THE PREGNANT WORKERS DIRECTIVE 92/85 AND THE IMPACT ON WOMEN WORKFORCE: THE CASE OF UNITED KINGDOM

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Introduction

Extension of maternity rights has occurred in most countries over recent decades alongside widespread growth in female participation in paid employment and women's increasing labour force attachment throughout their childbearing years (Whitehouse and Tomkins 2001). International data highlight the prevalence of legislative provisions for maternity leave, and the increasing adoption of 'parental' rather than simply maternity rights. Moreover, there are significant barriers to effective implementation of maternity rights in most countries, reflecting the widespread persistence of a gendered division of labour, with paid employment patterns generally consistent with 'male breadwinner' models of work and family life and uneven of managerial support for maternity provisions at workplace level. These barriers have been exacerbated by the proliferation of irregular working arrangements, which continue to limit the coverage of maternity rights provisions in most countries.

The Pregnant Workers Directive 92/85 was adopted in October 1992 in Europe. The purpose of this Directive is to improve health and safety of pregnant workers and workers who are recently given birth or breast-feeding. This new legislation is namely suggested that all women have right to maternity leave and pay, protection from dismissal and sex discrimination on the ground of pregnancy. In UK, the law was amended to the EP(C) Act inserted by Trade Union Reform and Employment Right (TURER) Act 1996-section 71 & 73, the Sex Discrimination Act 1975 and The Management of Health and Safety Work Regulation 1994. Generally these laws are extended and enhanced the statutory maternity rights of pregnant workers.

In this paper an attempt is made to examine the legislation implemented on the maternity and pregnancy. The discussion of this paper divided into four sections. The first section look at how the new law in 2000 affects the maternity leave and pay. Secondly look at the unfair dismissal related to pregnancy and other reason. Thirdly analyse how the health and safety law under EU Directive (Pregnant Workers Directive) and the Management of Health and Safety Regulation 1994 were protected pregnant worker from the health and safety at work place. Finally review on the Sex Discrimination Act 1975 and how this law will protect women from discriminate on the ground of pregnancy or other reasons related to pregnancy.

Maternity Rights: From the Maternity Leave Aspect

Trade Union Reform and Employment Rights Act 1996 (TURER) law amended the maternity leave provisions in the EP(C) Act. This law was response to the EU Pregnant Workers Directive (No.92/85).

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The Law until 1999

All women whose babies were due on or after October 16 1994 were entitled to 14 weeks maternity leave. The new S.33 EP(C) Act provided that this right applies regardless of length of service and hours of work. So, the female employees whose baby was due on October 16 will be entitled to benefit from the new scheme as from the July 31 because maternity leave can be commenced 11 weeks before the birth.

There are three categories of employees who entitled for this new provision:

1. Employees with less than two years service who will be entailed to 14 weeks maternity leave
2. Employees with more than two year service who will be entitled to the 14 weeks maternity leave and right to return to work up to 40 weeks after their leave commenced.
3. Employees in either of the above categories who also have a more favourable contractual maternity arrangement upon which they can rely.

The Law After 2000

Ordinary leave and Additional leave

There are two principal types of statutory maternity leave- 'ordinary' leave and 'additional' leave (Employment's Rights Act 1996, section 71 & 73 as quoted in Lewis 2000). The former is universal, resulting from the UK's adoption of the EU Pregnant Workers Directive 1992. Where the expected week of childbirth commences on or after 30 April 2000. The duration of ordinary leave is eighteen weeks (Maternity and Parental Leave, Regulations 1999, regulation 7). This is an increase from the previous fourteen weeks. No qualifying period of employment is required nor is there any minimum hours requirements, so the right to ordinary leave is available to short term and part-time employees.

Additional leave is available where the employee has at least one year of continuous employment with her employer (two years if the expected week of childbirth is before 30 April 2000). It commences at the end of ordinary leave and continues up to 29 weeks after week of childbirth. Since ordinary leave begins no earlier than eleven weeks before the expected week of childbirth, the combined leave can be up to 40 weeks.

The rights to both types of leaves are conditional upon the employee meeting certain notification and information requirements (MPL Regulations, regulations 4 & 5). At least 21 days before ordinary leave, the employee must notify her employer of her pregnancy, her expected week of child birth and the date on which she intends to start her ordinary leave. The last of these must be in writing if the employer so requests. In addition, if the employer requests medical certificate stating the expected week of childbirth, the employee must provide it.

