulations in that they had not carried out a risk assessment, which would have led to her suspension on full pay.

The Employment Appeal Tribunal held that the employment of a woman of child bearing age required the employer to carry out a risk assessment. In itself, it amounted to a trigger, and failure to undertake it was capable of amounting to detriment.

Article 8 of Council Directive 92/85 provides that (1) "member states shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least fourteen weeks allocated before and/or after confinement in accordance with national legislation and/or practice. (2) The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice". (See below).

The Directive also provides (under Article 9) for time off for ante-natal examinations, as well as a prohibition of dismissal (Article 10), various employment rights (Article 11), and defence of those rights (Article 12). (See below).

The main provisions of the Directive include the following;

- (i) to draw up guidelines on the assessment of various health and safety concerns to include physical agents, biological agents, chemical agents, industrial processes, and other forms of working considered hazardous for the health and safety of workers within the defined categories;

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- (ii) to conduct health and safety risk assessments in respect of those within the defined categories, or those who are likely to be within those defined categories, and to provide workers with details of the results of the assessments, and of any measures to be taken following the assessments;
 - (iii) following the assessments, if anything poses a risk to the health or safety of the workers, or will have an effect upon either pregnancy or breast feeding, to undertake certain measures to ensure that appropriate action is taken;
 - (iv) this may include temporarily adjusting the working conditions and/or the working hours of the worker concerned or, if that is not feasible or cannot reasonably be required, the employer may have to move the worker to another position or, if that is not feasible or cannot reasonably be required, then the worker will be granted leave.
 - (v) (in practice, this means that the female worker will be suspended on full pay);
 - (vi) the Directive also prohibits exposure to certain risks;
 - (vii) furthermore, if on medical advice it is determined that night working is hazardous to the health and safety of the worker concerned, then she must be transferred to day time work, or duly suspended;
 - (viii) the Directive also introduced the concept of a minimum period of fourteen weeks maternity leave irrespective of length of hours worked or service as well as compulsory maternity leave of at least two weeks either before and/or after confinement;
 - (ix) it is provided that all pregnant workers are entitled to paid time off for ante-natal care (and under U.K. common law this is fairly widely defined to

include parent-craft and relaxation classes; see Gregory v. Tudsbury Limited [1982] IRLR 267 and Satchwell Sunvic Limited v. Secretary of State for Employment [1979] IRLR 455).

- (x) measures were also introduced to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected with either pregnancy or child birth. It was also provided that if the worker were to be dismissed during the maternity period, then she would be entitled to receive written grounds detailing the reason for her dismissal;
- (xi) it was further provided that during the first fourteen weeks of maternity leave, all employment rights other than remuneration must be maintained;
- (xii) although remuneration is not maintained, the Directive points out that an allowance should be paid during maternity leave, and that allowance should be no less than the woman would have received if she had been absent on sick leave, and must be adequate;
- (xiii) the sick pay referred to has been held to be the equivalent of the statutory provisions.

It is worthwhile mentioning the Management of Health & Safety at Work (Amendment) Regulations SI1994/2865 as they apply to the categorised employees in terms of health and safety risks.

A non-exhaustive list of risks to be considered includes:

1. Physical agents

- (a) shocks, vibrations and movements
- (b) extremes of temperature
- (c) lifting of loads entailing risks

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- (d) ionising radiation
 - (e) non-ionising radiation
 - (f) noise
 - (g) movements and postures
 - (h) travelling inside and outside the establishment
 - (i) mental and physical fatigue
 - (j) other physical burdens associated with the activity of new or expectant mothers

2. Biological agents

- (a) set out in the EU Biological Agents Directive
- (b) any biological agent of hazard group 2,3 & 4

3. Chemical agents

- (a) substances labelled R40, R45, R46, and R47
- (b) chemical agents in annex 1 to the EU Carcinogens at Work Directive
- (c) mercury and mercury derivatives
- (d) anti-mitotic drugs
- (e) carbon monoxide
- (f) chemical agents of known and dangerous percutaneous absorption

4. Industrial processes

5. Underground mining work

In addition there is a prohibition against pregnant employees working in a hyperbaric atmosphere, or being exposed to toxoplasma or rubella virus unless shown to be adequately immunised. There are also provisions relating to night time working if that would affect the employee.

There have been a number of claims alleging breach of various directives, including the Pregnant Workers' Directive and (for no particular reason) it falls to consider those cases at this stage.

In Handels-Og Kontorfunktionaerernes Forbund i Danmark (Acting on behalf of Pederson) v. Faellesforeningen for Danmarks Brugsforeninger (Acting on behalf of Kvickly Skive) [1999] IRLR 55, Ms. Pederson and a number of her colleagues challenged, under Article 119, the Equal Pay Directive, the Pregnant Workers' Directive, and the Equal Treatment Directive, Danish national legislation stipulated that if an employee were to be off sick during pregnancy but before the commencement of her maternity leave, then she would be entitled to full sick pay only if her reason for absence was unconnected with pregnancy.

Danish law further provided that if the reason for sickness were to be connected with pregnancy, then the female employee would have no right in principle to her wages, but would receive certain benefits under national law. The applicant and her colleagues also challenged the provision which allowed an employer to pay half salary where it considered it was impossible to provide work for a pregnant worker, even though she was not actually unfit for work at the time. The European Court of Justice stated "it must be noted that although pregnancy is not in any way comparable to a pathological condition, the fact remains that it is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to take absolute rest for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risk inherent in the condition of pregnancy and are thus a specific feature of that condition," at pp. 66 - 67.

As a worker would normally be entitled to receive full pay from his or her employer if providing a medical certificate attesting to incapacity for work, the European Court of Justice had no difficulty in finding that this was therefore unlawful.

“Thus, the fact that a woman is deprived, before the beginning of her maternity leave of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory,” at p. 67.

It was put to the European Court of Justice that Danish legislation could be justified on the basis that it reflected a sharing of the risks and economic costs connected with pregnancy between the worker herself, the employer, and society as a whole. It was stated that this “represents inter alia a balance between the concern to facilitate the access of women to the workplace and the need to ensure their protection in the event of pregnancy,” at p. 67.

The European Court of Justice dismissed this argument stating “that goal cannot be regarded as an objective factor unrelated to any discrimination based on sex within the meaning of the case law of the court.” This seems at odds with the decision in the *Sidal* case, at p. 67.

Another aspect of the case concerned the position where, before the beginning of maternity leave, a female employee was absent from work not because of a pathological condition, or of any special risk for the unborn child giving rise to an incapacity for work attested by a medical certificate, but instead, was absent by reason either of routine pregnancy related inconveniences, or of mere medical recommendation, without there being any incapacity for work in either of the situations.

