

# Greater expectations

Final report of the EOC's investigation  
into discrimination against new and  
expectant mothers in the workplace



June 2005

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The support and expertise of the external Advisory Board has been invaluable throughout the investigation. They were:

### **Chair:**

Fiona Cannon, EOC Commissioner, Head of Equality and Diversity at Lloyds TSB

### **Members:**

- Caroline Waters, Director of People Networks, BT
- Janet Gaymer, Senior Partner, Simmons & Simmons, Chair of Employment Tribunal System Taskforce
- Liz Kendal, Director (previous), and Ruba Sivagnanam, Head of Policy Information & Campaigns, Maternity Alliance
- Peter Firth, HR Consultant, Member of Federation of Small Business Employment Affairs Committee
- Rhian Davies, Chief Executive, Disability Wales
- Sarah Veale, Head of Equality & Employment Rights, TUC
- Shernaz H Engineer, Managing Director, Verity Appointments
- Shona Simon, Vice President of Employment Tribunals in Scotland
- Stephen Haddrill, Director General of Fair Markets, DTI

We would also like to thank:

- The hundreds of women and their partners who have taken the trouble to share their stories with the EOC, motivated by the desire to help change things for the better.
- The many employers who have given up time to participate in our research and who have responded to our consultation.
- Other interested groups and individuals, particularly from the legal and advice community, who have contributed their experience, including Employment Tribunal chairmen and legal representatives who have responded to our separate questionnaires.
- Lloyds TSB for contributing towards the costs of research.
- Acas for conducting focus group research with small employers.

## ABOUT THIS INVESTIGATION

This is a report of the statutory investigation into pregnancy discrimination which the Equal Opportunities Commission (EOC) has carried out under the Sex Discrimination Act 1975. These statutory powers allow us to undertake investigations where we believe there are deep-seated issues of gender inequality or discrimination, and to make recommendations to those who can take action, including the Government.

Discrimination against pregnant women – particularly dismissal – has been unlawful under the Sex Discrimination Act since a decision of the Employment Appeal Tribunal in 1985.<sup>1</sup> In 1992 the European Commission directed that such dismissal be prohibited.<sup>2</sup> In 1996 the UK Government strengthened the protection against pregnancy-based dismissal and disadvantage by making it unlawful under the Employment Rights Act to dismiss or treat a woman disadvantageously for any reason connected with her pregnancy or maternity leave.

### **Our reasons for investigating**

Despite this statutory protection, the EOC has continued to receive a high number of enquiries from women experiencing problems at work while pregnant, on maternity leave, or returning from leave; and to see a high number of claims on these issues taken to employment tribunals – between 1300 and 1500 pregnancy-related applications each year in Great Britain. We were contacted by many women who had faced disadvantage at work from the very point of announcing their pregnancy, including dismissal and hostility.

So, in September 2003, the EOC launched this formal investigation to determine the extent of pregnancy discrimination in Great Britain and the reasons for it. We deliberately adopted a wide definition of pregnancy discrimination to encompass all the issues a woman in the workplace can face in relation to pregnancy and childbirth. We took the term to mean *any disadvantage at work caused wholly or partly by pregnancy, or by taking maternity leave.*

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<sup>1</sup> Hayes v Malleable Working Men's Club and Institute [1985] IRLR 367, EAT.

<sup>2</sup> Pregnant Workers Directive 92/85/EEC which introduced 'measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding'.

## Terms of reference

The terms of reference for the investigation were broad:

1. To establish the incidence of pregnancy-related dismissal in Great Britain and the characteristics of women who experience it, including their race, disability and income.
2. To investigate awareness of legal rights and responsibilities in respect of pregnancy at work.
3. To investigate the reasons why employers may break the law, including their perceptions of and attitudes towards pregnant women in the workplace.
4. To quantify the cost of pregnancy discrimination in terms of health and safety and in terms of women's attachment to the labour market.
5. To assess the effectiveness of legal protection for pregnant women at work in Great Britain, with respect to both the substantive law and the determination of complaints through the Employment Tribunal system.
6. To assess the effectiveness of access to advice and support for women facing discrimination, with particular emphasis on the most vulnerable groups, including black and ethnic minority women and those on low incomes.
7. To consider any specific issues in relation to race and disability in relation to the above.
8. To make and widely publicise recommendations to help reduce the problem, with follow up work as necessary.

## Interim report

In September 2004 we published an interim report based on our findings at that stage and we made some early, urgent recommendations for change. 'Tip of the Iceberg' was based on the evidence from our analysis of hundreds of individual responses to our investigation,<sup>3</sup> our consultation with the legal and advice community and evidence from other key bodies such as Maternity Alliance. We relied on research completed by that stage, in particular, an extensive survey of over 750 employers in England, Scotland and Wales; research into small and medium-sized employers in Wales; and an analysis of tribunal decisions on pregnancy-related issues.