The contract of employment is maintained during ordinary leave as are all terms and conditions except 'remuneration' (ERA, section 71). Hitherto this term has not been defined but the MPL Regulations state that only sums payable to an employee by way of wages or salary are to be treated as remuneration (regulation 9). This means that anything other than sums by way of wages or salary must be maintained during ordinary leave. The logic of excluding remuneration is that Statutory Maternity Pay fills the gap. However, SMP is payable at a rate of 90 per cent of gross earnings for six weeks followed by a flat rate for the remaining 12 weeks. Since 2 April 2000 the flat rate has been 60.20 pound sterling per week. This is increased annually. Employers in general are able to reclaim 92 per cent of the cost of SMP and small employers are entitled to an administrative subsidy resulting in them reclaiming 105 per cent. Small in this context means an employer who has liability to pay Class 1 National Insurance contributions not exceeding 20,000 pound sterling in the relevant tax year. Employees with at least 26 week' continuous employment are entitled SMP.

The contract of employment is also maintained during additional leave but only specified terms and conditions are maintained (and these do not include remuneration). During both ordinary and additional leave, terms and conditions are not restricted to contractual matters. During additional leave the employee is entitled to rely on a term of the contract requiring the employer to treat her with trust and confidence. This is implied into all employment contracts. She must also benefit from any notice rights if the employer terminates the contract, any term relating to compensation if made redundant and any term giving access to disciplinary and grievance procedures.

The Return to Work

The return to work from ordinary leave is automatic, requiring, no notice (unless the women wishes to return early). Her period of continuos employment is unbroken and the weeks on leave count, and this is true both for statutory and contractual purposes. The right is to return to her former job with seniority rights inaffected and terms and conditions not less favourable than if she had been absent (ERA, section 7).

The return to work from additional leave can be to a suitable and appropriate other job if it is not reasonably practicable to restore her to her former job (MPL Regulations, regulation 18). The employee must give written notice of return if requested by her employer. The request must be in writing explaining how the employee should establish the end date for additional leave and warning her of the consequences of not meeting the request within 21 days (the loss of automatic protection against unfair dismissal and other detriment). The request cannot be made earlier that 21 days before the end of ordinary leave and the notification must state the date of childbirth and whether the employee intends to return after additional leave (MPL Regulation, regulation 12).

Pregnancy and Unfair Dismissal

Dismissal of an employee because she is pregnant or for any other reason connected with her pregnancy is *automatically unfair* under S.60 (1) EP(C) Act. Even the employer to dismiss her if she not allowed to return to work after extended maternity absence. The law provides a special protection for women who were dismissed by an employer. The protection from dismissal did not apply to women employed in police service, women who ordinarily work outside the UK unless they are covered by the Employment Protection Order 1976,masters or crew members of share fishing vessels or women serving in the armed forces.

The reason for dismissal

Generally there was automatically unfair to dismiss any women regardless of her hours of work or length of service and in the following circumstances:

- The sole or principal for her dismissal is that she is pregnant or any other reason connected with her pregnancy.
- She is dismissed during her general maternity leave period (MLP) and the sole or principal reason for her dismissal is that she has given birth or is any other reason connected with her having given birth.
- She is dismissed after the end of her MLP and the sole or principal reason for her dismissal is that she was away from work during her MLP or that she had the benefit of her usual terms and conditions of employment (apart from her ‘remuneration’) during her MLP.

- She is dismissed because she has given birth or for any other reason connected with her having given birth within four weeks of the end of her MLP and she submitted a medical certificate during her MLP which stated that she incapable of work after the end of her MLP by reason of disease or bodily or mentally disablement and at the date of the dismissal, the incapability continued and the certificate remained current.
- The sole or principle reason for her dismissal is a requirement or recommendation to suspend her on health and safety ground's (IRR,1994,p.2).

Shortly, women who were absence from the work after end of maternity leave period (MLP) because her illness related to her pregnancy. For this reason, employer was dismissed her. Under the European Directive Legislation, this is automatically unfair dismissal and she has right to bring this case to the Industrial Tribunal.

The are certain condition for unfair dismissal. If the women were failed to return to work at the end of MLP, her protection unfair dismissal depends on the scope of s.60. If she finished two years' service by the date of her dismissal, she could bring this case and complaint of unfair dismissal and also a payment for redundancy if capable.