The European Court of Justice held that “the fact that the employee forfeited some, or even all, of her salary by reason of such absences which are not based on an incapacity for work cannot be regarded as treatment based essentially on the pregnancy, but rather as based on the choice made by the employee not to work,” at p. 67.

The facts here were that Ms. Pedersen was declared to be only partially unfit for work, and she had subsequently suggested to her employer that she be allowed to resume work on a part time basis, but this was declined. After this, she was informed that a full time replacement had been taken on, and that she would no longer be paid. Accordingly, she was informed that she should apply for early maternity benefits under the Danish state scheme.

Unfortunately, the reports do not give the full details of the nature of the circumstances, but it would seem the use of the word “inconveniences” has been deliberately chosen.

However, the statement a “mere medical recommendation” is perhaps somewhat more difficult. The Directive itself deals with issues of “safety or health and any possible effect on the pregnancies or breast feeding of workers”, rather than suggesting that there should be an incapacity for work.

One imagines that the facts before the European Court of Justice relating to the medical (or otherwise) conditions allowed the Court of Justice to state that this was very simply a choice being made by the females concerned not to work.

The European Court of Justice seems to come back on track when it is asked to consider whether the Danish employer may send home a female worker who is pregnant, although not unfit for work, and then decline to pay her salary in full simply because he considers that he is unable to provide work for her.

The Court held that this was in clear breach of the Pregnant Workers’ Directive (92/85/EEC) stating “it is contrary to Directive 76/207 and 92/85 for national legislation to provide that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her,” at p. 68

Under Danish legislation, the employer had not considered the health and safety risk assessment and responses of a temporary change of conditions, or a new job, before moving to suspension, and this was unlawful.

In Boyle v. Equal Opportunities Commission [1999] ICR 360, the European Court of Justice was called upon to consider a case where the Equal Opportunities Commission was being sued by its employees on the basis that its maternity provisions were discriminatory contrary to Article 119, the Equal Pay Directive, the Equal Treatment Directive, and the Pregnant Workers' Directive.

The practical issues within the Equal Opportunities Commission's maternity scheme were as follows.

Firstly, whether a provision that if an employee failed to return to work following child birth she would agree to re-pay any payment made to her during the maternity leave period (which could amount to three months and one week's paid maternity leave) was lawful.

Secondly, whether an employee who was on sick leave with a pregnancy related illness immediately before the six weeks preceding the expected week of confinement, and gave birth during the sick leave period could bring forward the date on which her paid maternity leave commenced either to the beginning of the sixth week preceding the expected week of confinement, or to the beginning of the period of sick leave, whichever was the later.

Thirdly, whether it was lawful to prohibit an employee from taking sick leave during her maternity leave period unless she elected to return to work and terminate her maternity leave.

Fourthly, whether it was lawful for the maternity scheme to limit the accrual of annual holiday to the fourteen week maternity week period.

It would probably be interesting to test this denial of accrual of holiday through a claim under the Working Time Directive.

Further or alternatively, as the Employment Relations Bill will provide for the continuation of the contract throughout maternity leave, it seems almost inconceivable that the person would not be able to continue to accrue holiday during her absence for pregnancy and confinement.

Fifthly, and finally, whether a condition within the Equal Opportunities Commission's maternity scheme limiting the accrual of pensionable service during maternity leave to the period during which the employee received either her contractual pay, or statutory maternity pay was lawful.

The European Court of Justice held that under the Pregnant Workers' Directive female workers were guaranteed an income which had to be adequate.

It was stated "... although Article 11(2)(b)(3) requires the female worker to receive, during the period of maternity leave referred to in Article 8, income at least equivalent to the sickness allowance provided for under national social security legislation in the event of a break in her activities on health grounds, it is not intended to guarantee her any higher income which the employer may have undertaken to pay her, under the employment contract, should she be on sick leave.

"It follows that a clause in an employment contract according to which a worker who does not return to work after child birth is required to re-pay the difference between the pay received by her during her maternity leave and the statutory payments to which she was entitled in respect of maternity leave is compatible with Directive 92/85 in so far as the level of those payments is not lower than the income which the worker would receive, under the relevant national social

security legislation, in the event of a break in her activities on grounds connected with her state of health,” at p. 393.

Thus, there was no guarantee of a higher income equivalent to occupational sick pay.

The Court of Justice continued by saying that “pregnant workers and workers who have recently given birth or who are breastfeeding” are in an especially vulnerable situation. They were therefore afforded special treatment, and their situation could not be equated with either a male or female employee absent on sick leave.

Further references to the woman’s biological condition and the special relationship between the woman and her child over the period which follows pregnancy and childbirth will hardly please many of the critics of the European Court of Justice, and it is difficult to understand why the European Court of Justice is unable to make the leap to the worker on sick leave, as it was quite simply able to do in the Hertz case, albeit after the maternity leave had expired.

The applicants also complained about a clause which, effectively, did not allow them to take unconditional paid sick leave if they were absent with pregnancy related illnesses, and gave birth whilst absent on sick leave. Essentially, contended the applicants, this forced them to take leave (i.e., maternity) which was paid at a much lower rate, and also to have to re-pay some of that salary if not returning to work in due course.

The European Court of Justice held that the automatic triggering provision and the date upon which maternity leave commenced was a matter for national legislation, and was not in breach of either the Pregnant Workers’ Directive or the Equal Treatment Directive.

It was possible that the European Court of Justice could have taken a braver approach, and it seems that this part of the decision is in conflict with its previous decisions.

To rehearse UK law on this issue, if a female employee is absent during the period within six weeks of the expected confinement, and that absence is wholly or partly due to pregnancy, and, one imagines, this would normally be due to sickness, then her maternity leave may be automatically triggered.

This means that her maternity leave will commence from the date of her absence. The provision can apply quite harshly in that if the female employee takes say, one or two days or absence, then she will trigger her entire maternity leave. If the absence is unrelated to pregnancy, then the employee in question could take sick leave, and receive any sick pay which might be due to her.

It must surely be discriminatory to refuse to allow a pregnant employee to take sick leave because her sickness is pregnancy related.

Even if that is not the case, the Court's decision can be criticised on the basis that if a man were to take one or two days off sick and then return to work, he would not be expected to absent himself from work for a number of weeks when he did not wish to do so, nor to have to take a lower rate of pay for a period of several weeks.

In one very important respect, the European Court of Justice does not appear to have considered the wording of the Directive and how the automatic triggering provision came about. Such a provision was not to be found within UK law prior to the implementation of the Pregnant Workers' Directive, and nor is any such provision to be found in the Directive itself.

