Fertility treatment and employment

21 NOVEMBER 2014

Meriel Schindler
PARTNER | UK

CATEGOR':
ARTICLE

This is a topic that employers can no longer afford to ignore. The most up to date figures from the Human Fertilisation and Embryology Authority ('HFEA') show that 48,147 women underwent IVF or similar treatments in 2011, with 61,726 cycles culminating in 17,041 live births. The average time trying to conceive for these women was 4.6 years. Babies born through IVF or similar treatments now account for 2% of all births.

Rights

There is no statutory right to time off to attend appointments for fertility treatments. Whilst infertility is a medical condition and may involve a number of medical tests and procedures, treatment is largely seen as elective in the eyes of the law. Employers need to tread carefully and avoid unintended consequences by making ad hoc decisions or creating a policy through informal custom and practice.

Any employee undergoing fertility treatment is likely to need time off work. If the employer has no formal arrangements in place, employees might use their holiday entitlement or request unpaid leave to receive treatment. Their absence (which might be sporadic and/or on short notice), combined with the consequences of dealing with a treatment that may be both physically and mentally challenging, is unlikely to go unnoticed by colleagues. However, unlike someone with a broken leg, few people undergoing infertility treatment will want to explain the situation to those around them. Poor handling of requests for time off or inappropriate management of an employee who is undergoing fertility treatment could lead to claims under pregnancy or sex discrimination law, or even under disability discrimination law.

In terms of pregnancy law, cases (Mayr v Backerei und Konditorei Gerhard Flockner OHG and Sahota v Home Office and Pipkin) have established that women undergoing IVF treatment do not benefit from the special protection that pregnant women have until any fertilised ova are transferred to the uterus. This means that it is only at later stages of treatment that female employees can claim unlawful discrimination on grounds of pregnancy.

However they may still have claims of sex discrimination if an employer mismanages an employee who is at an earlier stage of the IVF treatment cycle. In the Mayr case the European Court of Justice said that it would, for example, be unlawful sex discrimination to dismiss a woman on the grounds that she was undergoing IVF treatment, whatever stage of treatment she had reached.

The Sahota case is helpful to employers in that it makes it clear that an employer can still subject a woman undergoing IVF treatment to normal sickness management procedures, provided that it does not treat her less favourably on the grounds that she is undergoing the treatment.

There is as yet no legal authority tackling the issue of infertility, IVF and disability discrimination; however, it is potentially a silent ticking time bomb. The HFEA statistics demonstrate that women undergoing IVF have struggled to conceive for years and it is highly likely that this will have taken its toll emotionally. Many of these women may be battling depression. When added to this the stress of having to wait for and then undergo time consuming, sensitive, invasive and hormonal medical treatments – with high expectations as to their outcome – some of these women will undoubtedly struggle at work. The employer who has not considered or planned for this could have a rude awakening.

Policies

As in any areas where the law is complex and the subject matter potentially highly sensitive, employers are strongly advised to have a policy covering employees who are undergoing fertility treatment.

By bringing the issue of infertility out of the shadows, and having policy provisions that are clear and specific, employees should have improved confidence to talk about what they are going through and a better understanding of where they stand. Furthermore, employers should have a happier workforce and find it easier to avoid complaints of unlawful discrimination. A policy also promotes consistency and provides support to managers who may lack knowledge about what happens during IVF treatment. Ideally, a policy should be backed up by manager training.

Some employers might go further. Apple and Facebook have recently announced that they will fund the cost of egg-freezing for female employees. Whilst some commentators have praised them for their foresight and support, others have criticised them for implicitly suggesting that focusing on a career and having a child are incompatible aspirations.

What should be covered?
Any fertility treatment policy should set out:

- the amount of time off available to attend appointments for fertility testing and treatment and whether such time will be paid or unpaid (remember that individual fertility treatments and their effects may vary significantly, so there is no one-size-fits-all);
- whether the employer is willing to extend some rights to time off to employees whose partners are undergoing treatment (just as the statutory right to time off to attend ante-natal appointments has been extended to partners);
- the approach they will take if a woman undergoing fertility treatment develops health complications or is certified unfit for work and how this will fit with the employer’s policies and procedures on sickness absence;
- the procedure employees should use for seeking time off for fertility treatment and what they should do about keeping the employer informed;
- how (if at all) the policy relates to the employer’s flexible working policy;
- whether the employer offers a counselling service or other forms of support for employees; and
- what approach the employer will take towards confidentiality.

Fertility treatment is a fast moving area of scientific development and employers may need to adapt their policies as the science changes. For instance, it is now possible for a child to be genetically related to three individuals. Policies should always retain flexibility and be drafted with one eye to the future – a fertility policy is a prime example.

What are other employers doing?

A relatively recent article in the Guardian discussed how employers are dealing with the increasing take up of fertility treatment. The article stated that HSBC gave up to 20 days’ paid leave for fertility treatment (although their experience was that women only took 12 of them) and ASDA offered five paid days off a year for female employees whilst men were allowed up to 1.5 days.

Other employers such as UCL draw a distinction between appointments for investigating possible infertility issues and treatment. UCL’s policy treats investigatory appointments as other medical appointments and these are paid. During the treatment stage, five days of paid leave are offered. Partners are required to take annual leave to attend such appointments.
Authors

Meriel Schindler
PARTNER | LONDON

Employment

📞 +44 20 7597 6010
✉️ meriel.schindler@withersworldwide.com