Equal Opportunities from the Aspect of Dismissal

Refusal to allow return to work

If an employee was entitled to return to work after extended maternity absence and had given the 21 days notice of her return under s.42 (1) but was not permitted to return to her old job or would only be permitted to return if she accepted terms and conditions which less favourable, she was treated as if she had been continuously employed until her noticed date of return (NDR), and as if she had been dismissed with effect from that day for the reason for which she was not permitted to return to work(ss.56 and 86). This was an unfair dismissal and she has right to make a complaint.

Redundancy and Pregnancy

If there was redundancy and an employee was selected for redundancy because she was pregnant or for a reason connected with her pregnancy, the dismissal will be automatically unfair under S.60. There is question; if she selected for dismissal and other employees in similar positions who were equally affected for redundancy but the employer was not dismissed them.

But to prevent the automatic dismissal, then the employer should right to offer of alternative work. If the employer failed to offer the alternative work and the woman's dismissal will be automatically unfair, regardless of her hours of work or the length of service (IRR,1994). If the employer offered a new work and then a new contract should start after the original contracts end. The new contract must considered the capacity of work where women will be employed, other terms and conditions of her employment and not be substantially less favourable than those of the woman's original contract.

If the woman who had made redundant during extended maternity absence, still had right to return to work if she paid all redundancy cost payment.

Effect On Maternity Rights

An employee who was fairly dismissed for pregnancy because she is incapable of working or of a statutory prohibition on her continued employment and then she did not lost her other maternity rights. She will qualify for statutory maternity pay (SMP).

If an employee had been unfairly dismissed because of her pregnancy, she does not automatically retain her maternity rights. But the Tribunal may make an award that effectively preserves them in one of two ways:

1. They may order reinstatement or re-engagement, which will be on terms that the woman has been continuously employed since the date of dismissal.
2. If reinstatement or re-engagement is impracticable they may reflect loss of maternity in a compensatory award. This may include the SMP that would have been payable and also compensation for loss of future employment after exercising the right to return to work.

Pregnancy: From the Health and Safety Perspective

The EU Pregnant Workers Directive (No.92/85) made provision for the health and safety of pregnant workers, workers who have recently given birth and workers who were breast-feeding (IDS,1994a,p.6). This Directive was implemented in UK law by the Management of Health and Safety at (Amendments) Work Regulations 1994, which insert new provision into the existing Management of Health and Safety at Work Regulations 1992 SI 1992/2051 (the "MHSW Regs 1992') and by the EP(C) Act as amended by the TURER Act 1993(IDS,1994b).

Risk Management

The 'Pregnant Workers' Directive states that employers must carried out an assessment of the risk which might be posed to pregnant or breast-feeding workers in their workplace and must took action to avoid this risk. The Annex 1 and Annex 2 in "Pregnant Workers" Directive stated various kind of agents, process and working conditions which regarded as posing a risk (IRS,1994,p.4).

In UK, under MHSW (Amendment) Reg 1994, required employers to carry out a risk assessment at work place to all workers including women of childbearing age, new or expectant mother and also to their baby. This groups of people could involved risk from any or working condition or physical, biological or chemical agents including those specific in the Annex to the Directive.

If the assessment process identified risk, the employers responsibility informed to the women of childbearing age, expectant mother and breast-feeding women at the workplace. Employers should also be explained about the action they would take to protect expectant mothers from the risks, which can cause them harm.

Preventive or protection measures

Employers should take immediate action to prevent the risk among the workers especially pregnant workers, new mothers and those breast-feeding. This prevention and protection action was required by any specific legislation that will be covered the hazard and dangerous risk.

Alteration of working condition

According to the Regulations 13A (2) of the MHSW Reg 1992 and MHSW Reg 1994, if employers failed to prevent the risk, he should alter the employee's working condition or hours or work if it is reasonable.

Alternative Work

Reg S.46(1) was amended that if it was not reasonable to the entire employee's working condition or hours of work and then the employer must consider whether would possible to offer the pregnant women any suitable alternative work and the work must be:

- both suitable and appropriate for her to do in the circumstances and
- on terms and conditions no less favourable than her normal conditions. The job will offer by employer should fulfil the conditions like the nature of job, the status of post to be offered, the place of work, hours of working and travelling time.

An employee is entitled to make a complaint to the Industrial Tribunal if there is suitable alternative job available, which her employer had failed to offer her before suspending her from work on maternity grounds. The complaint can be make within three months starting from the first of suspension.