Council Directive 92/85 states that it “may not have the effect of reducing the level of protection afforded to pregnant workers ... as compared with the situation which exists in each member state on the date on which this Directive is adopted”, then it must be contended that the automatic triggering provisions, given their negative effect, must be unlawful. It can not possibly be argued that a provision which can reduce a female employee’s level of pay or cut short her maternity period of absence can be anything other than a reduction in the level of protection available.

Returning to the questions which were before the court.

The contractual maternity scheme also provided that a female employee could not take sick leave unless she elected to return to work and terminate her maternity leave. On this particular point, the European Court of Justice held that the Pregnant Workers’ Directive had been breached but only during the current minimum period of 14 weeks maternity leave. Any contractual maternity leave provided by the employer over and above the minimum requirement would allow the employer to stipulate that a woman would need to return to work and terminate her maternity leave.

Turning to the fourth question, the European Court of Justice was asked to rule on the accrual of holiday.

It is beyond doubt that for the first 14 weeks of maternity leave an employee is entitled to the receipt of her contractual benefits, save for those which are held to be remuneration.

It was held that annual leave did not accrue outside of the basic 14 week maternity leave period.

The next part of the question put to the European Court of Justice was a little more tricky. Under the rules of the Equal Opportunities Commission “if unpaid leave is taken (sick leave, special leave or supplementary maternity leave), the annual leave entitlement is reduced by a proportion of the amount of unpaid leave taken.”

The applicants argued that as a substantially greater proportion of female employees rather than male employees took periods of unpaid leave (basically because they took advantage of the supplementary maternity leave), the Equal Opportunities Commission had indirectly discriminated against women.

The European Court of Justice held that the measure was certainly not directly discriminatory, and that it could not be indirectly discriminatory, because “female workers who exercise that right subject to the condition that annual leave ceases to accrue during the period of unpaid leave cannot be regarded as at a disadvantage compared to male workers. The supplementary unpaid leave constitutes a special advantage, over and above the protection provided for by Directive 92/85 and is available only to women, so that the fact that annual leave ceases to accrue during that period of leave cannot amount to less favourable treatment of women,” at p. 399.

Finally, the European Court of Justice turned to the accrual of pension rights, and it was held that a clause in an employment contract could not limit the accrual of pension rights during the period of maternity leave where the occupational scheme was wholly financed by the employer.

In Dekker terms, this may appear to be good news, because the European Court of Justice has again held that the pregnant woman, or the woman on maternity leave, at least, can not compare herself with the sick male.

But, it is difficult to understand the reasoning that allows a different type of treatment to be 'dished out' to an employee who has a pregnancy related illness after her maternity leave, as opposed to one who has a pregnancy related illness prior to her maternity leave. If pregnancy is a condition which can apply only to women (and in all terms that is completely true), then it simply can not change.

Moreover, as the European Court of Justice expressly recognises that those who are pregnant, those who have given birth within the last six months, and those who are breastfeeding are in an "especially vulnerable situation" it seems strange not to come to the aid of such vulnerable persons. We are told that this special circumstance, this vulnerability, does not allow such persons to be compared with a man or a woman absent of sick leave who presumably, are equally vulnerable, and can make certain claims (in a very wide sense) for assistance under the common law and statute.

It is also difficult to reconcile how the European Court of Justice in Brown v. Rentokil is able to consider that pregnancy related illness will attract directive protection, and yet it is not capable of moving forward in a positive way in Boyle.

The confusion is well-illustrated in two similar cases.

In Reay v. Sunderland Health Authority (COIT 22905/92) the female applicant was employed as a health visitor. It was provided in her contract of employment that should she be sick on any Bank or Public holiday, then she would be entitled to receive a day off in lieu in respect of that holiday.

Thus, male employees who were off sick would be re-credited with the Bank Holidays. The applicant was absent on maternity leave for a period of six months. Upon returning to work, she sought time off in lieu of the Bank holidays which had fallen during the period while she had been away.

It was held that Reay was entitled to be re-credited with the Bank holidays.

In Todd v. Eastern Health and Social Services Board, and Department of Health and Social Services [1997] IRLR 410, the female employee was entitled to take 18 weeks maternity leave under the provisions of her contract. Under that contract, she received enhanced maternity payments, namely six weeks at 90% of her full salary, with the remaining 12 weeks at 50% of her full salary.

Her contractual terms provided that she would be entitled to five months full pay, followed by five months half pay if she were to be absent on account of illness.

The contractual sick pay scheme was stated as covering employees with either an injury or a disability, but pregnancy was specifically excluded. No restrictions were placed upon the meaning of the word 'disability' in the contracts of male employees.

In her application for sick pay, the applicant initially fared well, but it was finally held that pregnancy could not be compared with sickness.

It is surely incorrect to state that such benefits should not apply if the employee is genuinely off work sick. Pregnancy may not be an illness, but any complications arising from it must surely entitle a person to be paid.

Once again, the European Court of Justice, in its interpretation of EU maternity rights seems to be at odds with itself. This 'difficulty' has been created by its inability to recognise pregnancy related illnesses as pregnancy connected reasons - an attempt to import justifiability into areas of direct discrimination.

CHAPTER 5 PARENTAL LEAVE DIRECTIVE

The table below indicates the vast differences between the United Kingdom and other countries in respect of parental, child care, and family leave provisions. It should be noted that the table reflects the position as at January 1995, and that the E.U. Parental Leave Directive has already been adopted in some social partner countries, and is due to be adopted in this country via the Employment Relations Bill. The Parental Leave Directive allows time off for child care and urgent family reasons.

Against this background, the DTI has recently undertaken a survey⁵⁵ which was based on extensive questionnaires and interviews. Interviews took place in more than 3,000 organisations, with approximately 30,000 questionnaires being completed. Perhaps surprisingly, 46% of employees did not receive any entitlement to family friendly policies. This covered job sharing and flexible working. Flexible working was available to only 33% of employees, with job sharing being available to a mere 16%. Interestingly, the DTI survey found that 90% of employees would be able to take time off for the urgent reasons foreseen in the Parental Leave Directive.

Even though the provisions in the table are shortly due to change, the comparative provisions nonetheless make interesting reading, particularly where there has been no legal requirement for social partner countries to introduce such provisions. When one notes this point in particular, the U.K. provisions are far from generous.

⁵⁵ The 1998 Workplace Employer Relations Survey - First Findings - www.dti.gov.uk/emar

In another respect, the U.K. provisions may seem very generous, providing, as they do, for maternity leave to be available for up to forty weeks.

