Out of sight, out the door?

Following recent findings that one in seven women on maternity leave do not have a job to go back to, Harriet Bowtell considers the rise in the number of maternity-leavers being made redundant

Many employment law practitioners have seen a recent rise in pregnancy and maternity discrimination, particularly when connected with redundancy. This experience was supported by the findings of research commissioned by Slater & Gordon earlier this year into the experience of new mothers returning to work. The headline finding was that one in seven women did not have a job to go back to. Another key finding was that of the 40% of women who said that they returned to a changed position, almost half felt that the job they returned to was somehow worse than the job they had left. More than a quarter of these women had had their request for flexible working arrangements refused.

Interestingly, of the 40% who saw changes to their position, more than half said nothing to their employer either because they were unsure of their rights (25%), didn’t know where to turn for help (14%) or thought that seeking help would damage their future career prospects (nearly 12%). Fewer than 4% of those who saw changes to their position sought legal advice. Therefore, while we are seeing an increase of this type of case in practice, it really is only the tip of the iceberg.

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Of those who seek legal advice, only a tiny percentage go on to bring a claim in the employment tribunal. Even fewer ever get to a hearing. The case brought by trainee Katie Tantum against Travers Smith reported earlier this year is a rare example. She brought claims of automatic unfair dismissal and pregnancy discrimination when she wasn’t kept on at the firm after she informed them that she was pregnant.

There may be several reasons why so few women bring complaints. The very short time limit of three months for lodging a claim can be a real problem, often falling in the later stages of pregnancy or soon after the birth of their child. Women will also be concerned about the health of their baby and themselves, stress and anxiety and damaging their own careers. The Slater & Gordon survey found that almost one in five women took no action because they deemed the demands of new motherhood to be a greater priority. Employers often see women on maternity leave as an easy target.

Some examples of the cases we see in practice are:

- women not being given back the work they were doing before their leave;
- women being replaced by their maternity cover;
- women being told on the day of returning to work that they are being made redundant; and
- employers failing to offer suitable alternative employment when a redundancy situation arises during maternity leave, or failing to inform women of alternative roles until they are due to come back to work, by which time they may have missed out.

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The law

The law on pregnancy and maternity is contained in the Equality Act 2010 (EA), the Maternity and Parental Leave etc Regulations 1999 (the Regulations) and the Employment Rights Act 1996 (ERA).

Section 18 EA makes it unlawful to treat an employee unfavourably because of her pregnancy and/or maternity leave.

Regulation 20(1) and (3) of the Regulations provide that an employee’s dismissal will be automatically unfair under the ERA where the reason or principal reason for the dismissal is connected with maternity leave. Regulation 20(2) and (3) provide that a dismissal will be automatically unfair where the following conditions are satisfied:

• the reason or principal reason for the dismissal is redundancy;

• the circumstances constituting a redundancy applied equally to one or more employees who had positions similar to that of the dismissed employee; and

• the reason or principal reason for her selection for redundancy was pregnancy or maternity.

In addition, reg 10 of the Regulations comes into play where a redundancy situation arises during an employee’s maternity leave. In such a case, where ‘it is not practicable by reason of redundancy’ for the employer to continue to employ the employee under her existing contract, she is entitled to be offered a suitable alternative vacancy where one is available. This includes a vacancy with an associated employer. The obligation arises at the same time as the redundancy situation, so the employer must offer any suitable roles to the employee while she is on maternity leave rather than waiting until she is due to return to work.

Employers also often wrongly make presumptions about what maternity returners are and are not prepared to do and may, accordingly, score them unfairly in a redundancy exercise or use criteria that disadvantage a working mother.

Recent case law

In SG Petch Ltd v English-Stewart [2012], the Employment Appeal Tribunal (EAT) recently considered the application of reg 20 of the Maternity and Parental Leave etc Regulations 1999 (the Regulations) (see box above). The case concerned a part-time marketing manager who was told at the end of her maternity leave that she was redundant. Somewhat controversially, the EAT overturned the employment tribunal’s decision that the claimant was discriminated against because she had taken maternity leave and was automatically unfairly dismissed.

The claimant was due to return to work having had a year’s maternity leave. Her employer told her that it had been able to manage without her during her absence. It was therefore making her position redundant as her work had been absorbed by other members of the team.

The tribunal found that the employer did not carry out a proper process, having failed to produce a matrix to determine the skills needed in the department and then apply it to all four employees in the marketing team. It found that, as it became apparent to the employer during the claimant’s maternity leave that it no longer needed four staff, the claimant’s dismissal must be on the grounds of her maternity leave and she was therefore discriminated against.

Further, the dismissal was automatically unfair under reg 20(1) of the Regulations.

The EAT, in overturning the tribunal’s decision, held that because the tribunal had been bound to conclude that there had been a redundancy situation which resulted in the claimant’s dismissal, her dismissal could not be because of her maternity leave. It therefore rejected the claimant’s maternity discrimination claim. Further, the dismissal could not be automatically unfair under reg 20(1) of the Regulations and instead the tribunal should have considered the three-stage test in reg 20(2).

However, it cannot be right, if this is what the EAT meant, that where the reason or principal reason for dismissal is redundancy, it cannot be because of maternity leave. There could be a genuine redundancy situation but the employer’s selection could be discriminatory. An employer’s discriminatory reason does not need to be the only or even principal reason for the dismissal; it only needs to have a significant influence on the outcome. The correct question in Mrs English-Stewart’s case was whether the employer’s decision to select her for redundancy and not to include the other employees in a pool for selection was in no sense whatsoever because of her maternity leave. As the tribunal had found that the employer had not carried out a proper redundancy process, surely the burden of proof should have shifted to the employer to show that it did not discriminate?

The way forward

It may be that so many women on maternity leave are being targeted for redundancy due to employers’ ignorance and unfounded fears about what they can expect when the employee returns. The employer may question the employee’s commitment and may not want to agree to a flexible working request. Many employers are losing talented women, a fact born out by the endless statistics about the lack of women in senior positions. Rather than simply getting rid of working mothers or finding reasons to reject flexible working, employers need to rethink how work can be done and how performance can be measured. Focus on time in the office and after-work events is outdated. Employers need to get more creative about flexible arrangements such as remote working, job shares and compressed hours. While the law exists to protect those who are discriminated against, in reality a change in culture seems to be the only way that this rise in discrimination against new mothers can be tackled.

SG Petch Ltd v English-Stewart [2012] UKEAT/0213/12

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