Night work

Employers also consider risks to the new and expectant mothers who work at night. If an employee who is expectant or new mother worked at night and had a medical certificate stating that night work could affect her health or safety, the employer must either:

- offer her suitable alternative daytime work or if that is not reasonable, suspended her from work as long as necessary to protect her health or safety.

Suspension on maternity grounds

The proposed new Regulation 13A (3) of the 1992 Regulations provided that if it was not reasonable to alter the working condition or hours of work of a new or expectant mother, or if such adjustment would not avoid the risk, the employer must suspended the employee from the work.

The employer was not to obliged to suspend the employee from the work unless he received a written notice that she was pregnant or recently given birth or miscarried or she was breast-feeding.

Entitlement during maternity suspension

An employee on maternity suspension was entitled to be paid remunerates that was wages or salary at her full normal rate for as long as suspension continues except for any period during which she had reasonably refused to perform suitable alternative work that had been offered to her (see S.47(1) and (2)).

The remuneration payable is the whole or part of week's pay for each week or part -week of the suspension.(IRR,1994,p.6).

The employee continues to be employed during the maternity suspension period, which therefore counts toward her period of continues employment for the purposes of assessing seniority, pension right and other personal length -of- service payments (such as pay increments). This term of employment contractual was supported by Patrick MCLoughin, the Parliamentary, under Secretary of State for Employment (IRR,1994,p.6). He said, '…the employee's contract continues while she is suspended…. Her contractual right is maintained'.

If her employer failed to pay her some or all of the remuneration when she was on maternity suspension, then she has right to make a complaint to the Industrial Tribunal.

Unfair dismissal on the ground to maternity suspension

Under the TURER Act 1993, a dismissal on health and safety ground will now be automatically unfair even if the employer could show that there was no suitable alternative work.

Health and Safety consideration after the birth

The Directive stipulated that women should take two weeks maternity leave around the time of the birth. In UK, the law was implemented in Maternity (Compulsory Leave) Regulations 1994 SI 1994/2479, which stated that an employee entitled maternity leave must not work or be permitted by employer to work by her employer during the period of two weeks beginning with the date of her confinement. An employer who breach this law, was guilty of a criminal offence and will be fine not exceed level 2 on the standard scale of fine (currently 500.00 pound)- Reg3 (2).

Sex Discrimination and Pregnancy

Before discussion of sex discrimination law on pregnancy and maternity, first look at sex discrimination definition.

In UK, the Sex Discrimination Act 1975 (the SDA) made its unlawful for an employer to discriminate on the ground of sex in recruitment and dismissal, promotion, transfer and training, the provision benefit, facilities or services or by subjecting an employer to any other detriment (s. 6 of the SDA) (IRR,1994,p.2). Two types of sex discrimination already defined by the SD Act are:

- blatant discrimination in cases where an employer treats a woman less favourably on grounds of sex than he treats or would treat a man-S 1(1) (a). This is conventionally referred to as ***direct discrimination.***
- less over forms of action in cases where an employer applies a condition or requirement to a person which he applies or would apply equally to persons of the opposite sex but which is such that the proportion of the applicant's sex who can comply with it is considerably smaller than the proportion of person of the opposite sex who can comply with it-S.1(1)(b). This form of discrimination is commonly known as ***indirect discrimination.***

So, women who are pregnant or have recently given birth or are breast-feeding may have certain additional protection under the Sex Discrimination Act 1975. In UK, sex discrimination law to treat unfavourably simply because she is pregnant or may become so is direct sex discrimination. However, according to House of Lord there is no breach of UK law if the reason for a woman's unfavourable treatment was not her pregnancy, but rather the consequences of it (such as her unavailability for work, and a man would have been treated in the same way if his employment had those consequences). Before the discussion more detail about sex discrimination on pregnancy in UK, the author will review the case between Webb v Emo Air Cargo (UK) Ltd. 1994 IRLR 482. (Anderman, 1992, p.189). Mrs. Webb was recruited on a permanent contract, but with the primary purpose of providing cover for another employee, Mrs. Stewart, who was due to go on maternity leave. The company found Mrs. Webb was pregnant and was dismissed by employer. She brought the case to the Industrial Tribunal and EAT. The Industrial Tribunal and EAT made decision to refuse the case and said that the dismissal of pregnant women was on the ground of the impact of her prospective absence upon the business and not on the ground of sex. Industrial Tribunal found that real reason for her dismissal was she couldn't perform a primary task for which was recruited. Furthermore, EAT and Industrial Tribunal stated that, since man also can make comparable which to lose an equivalent amount of time because of a medical condition would also have been dismissed and the treatment was not on ground of sex.