However, the advantageous position of women who are pregnant within the United Kingdom is illusory. A comment in the first column indicates the pay available to those taking maternity leave, and it is clear that the U.K.'s story is not one to encourage maternity leavers to extend their absence. This lack of pay has a dramatic impact upon those who are able to take up the full forty weeks of maternity leave, and numerous commentators have sought to persuade the U.K. Government that it must provide some form of finance for those on extended maternity leave if maternity leave is truly to be a benefit within this country.

Parental, child care and family leave provisions EU-15, January 1995				
	Maternity/ paternity leave and pay	Parental leave/protection pay	Leave for child care Leave for pressing family reasons	Rights to work part- time
EU	Maternity: 14 weeks in total of which 2 compulsory. Benefit = statutory sick pay. Paternity: none (EU Directive on maternity rights).	Parental leave prop.) F/T or P/T parental leave following maternity leave. Optional payment of benefit. Possible qualifying period of 1 year. Possible opt-out on operational grounds.	Parental leave prop.) F/T or P/T family leave of at least 6 months. Benefit available if employee replaced by someone from unemployment register. Minimum number of days per year for pressing family reasons.	See previous columns.
Austria	16 weeks: 8 before plus 8 after birth. Paid at 100% earnings. Paternity: none by statute.	Unpaid parental leave until child reaches 24 months (or 48, if part-time) to either parent, or shared. State benefit available. Right to re-engagement but not re-instatement.	Right to one week's paid leave a year to care for close family members.	Either from 4 weeks after the birth, or after a year's maternity leave until child is 4.
Belgium	15 weeks: 1 must be taken before birth. State benefit 81%-75% of gross pay. Paternity: 3 days at 100% earnings.	Unpaid parental leave of at least 12 weeks (max. One year) to either parent following birth or maternity leave. State benefit may be available. Right to reinstatement.	Unpaid career break 6-12 months available to employees with a year's service. State benefit may be available. Leave for urgent reasons: 1-2 days paid, 10 days unpaid (by CA).	Part-time career breaks possible following maternity leave, either parent.

	Maternity/ paternity leave and pay	Parental leave/protection pay	Leave for child care Leave for pressing family reasons	Rights to work part- time
Denmark	18 weeks: 4 weeks before, 14 weeks after birth. Benefit = 90% of pay up to a ceiling. CA's can provide pay top-up. Paternity: 10 days paid as maternity.	Paid parental leave of ten weeks following maternity leave available for either parent. State benefit available. Right to reinstatement.	Unpaid child care leave (3 months statutory plus 9 months by agreement). State benefit available. Sabbatical leave: up to a year by agreement with state benefit.	No statutory or CA provision.
Finland	17.5 weeks: at least 5 weeks before and 9.5 weeks after. Benefit = 66% of earnings. Paternity: one week paid as for maternity.	Unpaid parental leave to either parent for 163 working days following maternity leave. Benefit = 66% of earnings. Right to reinstatement.	Unpaid child care for child under 3. Duration by agreement. State benefit available. 4 days a year for sick child under 10. Unpaid.	Right to work part-time if child under school age. Either parent.
France	16 weeks: 6 weeks before, 10 weeks after birth. Benefit = 84% gross pay up to a ceiling. CA's can provide top-up. Paternity: 3 paid days.	F/T or P/T unpaid parental leave to either parent until child is 3. State benefit available for 2+ children. Right to reinstatement in first year only.	Right to paid leave for family reasons, 1-4 days depending on circumstances. CA's may provide enhancements.	See previous columns.
Germany	14 weeks: 6 weeks before, 8 weeks after birth. Benefit = sick payment rate plus top up to full salary by employer. Paternity: none by statute.	Unpaid paternal leave to either parent until child reaches 36 months. Income-related state benefit available. Right to reinstatement.	Some employees entitled by statute to 10 days' leave to care for a sick child. State benefit available. Paid or unpaid leave for family reasons 1-3 days by CA.	No statutory provisions. CA's may facilitate switch to P/T work, where available.

	Maternity/ paternity leave and pay	Parental leave/protection pay	Leave for child care Leave for pressing family reasons	Rights to work part- time
Irish Republic	14 weeks: at least 4 before and 4 after birth. Benefit = 70% of earnings up to a ceiling. Paternity: none by statute.	No statutory provision. No widespread agreed provisions.	No statutory provision. Civil service grants up to six months' unpaid leave for domestic reasons or up to two to care for a sick relative. 1-3 days for other family events in some CA's.	No statutory provision. Part-time hours following maternity leave by individual agreement.
Italy	20 weeks: 8 before, 12 after birth, compulsory. Benefit = 80% of pay plus possible top-up by CA. Paternity: none by statute.	Unpaid leave for six months for either parent until child reaches 1 year. Small state benefit available. Right to reinstatement.	10-30 days leave upon marriage by CA. 1-2 days a year for family reasons by CA. Some informal arrangements.	No statutory provision. Agreed provisions uncommon.
Luxembo urg	16 weeks: 8 before, 8 after birth, compulsory. Benefit = 100% pay. Paternity: none by statute.	No statutory provisions. Private sector right to refrain from resuming work following maternity leave. Can apply for re-engagement the following year. Public sector - unpaid leave up to 1 year following maternity leave to either parent.	No statutory provision.	Public sector - right to work P/T until child commences full-time education, and at any time until child reaches 15.
Netherla nds	16 weeks: 4 before, 12 after. Benefit = 100% earnings up to a ceiling. Paternity: 2-3 days by CA (usually 100% earnings).	Right to up to 6 months' unpaid part-time parental leave for either parent until child aged 4 (this is paid in civil service). Right to reinstatement.	Career break arrangements by CA exist but are not common. 1-4 days' leave a year for family reasons by CA.	See right to part-time parental leave.

