

PREGNANCY AND MATERNITY DISCRIMINATION

Consultation on extending redundancy protection for women
and new parents

**Submission by Prospect to the Department for Business, Energy
& Industrial Strategy**

04 April 2019
www.prospect.org.uk

This response is present by Marion Scovell, Head of Legal, on behalf of Prospect Trade Union. Email – Marion.Scovell@prospect.org.uk

INTRODUCTION AND SUMMARY

Prospect is an independent trade union representing over 140,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to this consultation.

We believe that the existing rights under Regulation 10 of the Maternity and Parental Leave Regulations 1999, whereby employers are required to offer any suitable alternative role to a woman who would otherwise be made redundant during her maternity leave period, should be extended in order to apply the same protection during the pregnancy and for up to 6 months (or preferably a year) following the end of the maternity leave period.

We also believe similar rights should be provided for other employees taking adoption, paternity, shared parental leave, or parental leave, particularly this must include equivalent protection for same sex-couples.

Whilst not addressed by this consultation, we also believe that there needs to be better protections more generally for pregnant workers and those on maternity or parental leave, particularly around stronger rights to return to work on part time hours but retaining the existing role and terms and conditions.

We also believe that the protection in this area should extend to all atypical workers, including freelancers, casuals and temporary workers.

We also strongly support the recommendation from the Women and Equalities Select Committee to extend the time limit for starting claims to the tribunal to six months.

We have addressed the specific questions and provided reasons for our position below.

EXTENSION OF REDUNDANCY PROTECTION

- 1. To what extent do you agree that protections against redundancy for a period following return to work should be aligned with those already in place during maternity leave.**

Strongly agree

- 2. Please give reasons for your answer.**

Prospect believes that the additional protection against redundancy during maternity leave, that is provided for under Regulation 10, should be extended to a period of at least six months following the return to work.

The law rightly recognises the need to protect women on maternity leave from being made redundant. This is an important tool to ensure that employers cannot select women due to pregnancy and maternity and provides important additional protection at a time when they may not be in the workplace. Also it recognises that the opportunity for proper consultation and the ability to look for alternative roles is limited.

However there is no logic to limiting this to the period on maternity leave. Often redundancies are considered while someone is on maternity leave but not implemented until after the return (whether consciously or unconsciously by the employer). The same disadvantage to the woman can occur after the end of the maternity leave period.

Furthermore, in our experience, women are particularly vulnerable in the period shortly following the return to work. Often women have difficulties with reducing or changing hours of work on return, with many employers resistant to recognise the need for altered working patterns to care for young children. Prospect has had a number of recent cases where we have had to threaten or bring tribunal cases to assert a right for a woman to work part time. Similarly it is sadly not unusual for

employers to seek to downgrade women on return from maternity leave, particularly where the woman has requested a change in working patterns. In our experience redundancy decisions are often made in this context, so it is very important that where there is a redundancy situation the employer is required to offer the woman any suitable vacancy in preference to others.

It can be very stressful to go through redundancy consultations and we believe it is important to protect women both during their maternity leave and for a period on their return from this (and also during pregnancy, see our response to question 8).

3. What costs do you believe the extension would bring:

- a) For individuals
- b) For businesses

We do not believe that there would be any significant cost for either individuals or for businesses.

4. What benefits do you believe the extension would bring:

- a) For individuals
- b) For businesses

The additional protection for individual women workers would be significant as they would be able to return to work realising that there is that additional protection. They would know that they would be given priority in any redundancy exercise and as such be able to avoid prejudicial decisions being made.

We further believe there are good business reasons for employers. They will be able to show that they seek to treat workers fairly and without discrimination. Good practice will enhance their reputation, they will hopefully benefit by avoiding costly and time consuming litigation, and will be able to retain good and committed staff.

5. Do you agree that 6 months would be an adequate period of “return to work” for redundancy protection purposes?

We believe the period should be at least six months, but preferably 12 months.

6. Please give reasons for your answers

We consider that it would be better to extend the period to twelve months after return from maternity leave. This is because in some workplaces the consultation period can be quite long and we believe that employers may seek to delay decisions to avoid the period of statutory protection. Whilst any set period could have this impact, we believe six months is too short as it's often during this period following a return to work that there can be disputes continuing around changed jobs and hours.

7. If you think a different period of “return to work” would work better, please say what that should be and explain why

In our view, the protection should last for twelve months, see our answer to question 6 above.

8. Should pregnancy for redundancy protection purposes be defined as starting at the point a women informs her employer that she is pregnant in writing?

Strongly agree protection should apply during pregnancy, but
Disagree that the period should start when the woman informs her employer of
her pregnancy.

Prospect agrees that the protection should apply during pregnancy as well as during maternity leave. Our comments above about the need for protection on return to work apply in a similar way to the pregnancy period.