## Consultation

Following on from the interim report, the EOC began a major consultation exercise with a wide range of stakeholders across Great Britain, particularly employers and their representative organisations. We consulted with employers of all sizes and

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<sup>3</sup> Responses from individuals were received in the form of completed questionnaires, contact with our Helpline and emails.

across all sectors. We wanted to receive their views on our interim recommendations and their suggestions for possible solutions to the problems we had identified, as well as to gather additional evidence, case studies and examples of how managing pregnancy and maternity could be made easier for employers.

Over 1000 employers gave us feedback on our interim recommendations. We spoke with employer associations, such as the Recruitment Employers Confederation, CBI, Small Business Council, EEF, Forum of Private Business, Federation of Small Businesses and British Chambers of Commerce.

We also consulted with Acas, the Health and Safety Executive (HSE), the Commission for Racial Equality (CRE) and Citizens Advice.

### **Further research**

In the second year of the investigation, we completed a further major research project into the experiences of 1,006 women who had recently worked while they were pregnant. We examined details of women's experiences using in-depth interviews with 35 women who had experienced pregnancy-related discrimination, and 12 focus group discussions with women who had worked while pregnant, including four exclusively with women from black and ethnic minority groups.

### **Results**

Our research and our extensive consultation, as well as input from our external Advisory Board and members of the public, have provided us with unprecedented insight into:

- The scale and extent of pregnancy discrimination.
- Women's experiences of pregnancy and maternity at work and the impact of discrimination on their lives.
- The practical difficulties employers experience with pregnancy and what steps by government and others can help.
- The very large number of individuals and employers who are not aware of their rights and responsibilities.
- How few women take action when their rights are infringed and the reasons for this.
- Views on how well the employment tribunal system operates in cases of pregnancy discrimination.
- The costs of pregnancy discrimination to individuals, employers and society.

The full list of the evidence we have collected and organisations we have consulted with is found in Annex 1. The research reports referred to can be accessed via our

website at [www.eoc.org.uk/pregnancy](http://www.eoc.org.uk/pregnancy) together with a summary report of the investigation.

### **The findings of the investigation**

This report is the culmination of that work. The investigation presents the fullest picture ever of pregnancy discrimination in Great Britain – its extent, its nature, its impact, why it is happening and what needs to change in order for it to stop. What the EOC found is that pregnancy discrimination is one of the most hidden and damaging forms of workplace injustice. It is even more widespread than we suspected when we embarked on this investigation. We were stunned at the number of women who said they had been dismissed, demoted, denied training or promotion, or bullied into quitting, just because of their pregnancy.

### **Desire for change**

We have received overwhelming support for our investigation from all sides: individuals, HR professionals, employers large and small, unions, the legal community and voluntary organisations.

Women have given us the benefit of their experiences in the hope that other women will not have to face the same problems; male supporters have told us they don't want their partners and families to be put in this invidious position either. Employers have told us about the difficulties of managing pregnancy and the need for more support. Employer associations have worked with us to find solutions to the problems.

There is now an unprecedented level of desire for change from all quarters. More than 1,400 people have pledged online support for our Pregnant & Productive campaign. And in a poll of 1,000 adults in January 2005, 87% of people agreed that Britain needed to look after pregnant women at work because the economy needs them.

Armed with our knowledge of the scale of pregnancy discrimination and the reasons for it, and this momentum for change, we can move on to suggest what needs to be done in order for pregnancy discrimination to stop. Everyone now has greater expectations.

## EXECUTIVE SUMMARY

The EOC has undertaken a two-year investigation into pregnancy related discrimination at work. What we found was far worse than even we expected.

### **The extent and impact of pregnancy discrimination**

A million pregnant women are likely to experience discrimination at work over the next 5 years, if current trends continue. Our research has established that:

- Each year almost half of the 440,000 pregnant women in Great Britain experience some form of disadvantage at work, simply for being pregnant or taking maternity leave. 30,000 are forced out of their jobs.
- Women who lose their jobs miss out on £12m a year in Statutory Maternity Pay each year and, on average, return to hourly earnings 5% lower than they could have expected, 14% less for those on lower incomes.
- Yet the majority of women take little or no action to assert their rights. Around 3% of those who lose their job will attempt to seek financial compensation for their dismissal at an Employment Tribunal. Less than one in 20 will seek advice.
- This discrimination has serious, far-reaching implications for Government and employers, too. Women are nearly half the workforce and increasingly highly qualified. Unfair treatment at work during pregnancy makes it much less likely that they will return to their old jobs after maternity leave. And six times more likely that they will consider never going back to work at all. Employers not only lose out on their skills and experience, they also face extra recruitment and training costs.
- All women of childbearing age are potentially affected. Employer concerns about managing pregnancy may be having a wider impact on women's access to work. More research is needed but anecdotal evidence is shocking: 80% of HR professionals replying to one on-line survey said that they think twice before employing women of childbearing age. This needs to be tackled if the UK economy is to continue to grow.