	Maternity/ paternity leave and pay	Parental leave/protection pay	Leave for child care Leave for pressing family reasons	Rights to work part- time
Portugal	98 days: 60 must be taken after birth. Benefit = average earnings over a given period. Paternity: none by statute, some provided by CA's'.	Right to unpaid parental leave 6-24 months following maternity leave, either parent. Right to reinstatement. Limited right of refusal.	Up to 30 days to care for sick child aged <10 years old. State benefit available. Up to 15 days per year for sick relative including child <10 years. Unpaid, no benefit.	May work P/T or flexible hours for a period of 6 months to 3 years if child <12, and with employer agreement.
Spain	16 weeks: 6 must be taken before birth. Benefit = 75% of basic pay up to a ceiling. Employer may top up. Paternity: 2 days at 100% earnings.	Unpaid parental leave of up to 3 years for either parent with one year's service; no benefit available. Right to reinstatement during first year only.	Career breaks permitted, 2-5 years with one year's service. Preferential reinstatement. 2-4 days' unpaid leave by statute for birth of a child, or child's serious illness. Other by CA.	Either parent can opt to work part-time if child under age 6.
Sweden	12 weeks: 6 before, 6 after birth. Benefit = 90% earnings. Paternity: 10 working days at 80% of earnings.	Full-time parental leave until child is aged 1 ½ years or part-time leave until aged 8. Either parent. State benefit available (for 360 days at 80%-90% of pay). CA's sometimes make up shortfall in income. Right to reinstatement or similar job.	60 days per child per year. Either parent. Benefit = 80%-90% pay, CA's often supplement this. No qualifying period. 2 days' paid leave to visit child's school.	See part-time parental leave.
U.K.	14-40 weeks depending upon service. Benefit >2 years' service: 6 weeks at 90% of pay; rest at flat rate. <2 years' service: earnings-related flat rate. Employer may top-up. Paternity: none.	No statutory provisions. No widespread agreed provisions.	Some company career break schemes often with right to reinstatement. At employer's discretion.	No statutory provision. May work part-time following maternity leave by individual agreement.

Source: National Sources F/T = full-time; P/T = part-time; CA = collective agreement

A survey conducted by Industrial Relations Services, published in Equal Opportunities Review 64⁵⁶ concerned employees returning to work following maternity leave. The survey considered, amongst other things, part-time working, provision of nursery and child care facilities, breast feeding, and career breaks.

The sample was large, covering employers who employed 10% of those in employment.

Nearly all of the employers which took part in the survey provided a break down of their workforces by gender. Given that these gender based statistics indicated a majority of female employees over male employees, the statistics regarding various encouragements for women on maternity leave to return to work are particularly interesting.

The survey detailed the following as its main findings:

- Women who went on maternity leave had the opportunity to return to work on reduced hours in nine out of ten organisations. In just over 80% of these organisations the arrangement could be permanent.
- Six out of ten employers provided no facilities for breast feeding or expressing milk. Just over a third, 36% provided a private room of some sort. Only 4% provided a room specifically for breast feeding/expressing milk.
- Just under two thirds of employers provided at least one element of a “child care package” comprising: career breaks; nursery facilities; out of school place schemes; and child care allowances.

⁵⁶ Maternity Arrangements '95: Part 2, 64 EOR 11

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- Of those employers, 71% offered career breaks; 43% offered nursery facilities; 25% offered out of school play schemes; and 23% offered child care allowances.
 - No employer offered all four elements of the child care package; 17% offered three elements, and 27% offered two elements.
 - Just over two thirds of those employers who offered enhanced maternity pay and/or leave also offered at least one of the four elements of the child care package; no element of the package was offered by just under two thirds of those employers who gave only statutory maternity rights.
 - 70% of employers gave adoption leave; in the majority of cases some or all of their leave was paid.

The survey found that the greater the number of benefits offered in terms of enhanced maternity rights, child care provision and adoption leave provision, the more likely it was that employees would return to work with the same employer following maternity leave.

As detailed above, this survey covered employers offering employment to some 10% of the workforce.

However, the statistic is not so simple as that. The percentage of those included in the survey employing more than 500 employees was above 80%, whilst for those employing between 1 and 100 persons, the survey percentage was only 9.6%.

Anecdotal and real evidence suggest that those employed in smaller organisations are less likely to be aware of their rights and to receive them, and it is likely that many women covered by the law have simply not been reached by this survey.



This paper has already considered the legal issues surrounding the desire of those who have taken maternity leave to return to work on a more flexible basis, and it has been stated that 20% of those female employees taking maternity leave required changes in working time in order to facilitate their return to work.⁵⁷ This covered areas such as part-time working and job sharing.

We come back to the difficulty of trying to equate equality of opportunity with equality of outcome.⁵⁸ Sandra Fredman argues that the law is failing to achieve any type of equality.

Both UK and European maternity rights fail in the sense that they continue to define the child carer by gender, but some provisions have been made available, and, in spite of some confusion in the European Court of Justice, progress has been made.

Sight should not be lost of the fact that the ultimate beneficiary in any arrangement is surely the child, and any parental assistance (however socially or structurally skewed) is better than none at all, even if it perpetuates male social norms.

But, in the final analysis, there could be little disagreement with the statement that current maternity law “actively perpetuates women’s status as primary child carer. Only if parenting is properly valued and considered to be the responsibility not only of the mother but also of the father and of the broader community, will real structural change occur. This requires not only a threshold of rights protecting pregnant women at work, but also properly paid parental leave, good quality and

⁵⁷McRae, S., Maternity Rights in Britain, (1991) PSI

⁵⁸ Fredman, Sandra, Women in Labour: Parenting Rights at Work, Institute of Employment Rights, 1995

accessible child care facilities, and a flexible approach to working time for both men and women.”⁵⁹

Council Directive number 96/34/EC of 3rd June, 1996 "on the framework agreement on parental leave" was a Directive from which the U.K. had opted out.

“The origins of the Directive on parental leave date back to the early 1980s. this means that the idea of an EC - instrument on parental leave was borne at a time when the fresh impetus EC - social policy had gained in the late 1970s had already vanished. Consequently, the proposal for a directive on parental leave suffered the same fate as many other unadopted draft: it failed to gain the required unanimity within the council mainly due to the negative attitude of the British Government which was reluctant to impose what was seen as additional costs on employers.”⁶⁰

The Directive, the second to be adopted under The Social Chapter, “represents an undertaking to set out minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.”

Subject to certain exceptions, the Directive will provide both men and women with a right to parental leave, and adoptive leave for at least three months to allow parents to take care of the child. The Directive stipulates that the maximum age will be eight years, although the precise age is left to national legislation or collective agreement.

⁵⁹ Fredman, Sandra, Women in Labour; Parenting Rights at Work, Institute of Employment Rights, 1995

⁶⁰ Schmidt, Marlene, Parental leave: contested procedure, creditable results, (1997) International Journal of Comparative Labour Law and Industrial Relations 113, pp. 113 - 114

The Directive provides that in order to promote equal opportunities and secure equal treatment between men and women, that the right to parental leave should be non-transferable, that is, both parents will have a right to three months leave each, and the mother may not transfer her three months to the father or vice versa.

As with maternity rights, it is provided that there will be a protection against dismissal in respect of parental leave. Additionally, and again similarly to maternity leave, it is stated "at the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship."