Particularly pregnant women are vulnerable to discriminatory decisions being made and the additional stress of redundancy consultation and not knowing whether they will have a job to return to is unacceptable.

The law currently does not protect pregnant women until the maternity leave period actually starts, which means that employers can avoid the impact of Regulation 10 by making the redundancy take effect just before the maternity leave is due to start.

A good example of the complexity of the law and the difficulties that can arise because the protection does not currently extend to pregnancy is a Prospect member's successful tribunal case last year.¹ In this case the tribunal had to determine whether or not the redundancy took effect within the maternity leave period, even though the decision had been set in train earlier.

To be consistent with section 18 of the Equality Act we would propose that the protected period should be from the start of pregnancy. We recognise this may cause issues about employer's date of knowledge but of course it would be for the employee to notify the employer, if she believes the statutory protection would apply.

9. Do you think an earlier reference point should be used?

Yes

¹ Our member was employed on a 1 year fixed term contract, with every expectation the contract would be renewed for another few years. She told her employer she was pregnant with a few months remaining on the contract. The employer revised the post and decided to slightly change the emphasis of the role, saying it was a new job that she would need to apply for along with external candidates. She was unable to attend an interview because of sickness due to pregnancy complications and her application was withdrawn by the employer and she was made redundant. While the decisions in this case were predominately made while she was pregnant, to come within the protection of Regulation 10 we needed to be able to show that the redundancy actually occurred during the maternity leave period, which in her case had been triggered early because she was off sick with pregnancy related complications prior to the end of her fixed term contract. Our member succeeded in her claim, but the complexity of trying to resolve this is a good demonstration of the current inadequacies of the law and a reason why the protection should exist during the pregnancy as well as during the maternity leave period. (The case is *N Savvides v The British Museum* in the London Central Employment Tribunal 2018).

10. If yes, please say what that should be and explain why.

As we state above we believe the protection should apply from the start of pregnancy, which would be consistent with the wording in section 18 of the Equality Act.

OTHER GROUPS

11. Do you agree that the most direct equivalents to return to work from statutory maternity leave (on the basis that they are forms of leave that can potentially be taken by parent of either gender for longer periods) are:

- a) adoption leave - yes
- b) shared parental leave - yes
- c) longer periods of parental leave - yes
- d) Other - yes

12. If other, please explain your reasons.

Paternity leave should be included in the list for the additional protection. While it's likely that most cases of paternity leave would be for short periods of up to two weeks, similar issues could arise.

13. Supposing that the additional redundancy protection afforded by MAPLE is extended to mothers returning to work after maternity leave, to what extent do you agree that the same protection should be extended to those groups?

Strongly agree

14. Please explain the reasons for your answer.

It is necessary to ensure that other workers taking family leave in these circumstances should have equivalent protection. This is particularly so in respect of adoptive parents, who have rights that mirror maternity leave and are likely to face a similar level of discrimination, due to becoming new parents.

Also now that parents can choose to share the entitlement to maternity leave as shared parental leave, it is important that fathers or co-parents taking leave have the protection against being made redundant. They should have full rights equivalent to that of the women taking maternity leave. Anything less than this will act as a barrier to shared parental leave.

The rights should, of course, apply equally to same sex partners. For example two gay men adopting a child would currently not have the protection of Regulation 10 and clearly it is important that they should do so.

If we are concerned to ensure that parents are not facing discrimination due to their family commitments we believe the protection for offering alternative employment in redundancy situations should apply to all those on maternity, paternity, adoption or other parental leave.

15. Are there other forms of leave which should be considered for additional redundancy protection on return to work?

See answer 12 above.

16. Please give your reasons.

See answer to 12 above

AWARENESS OF RIGHTS AND OBLIGATIONS

17. How effective have these steps been in achieving their objective of informing pregnant women and new mothers of their employment rights?

Fairly effective

18. Please give your reasons.

Clear information about the rights of pregnant women and those on maternity and parental leave is essential. But the law on maternity and parental rights remains too complex. Particularly in our experience many employers, let alone workers, are unaware of the specific protection under Regulation 10.

The information provided through ACAS, HSE, and the Gov.uk website, along with the Equality & Human Rights Commission, is important in explaining rights.

However this has been very effectively supplemented by many other independent organisations, such as Maternity Action, Pregnant then screwed, and women's campaigning groups.

Trade Unions, of course, continue to be the main provider of advice to women in recognised workplaces. Unions provide a lot of detailed information on maternity rights, can work with employers to improve workplace policies and procedures, and importantly are able to provide effective legal advice when things go wrong.

19. How effective have these steps been in achieving their objective of informing employers of their rights and obligations in relation to pregnant women and new mothers?