### **The causes of pregnancy discrimination**

Our investigation has established that the principal reasons for non-compliance with the law on pregnancy and maternity are:

- **A lack of knowledge and understanding of maternity rights.** Many businesses do not understand their obligations towards pregnant women as well as they think they do. More than a quarter of businesses cannot name a single maternity entitlement.

- Line managers, generally the first point of contact for the pregnant employee, are also often the least well informed. Small employers often have problems keeping abreast of employment law. Awareness of health and safety responsibilities appears to be particularly low.
- **Lack of dialogue and planning.** There are some serious challenges to managing pregnancy effectively - the most difficult being the disruption caused by the absence of the member of staff and uncertainty surrounding her return. But a lack of dialogue between employer and employee and inadequate planning are exacerbating, and in some cases causing, the disruption.
- **Costs.** The costs associated with pregnancy, although not easily quantifiable, are a particular issue for small employers. We were informed that pregnancy in a micro business (less than 10 employees) can spell at best cash flow problems and at worst the threat of closure.
- **Negative attitudes towards pregnancy and maternity.** A small minority of employers hold views that may allow discrimination to take root, such as viewing pregnant women as less committed and less suitable for career progression or training.

### **Managing pregnancy well makes business sense**

Our research shows that the majority of employers do have positive attitudes to pregnancy in the workplace. Employers who have learned to successfully manage pregnancy describe it as an integral part of a long-term business strategy, a key investment that is returned through:

- Improved talent, skills and knowledge retention (some achieve return-to-work rates of more than 90% after maternity leave).
- Lower absenteeism and better morale.
- A constantly developing and more productive workforce.

All businesses can achieve these benefits, and many more will do so if the Government and employers respond positively to this report.

### **Health and safety**

Our research shows that the protection of the health and safety of new and expectant mothers and their unborn children in the workplace - which should be of paramount importance - is jeopardised because:

- The systems for protecting the health and safety of pregnant women are commonly unknown or ignored, for example, nearly half of women did not know they were entitled to a risk assessment.
- 50% of pregnant women do not receive the required health and safety risk assessment.
- Risk assessments are not always carried out well.
- There is a lack of both complaints and enforcement.

As a result some women are forced to choose between working in an unsafe environment or leaving their job.

### **Making the law work better for women and employers**

Our investigation has found that the current legal framework is not preventing pregnancy discrimination.

- The law has not proved effective in preventing pregnancy related discrimination. This is partly because pregnancy law is complex and confusing, and requires simplification; but there is also a gap in the law protecting women on return to work from maternity leave.
- The law is operating in a vacuum without the support and guidance for individuals and employers which is needed to back it up.
- Enforcement of the law relating to pregnancy and maternity leave depends upon a woman taking action to address her complaint either internally or at an employment tribunal. But very few women seek to assert their rights as taking a claim is very stressful and many fear the employment consequences.
- The 1300-1500 employment tribunal claims for pregnancy related discrimination each year in England, Scotland and Wales are the tip of the iceberg.
- The time limits for taking enforcement action are very short given the extra pressures pregnant women face, and the steps to be taken before going to an employment tribunal are cumbersome.
- Tribunal claims often present a lose/lose situation for both employees and employers. Many women who take employment tribunal claims report lower status or lower paid employment, or even unemployment, afterwards.
- There are insufficient mechanisms for resolving disputes in the workplace.
- The onus for driving change must move from individuals to institutions. The new public sector duty will support this process. Current legislation deals with single instances of discrimination when they occur but is not geared to tackling the underlying causes of inequality in a systemic way.

## **The way forward**

Our investigation, and the awareness-raising campaign the EOC has run during it, has mobilised an unprecedented level of desire for change from all quarters – men as well as women, HR professionals, employers large and small, unions, the legal community and voluntary organisations. Everyone now has greater expectations.

## **Key recommendations**

Three of our key recommendations to achieve change are:

- A written statement of maternity rights and responsibilities for individuals and their employers to improve knowledge and understanding.
- A ‘green light’ for employers to ask women to indicate their return dates much earlier in the maternity leave, where this is possible, to improve dialogue and planning.
- Support for small businesses, a vital part of the UK economy, to support their specific needs. The Government should provide more financial support for micro employers who have a pregnant employee, and access to HR support for small employers.

Many of our recommendations are widely supported.