The Directive also makes provision for time off work on the grounds of what it terms force majeure. Essentially, this is for urgent family reasons, and the Directive itself mentions sickness or accident.

Throughout the Directive, considerable scope is provided for national law or collective agreement to define the precise details of the rights available.

By way of example, Clause 2.3 states: "the conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreement in the member states, as long as the minimum requirements of this agreement are respected. Member states and/or management and labour may, in particular:

- a) decide whether parental leave is granted on a full-time or part-time basis in a piecemeal way or in the form of a time credit system;
- b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year;

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- c) adjust conditions of access and detailed rules for applying parental leave to the special circumstances of adoption;
 - d) establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave;
 - e) define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and practices, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the undertaking (e.g. where work is of a seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time, where a specific function is of strategic importance). Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and practices;
 - f) in addition to (e) authorise special arrangements to meet the operational and organisational requirements of small undertakings.

Even in the absence of the Parental Leave Directive, the United Kingdom is somewhat out of step with its European partners. Already, approximately one dozen member states provide for parental leave, and this is available to either the male or female parent. Some States also provide for family leave, whilst several provide for "force majeure" reasons for absence.

All of this is now tremendously important, because of the remarkable changes in female economic activity during the last twenty or thirty years. In certain parts of the country, there are whole areas where the concept of the man being the main breadwinner of the family has been completely replaced. In 1973, figures indicated that forty three per cent of couples with children had both partners working. Less than twenty years later the figure had increased to sixty per cent, and, perhaps even more notably, of those women with children under five years, whereas only twenty five per cent worked in 1973, by 1992, that figure had risen to forty three per cent.⁶¹

It is undoubtedly the case that family friendly policies have a major impact upon the employment of females in the workforce.

A recent Bank of England report⁶² indicates that figures for those in employment with young children have risen significantly between the period 1984 and 1996.

Indeed, for those working females with children aged under five, the figure for those in work has risen from 700,000 to 1.5 million.

The report argues that this is entirely due to family friendly policies, and it states “the biggest drop in unemployment rate, from 27.2% in 1984 to just 9.8% in 1996 was experienced by women with children aged four or under.”

Of course, all is about to change within the United Kingdom (assuming that the Employment Relations Bill is passed into law).

⁶¹ General Household Survey 1992, (1994) HMSO

⁶² Why has the female unemployment rate in Britain fallen so much?, Bank of England Quarterly Bulletin, volume 38, number 3

The Bill is somewhat strange in its approach, for it contains a significant number of enabling powers. In other words, much will be left to the Secretary of State to put the flesh on to the bones.

However, a person will be entitled to be absent on parental leave for the purpose of caring for a child. There will be a qualification period required for this, and it is intended that the service qualification should be one year.

The Secretary of State will define those who have "responsibility for a child" as well as the actual level of entitlement to parental leave, and when it may be taken.

The Parental Leave Directive itself stipulates that the minimum period is three months, and the Directive also specifies that the child must be aged up to a maximum of eight years.

The provisions also state that regulations may be made detailing what will happen where a person ceases to qualify for parental leave "specifying matters which are or are not considered to be part of caring for a child; requiring parental leave to be taken as a single period, or at or by specified times."

The regulations also make provision for how an employer may postpone a period of parental leave which an employer wishes to take, as well as a minimum period of absence which may be taken as part of a period of parental leave.

If enacted, the Bill will also provide that for an employee who is absent on parental leave, the benefit of the terms and conditions of employment will

continue to apply, although the precise nature of these terms and conditions will need to be proscribed.

As with maternity leave, those absent on parental leave will not have any right to benefit from their remuneration, and the Government's current intention is that parental leave will remain unpaid.

This, of course, is one of the greatest criticisms of the leave provisions.

As with maternity leave, there are provisions for an employee who has taken parental leave to be entitled to return to a job "of such kind as the regulations may specify."

Employees will have the right to complain to Employment Tribunals where employers have either unreasonably postponed any period of parental leave, or prevented or attempted to prevent employees from taking advantage of the parental leave provisions.

It is also intended that the Employment Rights Act will be amended to allow employees to make a complaint of automatically unfair dismissal for various reasons connected with parental leave (which will be akin to the maternity leave provisions).

There are many blanks to be filled in by the Secretary of State, and this is also true of the time off for domestic incidents which the Government has included in the bill in order to comply with clause 3 of the Parental Leave Directive permitting a right to time off for urgent family reasons.

It is proposed that the Bill will insert a new section 57a into the Employment Rights Act 1996 stating that “an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee’s working hours, where it is reasonable for him to do so, in order to deal with a domestic incident.”

Helpfully, the Bill defines a domestic incident as one which “occurs in the home of the employee” or “affects a member of the employee’s family or a person who relies on the employee for assistance.”

The DTI’s explanatory notes provide additional guidance, although how workable in practice this will all be remains open to the test of litigation.

Matters covered in the guidance include dealing with a crisis relating to a member of the employee’s family requiring the employee’s immediate attendance. By way of example, this could involve attendance at a school where the employee’s child is a pupil, and has been involved in a fracas.

A domestic incident might also involve dealing with the death of a person close to the employee, or where the employee was the executor or responsible person for the funeral and any other arrangements surrounding the bereavement.

Illness, burglary, or flooding, could all be covered.

The concept of employees remaining at home to take delivery of a new washing machine after the existing one has flooded the utility room may not be so bizarre!

The Secretary of State is empowered to make regulations (and he must do so) which will specify the factors to be taken into account in determining whether it is reasonable for a person to take time off from employment.

The Secretary of State will also have power to specify regulations detailing the amount of time an employee may take off in relation in particular to a particular incident or a set of particular incidents during a particular period.

Additionally, he may make regulations which will make provision for the various notices, evidence and procedures to be followed, although given that the time off will be for (in the words of the Directive) urgent family reasons, one can imagine that the notice requirements may well be difficult. Admittedly, the DTI's explanatory guidance has provided some qualification here.

As with the parental leave aspect of the Bill, provisions will be inserted to the effect that employees may complain to Employment Tribunals if the employer has failed to allow time off as required under the new section 57a.

On a slightly negative note, now we have the Parental Leave Directive (96/34/EC), it is to be hoped that it will remain, in spite of the challenge being mounted against it by UEAPME (The European Association of Craft, Small and Medium Sized Enterprises), which represents some six million small and medium sized businesses.

The UEAPME has sought to have the Parental Leave Directive declared null and void or inapplicable to its members, on the grounds that it was not included in the negotiations and that the essential procedural requirements have been infringed.