Not very effective

20. Please give your reasons.

Prospect is not convinced that all employers are aware of their obligations in this area, and this is particularly (although not exclusively) true of smaller employers. As we say above it is especially the case that many employers are unaware of their obligations under Regulation 10. They are often surprised when union officials explain that they have additional duties to ensure that women on maternity leave are offered alternative work in a redundancy situation and that they must take 'priority' over others.

21. How do you think these steps might be improved?

There needs to be improved resources available to Government agencies tasked with advising on rights, such as ACAS, HSE, and EHRC.

22. Please outline any further steps which should be taken to provide advice and guidance to employees and employers about the employment rights of pregnant women and new mothers and employers' obligations towards them.

23. If further steps should be taken, who is best placed to take that action?

Prospect believes that unions are in the best position to advise workers on their rights at work. We are in the unique position of not just being able to advise individuals but also to work with employers to improve the position in the workplace.

So, a key way to improve rights of pregnant workers and those on maternity or parental leave, is to extend obligations for collective bargaining, remove unnecessary restrictions on unions (such as the additional reporting requirements introduced under the Trade Union Act 2016) and to provide statutory recognition of union equality reps giving them increased rights to time off and better protection against being subjected to a detriment.

ENFORCEMENT AND TIME LIMITS

Whilst the consultation paper does not ask any specific questions on these sections of the consultation paper we would like to address these additional points.

Enforcement

We support the Women and Equalities Select Committee recommendation that the Government should implement a system similar to that used in Germany under which pregnant women and for a period after giving birth could only be made redundant in specified circumstances. We understand that under the German scheme employers are required to obtain consent from a competent authority before making someone redundant. This appears to be a good idea, it would still allow businesses freedom to make redundancies where it is essential to do so, but provides the greater protection for pregnant workers than that under the UK legislation.

We also believe that greater transparency is needed in respect of the extent of dismissals and detrimental treatment for pregnant women, those on maternity leave and those returning to work after a period of maternity or parental leave. To this end we recommend that the Government adopts a reporting system for employers to report on the number of dismissals and resignations of workers in these groups. This could be similar to the legislation on Gender Pay Gap reporting. We believe a greater transparency and holding to account would improve the situation for workers.

Further we believe there needs to be greater funding and resources to the EHRC to enable them to effectively monitor and enforce any new regulations.

Time Limits

We strongly support the Women and Equalities Select Committee recommendation to extend the time limit for bringing a claim to the tribunal to six months.

The three month time limit to initiate claims can be problematic in all jurisdictions, but it is particularly unjust in cases of pregnancy and maternity discrimination and claims

of automatic unfair dismissal on these grounds. Someone who is shortly to give birth or is caring for a new child is unlikely to be prioritising a tribunal claim. The three month limit is especially harsh in these circumstances.

Whilst it is right that tribunals have powers to exercise their discretion to allow the time limit to be extended, this discretion is applied fairly sparingly. In our view rather than looking at the number of late applications granted, it would be important to know the number of claimants who had been deterred from bringing a claim because they believed they would be out of time. Rather than seeking to relying on a discretionary way round the problem (which is probably not applied wholly consistently in any event), we believe it would be much better to increase the time limit.

We believe the increased time limit should be applied immediately in these cases rather than wait for a wider review. It should be noted that there are already six month limits for redundancy payment and equal pay cases, so extending for pregnancy and maternity cases would not be wholly out of line with other jurisdictions.

OTHER ISSUES

Atypical Workers

There are particular problems for a range of atypical workers, such as freelancers, casuals, and temporary employees, who do not have full employment protection rights. Whilst these workers could claim under the discrimination provisions in the Equality Act, there is limited protection for those atypical workers who have their contract terminated due to pregnancy or maternity. We believe that 'workers' should have the rights to automatic unfair dismissal and equivalent protection to that provided by Regulation 10.

We appreciate that issues around employment status are being considered in respect of the Taylor Review and the 'Good Work Plan', but we think it is extremely important that full protection is provided for atypical workers immediately. A relatively simple way to do this is to extend rights to all workers.

Greater protection on reduction in hours

We also believe that the existing provisions should be strengthened to stop the fairly common practice of employers only agreeing a request to reduce hours on return to work if the woman agrees to a lower graded role. This is not uncommon in many areas where Prospect members hold managerial or specialist roles prior to maternity but are pressurised into accepting a loss of responsibility and a lower graded job in return for working part time.

We appreciate this can be challenged under the Equality Act, but there needs to be much stronger guidance to employers explaining that they must not do this. A statutory change would also be helpful that provides for women returners to come back to work to the same role and on a part time basis if she requests this and that her existing terms and conditions would be maintained on a pro rata basis.

Maintaining EU rights

Lastly we note that many of our existing legal protections are underpinned by the EU pregnant workers. We believe it is vital that the Government commits to maintain all rights, deriving both from the directive and case law, post Brexit.

Marion Scovell

Prospect

4 April 2019