*We welcome the report's realistic approach to the problems faced by smaller firms in managing pregnancy. The proposal to allow employers to ask the question about a return date will give firms the much needed certainty they desire in running the business. Of equal importance is the recommendation to Government for financial support for micro employers to cover such items as recruitment costs.*

*Stephen Alambritis, Head of Parliamentary Affairs, Federation of Small Businesses (FSB).*

Our full recommendations are listed below.

# OUR RECOMMENDATIONS

## Aims of the recommendations

The purpose of our recommendations is to achieve the following changes, which are essential if the level of pregnancy discrimination is to be significantly reduced:

- To increase employers' and individuals' knowledge and understanding of maternity rights.
- To encourage and facilitate better planning and dialogue between employers and employees.
- To provide enhanced support for micro and small employers.
- To improve the level of and quality of health and safety risk assessments.
- To make the legal and advice system work better in preventing pregnancy discrimination and providing redress where it occurs
- To change workplace culture and attitudes, and provide incentives towards compliance.
- To provide for future monitoring of the impact of the recommendations in reducing pregnancy discrimination.

### **A. To increase employers' and individuals' knowledge and understanding of maternity rights**

We recommend:

- A written statement to be given to a woman at her first antenatal appointment with instructions to give a copy to her employer.
- A toolkit for employers, prepared by the EOC, with a separate version specifically tailored to the needs of small employers.
- Employers and trade associations should adapt the toolkit and distribute to their own members and/or their own sectors.

### **B. To encourage and facilitate better planning and dialogue between employers and employees**

We recommend:

- A 'green light' for employers to ask women to indicate their return dates from maternity leave in good time before the return wherever possible.
- Employers to be required to give notice of any proposed change to the woman's job on return from additional maternity leave, and to consult with the individual about the alternative post offered, which must be equivalent to her original post.

**C. To provide enhanced support for micro and small employers**

We recommend:

- Government financial support for micro employers, in the form of either a universal or means-tested grant or reimbursement of some of the costs, such as recruitment, training or health and safety.
- The Government should provide access to one-on-one HR or equivalent support for small employers without HR functions to help them deal with pregnancy and maternity.

**D. To improve the level of and quality of health and safety risk assessments**

We recommend:

- Trade associations and sectoral bodies should work in partnership with trade unions to prepare model risk assessments for their sector. This process should be facilitated by the HSE.
- The Government should take steps to ensure that every employed pregnant woman receives an appropriate risk assessment, whether this be achieved through the HSE, employers or other means.

**E. To make the legal and advice system work better in preventing pregnancy discrimination and providing redress where it occurs**

We recommend:

- A statutory Code of Practice produced by the EOC as a single point of reference on pregnancy and maternity law, which would be used as a benchmark in internal disputes and tribunals.
- The Government should simplify equality and employment legislation and address the aspects of employment law relating to pregnancy and maternity that require harmonisation and clarification.
- The existing protection against victimisation - for a woman making a complaint to her employer about her treatment - should be made more comprehensive.
- The three-month time limit for registering a pregnancy or maternity-related unfair dismissal or sex discrimination claim should be extended for pregnancy-related claims. A parallel extension of time will be required for lodging a statutory grievance.
- The capacity of existing services to offer advice and support to those individuals who wish to enforce their claim should be increased.
- There should be greater investment in the transfer of expertise from bodies such as the EOC to HR advisers, Citizens Advice Bureaux and legal advisers.

**F. To change to workplace culture and attitudes, and provide incentives towards compliance**

We recommend:

- The new gender equality duty for public sector bodies or the accompanying guidelines should include measures requiring public sector employers to address pregnancy discrimination.
- When contracting out, public authorities should specify equality standards, including reinforcing the requirement to undertake pregnancy risk assessments, and assurances of an adequate maternity absence management system.
- With Government support, major employers and their representative bodies, along with their trade unions, should communicate consistent and positive messages about the benefits to employers and wider society of supporting pregnancy and maternity.
- A National Family Strategy should be adopted in England, Scotland and Wales that increases parental choice, through an improved framework of paid leave for mothers, fathers and carers, better access to flexible working and quality childcare.

We also make proposals to provide for future monitoring of the impact of our recommendations in reducing pregnancy discrimination (see chapter 7).

## CHAPTER 1 - INTRODUCTION

Around 440,000 working women are pregnant in Great Britain each year. Almost half are likely to experience some form of disadvantage and more than seven out of ten are likely to suffer in silence. More than 30,000 will be forced out of their jobs and left without work, an income, perhaps even access to benefits – just for getting pregnant. Only a tiny proportion seeks any advice or redress. If current trends continue, a million pregnant women are likely to experience discrimination at work over the next 5 years.

These are sobering statistics in 2005, the 30<sup>th</sup> anniversary of the Sex Discrimination Act. Before the advent of equality laws, women were expected to resign once they were 'in the family way'. Most people would think that idea laughable today; pregnant women expect to be able to carry on working as long as they can, and most expect to return to work after maternity leave.