The court at first instance rejected this contention on 17th June, 1998, but the UEAPME has recently appealed to the European Court of Justice.

There is now a real belief in the value of family friendly policies, but it is doubtful that the Parental Leave Directive will be considered as a success in terms of basic UK maternity rights.

The absence of pay means that the benefits will just not materialise for most employees. In fact, given that many employees currently use up holiday to care for sick children or relatives (and are paid for this holiday), they are likely to suffer financial loss under the enacted Employment Relations Bill.

It is clear that the UK and European law in this respect may succeed by way of incentivisation. However, incentivisation is normally to be found in large companies, who see forthcoming or actual legal requirements as minimum standards.

A 1998 survey by MORI and The Day Care Trust found that 88% of companies believed that family friendly employment policies will become more important in the next five years. With 65% of respondents to the survey agreeing that they should do more to help working parents it was surprising to find that only 4% were likely to introduce a work place nursery within the near future.

In spite of these figures, 59% of respondents said that child care support policies had made it easy to recruit female staff, with 83% stating that such policies had helped in the retention of such staff.

Interestingly, 80% of respondents thought the government should offer financial incentives to employers who were prepared to introduce family friendly policies.

Most employers are not so idealistic as to want their employees to take time off to bring their children up in a proper manner. Parental leave is capable of having an impact on the bottom line.

This is illustrated by a case study concerning a large American bank.

The First Tennessee Bank adopted family friendly policies, and introduced these to its staff, which comprised 70% females. Via formal policies, the bank is committed to flexitime, telecommuting, job sharing, day care nursery subsidies, reduced time working with full benefits, and family leave. The bank claims to have saved \$1m over the past three years as a result of its family friendly policies.

If employers could only be persuaded of cash and shareholder benefits as above, then the failure of both UK and European maternity rights to provide a proper system of carers leave could be addressed.

CHAPTER 6 NEW MATERNITY RIGHTS

The Employment Relations Bill contains provisions for a marked change to the maternity rights presently available.

Assuming the Bill is enacted (and there is no reason to doubt that it will not be) the current provisions will be replaced by the introduction of 'ordinary maternity leave' and 'additional maternity leave'.

The ordinary maternity leave period will be the maternity leave to which all pregnant employees are entitled irrespective of length of service or hours of work.

As with much of this Bill, the precise details are left to the Secretary of State to determine by way of regulation.

Nonetheless, certain matters are reasonably clear, and the most important of these is that the ordinary maternity leave period will be eighteen weeks. This represents a four week increase against current legislation, and corrects the somewhat bizarre situation where (assuming the female employee qualified) she might be entitled to eighteen weeks of maternity pay, and only fourteen weeks of maternity leave.

As with the current law, there will be a requirement for the employee to notify her employer of her condition, and the DTI's explanatory notes have suggested that this may amount merely to informing the employer of the pregnancy and the expected week of confinement.

As with current legislation, the employee will be entitled to all of her terms and conditions of employment during the ordinary maternity leave period, save, of course, those relating to remuneration.

It has been decided that The Secretary of State will provide some guidance as to the meaning of remuneration.

There will remain the two week period following the birth of the baby in which working is prohibited. It will continue to amount to a criminal offence for the employer to permit an employee to work during this period which will, in future, be known as the compulsory maternity leave period. Perhaps surprisingly, the Government has not elected to do anything about the compulsory period of maternity leave prior to the birth of the baby. It should be recalled that Mr. Michael Portillo, when he was Secretary of State for Employment, declined to allow a two week compulsory leave period prior to the birth of the baby. This omission seemed glaring at the time, and seems even more glaring now.

The current period of extended maternity leave will be renamed 'additional maternity leave', but it will broadly follow the current provisions.

However, there will be a sharp difference in the service requirements to gain additional maternity leave as against the current provisions. Those current provisions require that a person should have two years service at eleven weeks before the expected week of confinement in order to be able to take account of the extended maternity leave period of twenty nine weeks following the confinement.

The Bill proposes that the twenty nine week period will become an entitlement after one year's service.

It is very likely that there will be some attempt to remove the confusion from the present notice requirements.

Perhaps a truly staggering change is that the contract of employment will remain in force during the maternity leave period. This clarifies what has been a difficult issue for the courts.

CHAPTER 7 THE FUTURE

“Sex discrimination still exists as job segregation between male and female workers remains a major determinant in modern industrial relations systems, with a continuing gap between average male and female earnings. Moreover, the enactment (and the implementation by member states) of the directives aiming towards further equality between the sexes has not eliminated indirect discrimination and neither legislation nor jurisprudence have been fully successful in striking down this type of discrimination. Finally, direct discrimination is still possible at national level, as a result of either loop holes in the laws implementing the EC Directives or of ineffective enforcement procedures and inadequate remedies.”⁶³

As a remedy against this position, the immediate future of UK and European maternity rights is centred around implementation of the Parental Leave Directive, and it can be fairly safely assumed that the Employment Relations Bill (which will ensure compliance with the Directive) will be enacted in the near future.

As illustrated elsewhere in this paper, much is left to the Secretary of State to introduce regulations which will deal with parental leave and time off for family incidents. The Secretary of State will have a certain amount of discretion in respect of some of the provisions, but the key changes will not alter.

⁶³ Bovis, Christopher and Clossen, Christine, Stereotyped assumptions versus sex equality: A socio-legal analysis of equality laws in the European Union, (1996) International Journal of Comparative Labour Law and Industrial Relations 7, p. 8

The Employment Relations Bill (again as mentioned elsewhere in this paper) will also significantly alter the maternity leave provisions and ensure that the UK government's family friendly policies are, at least to some degree, delivered.

The Employment Relations Bill will also deliver in a number of other ways.

At present, the law in the United Kingdom does not define, in any degree of substance, the definition of employee and self-employed person.

The definition has to be worked out by looking at a number of tests under the common law, namely, control, integration, mutuality of obligation, economic reality, and the multiple test. These tests are not always easy to apply, although the courts and tribunals do look towards the substance of the employment relationship rather than the mere form.

It would be naive to believe that many organisations and workers (as opposed to employers and employees) do not simply try to find ways round an employer/employee definition of employment status. This can have many beneficial effects for the employer, not least of which might be the avoidance of unfair dismissal and redundancy claims, obligations such as holidays, and payment of employer's National Insurance contributions.

Additionally, certain maternity rights can frequently be avoided if a person is self-employed (although this is not always true, for example, Caruana v. Manchester Airport PLC [1996]IRLR 378). It is intended under the Employment Relations Bill that a number of categories of person will be brought within various employment law protections including the Trade Unions and Labour Relations (Consolidation) Act 1992, The Employment Rights Act 1996, The Employment

Relations Bill itself (when enacted), and any instrument made under section 2(2) of the European Communities Act 1972.

