Employment news: Maternity rights and wrongs

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Risk assessments for pregnant workers

The Pregnant Workers Directive is implemented in Great Britain by the Management of Health and Safety at Work Regulations 1999 and the Employment Rights Act 1996. These provide that where a risk to a pregnant employee has been identified at work, the employer must:

- alter her working conditions or hours of work;
- if that is not reasonable, or would not avoid the risk, offer suitable alternative work; or
- if that is not available, or it is reasonable for the employee to refuse it, suspend the employee ('maternity suspension').

Whilst it may be prudent to carry out a risk assessment for all pregnant workers, recent cases (*Madarassy v Nomura plc* and *O'Neill v Buckinghamshire County Council*) have confirmed that this is a legal requirement only where:

- the employee notifies her employer in writing that she is pregnant;
- the work is of a kind that could involve risk of harm to the health and safety of the expectant mother or baby; and
- this risk arises from processes, working conditions or physical/biological/chemical agents in the workplace.

Legislation provides a non-exhaustive list of examples within the third bullet above. This is obvious in some cases, for example radiation and mercury, but not in others, for example mental and physical fatigue. If in doubt, the risk-averse approach remains a risk assessment, particularly as failure to carry out an assessment where one is necessary could amount to pregnancy discrimination.

Pay during maternity suspension or altered duties

If a risk assessment suggests that, for health and safety reasons, a woman should be moved to different duties or suspended during her pregnancy, will she be entitled to the same pay and conditions as she earned in her principal job? The European Court of Justice 'ECJ' has clarified the position in a recent case involving two women (Ms Gassmayr and Ms Parviainen).

Ms Gassmayr was a nurse who lost her on-call duty allowance when she was suspended on health grounds during her pregnancy. Ms Parviainen was an air stewardess who, during her pregnancy, was moved to ground duties and lost some of her flight allowances for work relating to, for example, night work and long-haul flights.

The ECJ's decision confirms that, in terms of a right to pay, where a pregnant worker is temporarily transferred to another job:

- she must not be paid less than employees performing the job to which she is temporarily assigned;
- she is entitled to be paid components or supplementary allowances that relate to her professional status, such as seniority, length of service or professional qualifications; and
- she is not entitled to receive pay components or allowances that are essentially intended to compensate for disadvantages related to the performance of specific functions in particular circumstances. For example, the stewardess (Ms Parviainen) was not entitled to payment for night flights, which, as ground staff, she did not perform.

Similar principles apply on maternity suspension. In Great Britain, under the Employment Rights Act an employee is entitled to a week's pay for each week of maternity suspension. This should mean that the requirements set out in the ECJ's decision are likely to be met or exceeded, provided that the only pay elements that are withheld during the suspension period are those that are not contractually guaranteed and that vary according to work done (such as shift premia, night work allowances or overtime pay).

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