But the reality is that, despite the legal protection introduced over many years, expectant and new mothers remain disturbingly vulnerable in the workplace. Women who have felt valued and respected throughout their careers say they find this counts for little once they announce their pregnancies. Instead they experience a loss of dignity, prospects, and even their livelihood, that can shake their confidence and trust to the core.

The costs of pregnancy related discrimination are untenable. Women who have been dismissed lose £12 million in Statutory Maternity Pay (SMP) annually; they return to other employment on hourly earnings, on average, 5% lower than they could have expected, 14% less for those on lower incomes. The loss of women from the workforce also costs their employer – the recruitment, training and other costs of replacing them have been estimated at up to £126 m per year - and it costs UK plc too, in lost taxes and extra benefit payments.

In addition, there are unquantifiable costs. For pregnant women, excessive stress, anxiety, unsuitable workloads or other detriment in the workplace can put their health and that of their unborn babies at risk. Stress increases the danger of miscarriage and can lead to premature birth.

Pregnancy discrimination costs those who want to have children and to give them the best possible start by maintaining a decent income and quality of life. Pregnancy discrimination can undermine the financial and emotional security of the whole family.

Fathers increasingly want to share in the care of their children, and research shows that this is best for children too. But the effect of mothers losing their income is often to force fathers to earn more, pushing them out of the home at the very time they are most needed.

There is even a knock-on effect on women who have no intention of having children; employer concerns about managing pregnancy may be having a wider impact on women's access to work. We know that some employers deliberately steer clear of taking on women of childbearing age.

In fact, pregnancy discrimination costs all of us who depend on the success of the UK economy for our wellbeing and prosperity. Women now make up virtually half the workforce. They are increasingly highly qualified. Failing to ensure they are fairly treated at work during pregnancy makes it much less likely that they will return to their old jobs after maternity leave. And six times more likely that they will consider never going back to work at all.

*Deep down, you know these places are different, all employers are different, but at the time I just couldn't face going back to anybody like that, so to find another job was totally out of the question. Woman IES focus group, 2005.*

That translates into a leaching of talent and experience that employers, many of whom are already facing severe skills shortages, cannot afford. Our competitiveness in the global economy depends on a high-quality labour force. Employers are having to invest heavily in recruiting the best people for the job, and training and developing them to a high level. When women fail to return to work after maternity leave, or return to a lower level job, employers lose some or all of that investment.

*The stock market would not allow the waste of capital in the way we tolerate the waste of female talent and ability. Paul Myners, Chair of Marks & Spencer PLC, Oct 2004.*

There is an inevitable short-term disruption that causes problems for small and medium enterprises, but those SMEs that have found ways to minimise the disruption agree that it is outweighed by the long-term benefits of retaining the skills and talent of returners.

*Experience has taught us that women are more likely to return to the workplace if they feel they have been valued and looked after during their working pregnancy and maternity leave and so the benefits can outweigh the costs. West Yorkshire Housing Association, 56 employees.*

There is no reason why all businesses cannot achieve these benefits - even the smallest ones - if business support is provided.

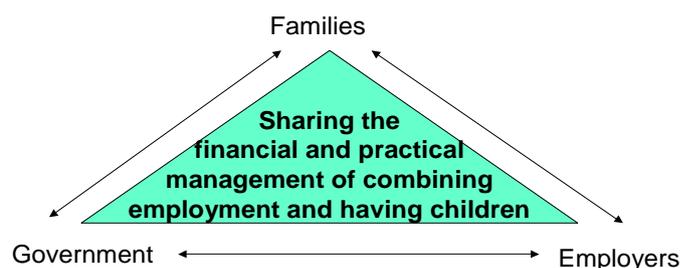
### Things could be different

We believe that with some quite feasible changes, we can achieve our vision of a working environment where:

- Women feel able to tell their employers they are pregnant without fear of negative consequences.
- This announcement sets off a two-way dialogue between employee and relevant managers, in which the mutual rights and responsibilities are openly discussed, as well as any risks that might have to be addressed to ensure a healthy and safe pregnancy.
- That dialogue continues throughout the pregnancy and maternity leave, allowing employers to plan ahead and women to feel listened to and supported.
- Because they have planned, and are aware of the pregnant employee's plans, employers feel able to cope with the pregnancy without panicking about the impact on their business.
- Because they feel supported, women feel confident and happy about coming back to work after their pregnancy, whether full or part time.
- Employers retain the skills and knowledge of the employee for the long term, while allowing other employees to benefit from development opportunities while she is away.

But for this vision to become reality, we need to spread the costs and responsibilities of combining work and pregnancy fairly and equitably. Imagine a finely balanced triangle with families at one corner, the Government at another and employers at the third. Just as all three 'corners' stand to gain from ensuring families can successfully combine paid work and having babies, so all three have an essential part to play in helping to achieve this. None can do it without the others.