This will ensure that various workers who might presently be described as self-employed will be able to take advantage of maternity leave and parental leave (as well as a whole host of other rights).

The Bill itself leaves much to be determined by regulation by the Secretary of State, but the explanatory notes published by the DTI state that it is the government's intention to ensure that "all workers other than the genuinely self-employed enjoy the minimum standards of protection that the legislation is intended to provide, and that none are excluded simply because of technicalities relating to the type of contract or other engagement under which they are engaged."

It should be noted in particular that these explanatory notes have seen fit to make special mention of those who are considered to be in "bogus self-employment".

Clause 19 of the Employment Relations Bill deals with the issue of part-time working.

The clause provides that the Secretary of State may issue codes of practice containing guidance for the purposes of eliminating discrimination in the field of employment against part-time workers, facilitating the development of opportunities for part-time work, facilitating the flexible organisation of working time taking into account the needs of workers and employers, and any matter dealt with within the framework agreement on part-time work annexed to Council Directive 97/81/EC.

The bill states that the government will engage in a consultation process before issuing a code of practice, as well as further consult after the publication of a draft code.

This is in response to the requirement to ensure that the Directive on part-time work (97/82/EC) is implemented into national law by 17th July, 2000.

There is some validity to the viewpoint that the Part Time Work Directive will not have an immediate and dramatic impact in the UK because of the Equal Opportunities Commission's vigorous pursuit of claims on behalf of part-time workers via the Sex Discrimination Act.

However, the Sex Discrimination Act claims rely on the fact that women are frequently in a minority as regards full-time working, and that any detrimental effect suffered as a result of part-time working is far more likely to impact upon women. The problem with this, of course, is that if the balance of the sexes were to change, then women would lose an important avenue of legal complaint.

So, in that sense alone, the Directive is to be welcomed.

It is intended that "in respect of employment and conditions, part-time workers shall not be treated in a less favourable manner than comparable full time workers solely because they work part time unless different treatment is justified on objective grounds."

The principle of non-discrimination will allow a part-time worker to compare herself (or himself) not just with a full-time employee in the same establishment, but also with someone outside if needs be.

It is specifically stated that, where appropriate, “the principle of pro-rata temporis shall apply.”

There is also something of a ‘get-out’ clause, in that for objective reasons, member states may “where appropriate, make access to particular conditions of employment subject to conditions such as a period of service, time worked or earnings qualification.”

As mentioned, it will be necessary to justify this on objective reasons, and it is stated that any qualifications for access should be reviewed periodically.

The Directive states that one of its major considerations in terms of social policy is that “the parties to this agreement attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, and to take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises.”

Accordingly, the Directive lays down that member states will create opportunities for part-time work. In particular, they “should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them” and “through the procedures set out

in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them” also.

It will be remembered, that under UK law there is no right for employees to work part-time, in particular, when seeking to return from maternity leave to what was previously a full time position. The reliance on the use of the Sex Discrimination Act should therefore be reduced, dependent, of course, upon the regulations which are actually framed. It should be noted that it is not always to the advantage of claimants to wish to move away from the Sex Discrimination Act. At present, the damages which can be awarded for claims under the Sex Discrimination Act are unlimited. On the other hand, claims brought under unfair dismissal legislation are presently limited to £12,000 for the basic award. There is no real deterrent effect in the latter figure, particularly when it is unusual for tribunals to make awards at the top of the scale.

The Employment Relations Bill threatens to change some of this, in that the ceiling for unfair dismissal awards will rise to £50,000, although the proposals to remove the ceiling completely have now been dismissed.

Not surprisingly, the Commission has not stopped with the Parental Leave and Part Time Work Directives.

It is a matter of both social and economic policy that women should not be excluded from the work place across Europe as a whole. Some of these matters concern wider issues than maternity rights, but several of the items are relevant to the current discussion.

The 1998 Employment Guidelines (Council Resolution 15th December, 1997) deal with improving employability, developing entrepreneurship, encouraging adaptability in businesses and their employees, and strengthening equal opportunities. These are part of the social plan to achieve higher levels of employment and lower levels of unemployment.

In particular, the social partners will negotiate on agreements which will modernise the organisation of work. This is likely to include flexible working arrangements, reductions in working hours, and career breaks.

Member states have been asked to attempt to reduce the gap in unemployment rates between males and females by actively supporting the increased employment of females.

Moreover, the 1998 Employment Guidelines state that there must be adequate provision of good quality childcare (and care for other dependents) in order to support the entry and participation in to the labour market of both men and women. It is stated that “policies on career breaks, parental leave and part time work are of particular importance”. It is notable that the Guidelines refer to both men and women in these respects.

The United Kingdom government’s commitment to increased childcare facilities is of particular importance to the future of closing the gender gap and giving real bite to sex equality.

At least the future heralds some success!

CHAPTER 8 CONCLUSION

The question has been asked whether UK and European maternity rights have succeeded or failed.

Before answering the question in this conclusion, it should be stated that little more than twenty years ago there were no maternity rights whatsoever in the United Kingdom, and only fourteen years ago it was still acceptable to dismiss a woman on grounds relating to pregnancy.

Given the hostility of employers and the reticence of courts to show full protection to pregnant employees or those on maternity leave, (evidenced even recently in the Webb case in the House of Lords), it is some testament that there has been a huge growth in women with families both returning to work and staying in work.

This is not accidental, and the maternity rights under the Employment Rights Act and (via the back door) the Sex Discrimination Act have been of assistance.

In spite of the above, UK maternity rights have ultimately failed, in that access to the full provisions is strikingly limited to those who can afford to take advantage of them. Moreover, the protection outside of the maternity leave period is very limited, and until the Employment Relations Bill becomes law, there will have been no legally in-built flexibility through child care provision. Even when the Bill becomes law, finance may well play a crucial role.

European maternity rights had a strong beginning, and it is certainly the case that the Equal Treatment Directive, the Pregnant Workers Directive, the Parental Leave Directive, and the Part-Time Work Directive are, or will be significant factors in the protection of women.

However, the confused approach of the European Court of Justice in the interpretation of some of the case law must be considered a failure.

Only as we move towards a fairer system of leave and proper protection for part-time working, will maternity rights have an opportunity to flourish.

Even with the developments which are forecast, the law remains confused and contradictory, and is, I strongly believe, the subject of economic policy considerations rather than a logical approach to interpretation.

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