So, Mrs Webb case was interpreted by European Community Law approach through European Court of Justice (ECJ). ECJ based on case Dekker v Stichting Vormingscentrum voor Jonge Volwassenen and Hertz v Dansk Arbejdsgiveforening summarised that if a woman was treated unfavourably because she is pregnant, this will apply a direct discrimination. In the first case, the employer dismissed Dekker because she was pregnant when the selection time for the post of training instructor. The employer argument for her dismissed because insurance fund would note refund the sickness benefits and the employer was required to pay her while she was on maternity leave. The second case was Hertz from Denmark was dismissed because her illness lasting for hundred days which originated in her pregnant and childbirth. (IDS, 1994,p.33)

ECJ judge the first case and concluded "…as employment can only be refused because of pregnancy to woman, such refusal is direct discrimination on the grounds of sex. A refusal to employ because of the financial consequences of absence connected with pregnancy must be deemed to be base principally on the fact of the pregnancy. Such discrimination cannot be justified by the financial detriment in the case of recruitment of a pregnant woman suffered by the employer during her maternity" (IRS,1994, p.3).

On the other hand, the second case judges by ECJ and confirmed that the dismissal because of pregnancy constitutes direct discrimination on grounds of sex. In addition, this type of dismissal would be unlawful not only whilst she was pregnant but also whilst she was on statutory maternity leave. After this two cases was judged, ECJ amended the "Pregnant Workers" Directive (No.92/85/EEC) in 1992 which ECJ established 'protected period' during which a pregnant woman cannot be dismissed. The Court of Appeal's still reject the Mrs. Webb even though ECJ had given strong evidence in both cases stated above. Mrs Webb had not direct right under the Equal Treatment Directive because EMOS was private company (see more detail in IDS, 1994,p.36). If someone employed in private company, they had to continue to show in almost all they were treated less favourably that a comparable man would have been treated in order successfully to claimed direct discrimination. ECJ judgement's to these two cases were not applied to Mrs. Webb case.

No comparison with sick man

The ECJ was not agreed with comparative approach which adopted by House of Lord (UK Law). ECJ said, there can be no question of comparing the situation of a woman who finds herself incapable for medical or the situations of a woman who finds herself incapable, by the reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reason's (IRR 1994,p.4). Furthermore, pregnancy was a unique characteristic for women and can not be comparable with man.

Equal Opportunities in Employment for Women: From the Sex Discrimination Aspect

Women can receive special treatment under the Equal Pay Directive comparable to man. This was because women had protection particularly as regards pregnancy and maternity. When women receives maternity pay, man shouldn't dissatisfied with employer that employer was discriminated him on basis employer refused him time off after the birth of his baby.

A woman who is dismissed as a result of a pregnancy-related illness might able to recover compensation for sex discrimination as well as establishing that she was unfairly dismissed. However under UK law, the success of her claimed will depend upon whether a man who had and illness with similar consequences would have been dismissed. For example see case Fyfe v Farmer Giles Foods (Scotland)Ltd.

In UK law, a women can argue that during any period of incapacity during maternity leave, she should be entitled to same level of pay as a man would receive if he were incapacitated for some reason.

Another equal opportunities was that statutory right is to return to the job that she was originally employed to do and on the same or no less favourable terms and conditions. Some women who originally worked as a full-time job might be changed their working pattern because taking care their child. So that they no longer working overtime or to respond to their employer's request to be flexible about when their hours are worked. If the employers refused to respond to their request on return from maternity leave, this can be indirect sex discrimination.

Summary and Conclusion

From the review and analyses of legislation on maternity and pregnancy, we can say that law on maternity leave are very clear and pregnant workers entitled a lot of benefit mainly on Maternity Allowance and Statutory Maternity Leave. But the employer and the employees dissatisfied with the law on sex discrimination. This is mainly because there is contradiction between EU Equality law and UK legislation on certain maternity right cases. The House of Lord still referred some cases to the EU Legislative especially Pregnant Workers Directive. The new legislation on equal pay and sick pay under maternity leave still not very clear.

The conclusion is that the legislation on maternity and pregnancy should be improved and the government can alter certain changes on sex and discrimination law. In UK, generally the sex and discrimination law is referring to 1975 Act. Therefore, this law should be reviewed and presumably introduce a new legislation which will give more advantage to both party.(employer and employee). However, if a new legislation will introduce, it should based on to European Union Law.

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