#### The triangle of shared responsibility



**Parents and families** already have all the practical and financial responsibilities of combining pregnancy and maternity with work – not least, in taking maternity leave, foregoing a considerable amount of their income and putting their careers on hold. If their employers do not comply with the law, they have the additional burden of taking action against their employer or accepting a denial of their rights.

**The Government** has a responsibility to make sure that the law on pregnancy and maternity works properly for all concerned - our evidence shows that the plethora of laws designed to protect expectant and new mothers is not stopping discrimination. It must ensure that the law is accessible and easy to understand and that its provisions are complied with. It must provide employers, especially small ones, with the business support they need to comply with the law and apply best practice, and must then effectively enforce the law.

**Employers** have a responsibility, too, to put in place management and communications structures that allow them to deal with pregnancies in the workforce positively and in line with their legal obligations; and to introduce the kind of flexible, family-friendly workplace culture that makes it possible for new parents, whether women or men, successfully to combine work and caring.

Once the triangle is working as it should and the costs and responsibilities, as well as the benefits, are fairly spread, we believe pregnancy discrimination will cease to be a problem – for everyone.

## CHAPTER 2 - THE SCALE OF THE PROBLEM

### Key facts

- Each year 45% of working women, around 200,000, experience pregnancy discrimination.
- 30,000 of these lose their job due to pregnancy discrimination.
- Women with less than one year's service are the most likely to experience discrimination.
- Pregnancy discrimination happens in all sizes of workplace, economic sectors and occupations but appears to be more marked at both ends of the occupational spectrum.

### What we knew about the scale of the problem at the start of the investigation

The EOC was receiving a high number of enquiries every year from women suffering disadvantage at work while pregnant, on maternity leave, or returning from leave – more, in fact, than for any other type of complaint. Other organisations were also receiving thousands of queries each year. For example, Citizens Advice Bureaux reported receiving tens of thousands of enquiries from women seeking advice on their maternity or parental rights at work. Of these, by far the most common problem was pregnancy-related dismissal or detrimental treatment.<sup>4</sup>

On average, between 1,300 and 1,500 pregnancy-related claims, including unfair dismissal and sex discrimination claims, are registered annually at the employment tribunals in England and Wales, and in Scotland. About 95% of these are in England and Wales and 5% in Scotland.

### Our further research into the experience of pregnant women

We commissioned the following research into the experiences of individual women:

- an in-depth survey of 1,000 women in Great Britain who had worked during their pregnancy and had a child aged between 9 and 24 months;
- 12 focus groups with women from England and Scotland and Wales who had recently had a baby and had worked during their pregnancy;
- in-depth interviews with 35 women (in England and Scotland) who had faced some form of pregnancy-related discrimination in the workplace;
- a survey of 57 individuals who contacted the EOC helpline Wales in 2003;
- a study of 55 women who contacted Maternity Alliance for advice in early 2004.

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<sup>4</sup> Dunstan, R. (2000) *Birthrights: a CAB evidence report on maternity and parental rights at work*. London: National Association of Citizens Advice Bureaux.

In addition over 700 women have contacted us in response to the investigation, giving details of disadvantage they have faced at work as a result of pregnancy or maternity, including black and minority ethnic women, sole parents and disabled women, who responded to a questionnaire seeking information about their experiences.

## 1. WHAT THE RESEARCH REVEALED

This research has shown that the level of pregnancy discrimination is much higher than we had anticipated, affecting almost half of the 440,000 British women who work whilst pregnant each year. This discrimination occurs at all levels of employment, in all sectors of the economy, and all sizes of workplace.

Some allowance needs to be made for the fact that the data is based on women's own perceptions of the way they were treated and the reasons for their treatment, as only a court or tribunal can adjudicate complaints and confirm whether unlawful discrimination has occurred. Nevertheless the figures indicate that there is a huge problem.

45% of the 1,000 women we surveyed said they experienced dismissal or disadvantage at work because of their pregnancy. This equates to more than 200,000 women per year across Great Britain (Adams et al, 2005). Our surveys asked women about their actual experiences during pregnancy and maternity, such as whether they had been denied training as a result of their pregnancy, but did not refer to 'discrimination'. Any disadvantageous treatment due to pregnancy or maternity, if proven, would be unlawful under the Sex Discrimination Act 1975 and/or the Employment Rights Act 1996.

### 1.1 Dismissal or loss of job due to pregnancy and maternity

7% of the women we surveyed, the equivalent of 30,000 women each year, said they lost their jobs as a result of their pregnancy or maternity. Some were actually dismissed or made redundant (about 2%) but it was far more common for women to be treated so badly they felt they had no option but to leave (Adams et al, 2005). Women who lost their jobs prior to going on maternity leave lost £1,500 in maternity pay on average, not to mention their lost earnings.<sup>5</sup>

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<sup>5</sup> Hogarth and Elias *Pregnancy discrimination at work: the costs of pregnancy related discrimination*. EOC, 2005.

About half of these dismissals/constructive dismissals occurred prior to maternity leave and about half at the time of return to work (Adams et al, 2005).

Our research has highlighted the type of circumstances that may result in women giving up their employment:

- Where women face serious criticism of their performance, which they believe is really an attempt to get rid of them (Maternity Alliance, 2004).
- Where the work situation has become intolerably stressful. Some employers admit they know of situations where, rather than dismiss a pregnant employee, an employer might make her life so difficult she has to leave (Leighton and Evans, 2004).
- Where women are given an increased workload.
- Where they are given a financial inducement to leave - nearly one in 10 HR professionals said that their company had offered a pregnant employee a 'package' to terminate their employment in the last three years (Personnel Today, 2004).
- Where health and safety risks have not been properly addressed, and women feel they cannot remain in the work environment because of the risk to their health and that of their baby (Lux, 2004).

The impact of pregnancy dismissal is made particularly acute for an individual by the difficulty she often feels when it comes to finding another job.

*What employer is going to hire a pregnant woman? I know the law is supposed to protect us but that's not the reality. (Lux, 2004)*

## **1.2 Financial loss**

In addition to those who are dismissed, an additional 14% of women, the equivalent of 60,000 pregnant women per year, suffered some form of financial loss due to their pregnancy or maternity leave. For example, they were denied a promotion which they believed would otherwise have been theirs, they had their salary or benefits reduced, or they were given a lesser pay rise or none. Some women reported that salary increases were withheld while they were on maternity leave (Adams et al, 2005):

*I kept finding letters about me on the desk and I missed out on two years on a pay rise. Everybody had a pay rise apart from me, because I'm was on maternity pay. Woman quoted in Davis et al, 2005.*

Others had their hours reduced ( sometimes leading to ineligibility for SMP):

*A Beauty Therapist had her working days cut from full time to two days per week the day after she told her employer she was pregnant. Her wages were then too low to qualify for Statutory Maternity Pay. (Maternity Alliance, 2004)*

The proportion of women who experienced financial loss was comparable across all sectors with the notable exception of those who worked in the public services (of whom a higher proportion, 17%, suffered financial loss).

Managers and those with the highest earnings (in excess of £30,000 per year) were particularly likely to experience discrimination leading to financial loss – in fact a third of women employed in a managerial capacity experienced this type of discrimination (Adams et al, 2005).

### **1.3 Other discrimination**

In addition to those dismissed and those who suffered financial loss, around one quarter of the women we surveyed, equivalent to more than 100,000 a year, suffered some other form of unfavourable treatment and often several forms. The most commonly mentioned problem was being signed off sick or encouraged onto maternity leave earlier than they wanted. Other examples of such treatment were:

- being threatened with dismissal or redundancy;
- being discouraged from attending antenatal sessions;
- being given unsuitable workloads or work;
- being unfairly criticised;
- being denied access to training;
- having shifts/hours changed against their wishes;
- experiencing employer unwillingness to grant maternity leave; or
- being given a different job on return to work.

The most frequent forms of unfavourable treatment appear to stem directly from an employer's unwillingness (or inability) to accommodate the pregnancy:

- 1 in 20 (5%) of women said they were put under pressure to hand in their notice at the point when they announced their pregnancy – i.e., before any problems had arisen.
- 1 in 10 were discouraged from attending antenatal classes in work time.
- 1 in 10 were given unsuitable work or workloads, either during pregnancy or after their return to work
- 7% said their manager was unhappy about letting them take maternity leave (Adams et al, 2005).

#### **1.4 Employer inflexibility on return to work**

In addition to the discrimination described above, our research also identified a significant level of inflexibility towards mothers on return to work. Around a quarter (23%) of mothers who returned to work experienced problems such as not being allowed time off to care for an ill child; having requests for more flexible working denied; or feeling unable to request more flexible working because they felt sure it would be refused. Women in households with an income of £50,000 or more, and women in managerial or professional roles, were slightly more likely to suffer from employer inflexibility after return to work (27%) (Adams et al, 2005).

Although such inflexibility has a substantial impact on the ability of women with young children to remain in employment, we have not counted these instances of inflexibility as discrimination. Although the unjustifiable refusal of flexible working can amount to sex discrimination, there are circumstances in which an employer may be legally justified in refusing more flexible working. Therefore, without knowing an employer's reasons for refusal, it is not possible to say whether discrimination has occurred in any particular case.

However there was a correlation between the women experiencing discrimination and the women experiencing employer inflexibility, which indicates that the workplace culture is a significant underlying factor: our research showed that woman who has been discriminated against is more likely to experience inflexibility from her employer on her return to work (Adams et al, 2005.)

The important issue of flexible and part-time working is the subject of a separate EOC investigation (EOC, 2005b).

#### **1.5 Positive and supportive treatment**

Although our investigation has uncovered evidence of widespread discrimination, it is important to set the findings in context. Three-fifths of mothers felt their employer was very supportive during pregnancy (61%) and only 12% felt their employer was unsupportive. Those with long hours, i.e., those working more than 40 hours a week, felt less supported by their employer (26% felt their employer was unsupportive).

The main reasons women gave for considering their employer supportive were because they were sympathetic, understanding and caring (54%). Mention was also made of being allowed time off for appointments and illness (30%). A significant minority (15%) valued the fact that they were treated 'normally' (Adams et al, 2005).

Many women were appreciative of the support from their employer:

*The HR department knows exactly what is supposed to happen, we have a health facility here that is always available for questions and blood pressure checks. If I return to work for a full year, as I expect to do, I get full pay for the standard 26 weeks of maternity leave. We also have a bump club where all the pregnant women get together for lunch once a week and there is an on-site nursery after we return to work. This is the best company I have ever heard of for these benefits. (Engineer in a software company)*

*My employers were very accommodating during my pregnancy. I found them to be very helpful and considerate during the hot summer months when I was heavily pregnant. They did everything possible to make my pregnancy at work as comfortable as possible. (USDAW member)*

The numbers of women considering their employers to have been supportive appears at first sight to be inconsistent with the high numbers of women describing disadvantageous treatment. However other evidence from the investigation indicates that there are several reasons why a woman experiencing discriminatory treatment may still consider her employer to have been supportive overall:

- some women are not fully aware of their entitlements, or that they have been discriminated against (discussed further in chapter 6).
- others, whilst realising that they have been treated unfairly, blame the problem on their individual manager rather than their employer generally. Our focus group research found: 'an overall sense from individual women that their experiences were a result of problems with individual managers or colleagues rather than an organisational or society wide problem' (Davis et al, 2005).
- some women feel themselves that there are 'grey areas' where it may be difficult for employers to treat women completely fairly when the business is the top priority. For example, women in focus groups described examples of pressure from the employer for an employee to go on maternity leave early if the employee had been ill. Although participants felt this was unfair, they could also sympathise with the employer's reasons for requesting this (Davis et al, 2005).

## **2. TYPES OF DISCRIMINATION OCCURRING DURING PREGNANCY AND MATERNITY**

The picture that has emerged from our research is complex. To better understand what is happening, and how it can be addressed, we have looked into the following in more detail:

- At what point during pregnancy/maternity does discrimination tend to take place?
- What problems occur **before** maternity leave?
- What problems occur **during** maternity leave?
- What are the issues **on return to work**?

### **At what point during pregnancy/maternity does discrimination tend to take place?**

Women are most likely to experience discrimination before they go on maternity leave and when they return to work.

In our survey:

- more than a third of women, 35%, experienced discrimination prior to taking maternity leave.
- almost a quarter of women, 23%, who returned to work after maternity leave experienced discrimination.
- 7% said they had problems during their maternity leave.

#### **2.1 On announcing the pregnancy**

The majority of women felt that their employers reacted positively, but 5% stated that they were immediately or soon put under pressure to hand in their notice.

*... it was just completely different from the minute I found out I was pregnant, the attitudes of people. I just felt like an outsider. I'd worked there all them years with all the people I knew and I just felt pushed out, to be honest. (Davis et al, 2005 )*

Some women who contacted the EOC have described very negative responses. Some typical examples are:

- "Are you planning to have an abortion?"
- "But I thought you were career minded."
- "Naturally I have mixed feelings, being mindful of the additional work for your hard-pressed colleagues."
- "Well, you're not a lot of use to me now are you?"
- "I didn't think you were so \*\*\*\*ing stupid."

#### **2.2 Dismissal during pregnancy**

3% of women were dismissed, made redundant or treated so badly they felt they have no option but to leave (Adams et al, 2005). This is equivalent to about 13,200

women losing their job during pregnancy and results in about 1,200 claims per year to the Employment Tribunal for pregnancy-related unfair dismissal and some 200 claims for sex discrimination in England Scotland and Wales (EOC estimate).

*RM, a trainee nursery nurse, was sacked just weeks after informing her employer she was pregnant. When she asked why she was being dismissed she was told it was because of her pregnancy. The Employment Tribunal held that, as the reason given for RM's dismissal was pregnancy, it was clearly unlawful.<sup>6</sup>*

Although women who were dismissed were more likely to take action than those who suffered financial loss of other discrimination, only about one in ten of the women who believed that pregnancy was the principal reason for their dismissal took a claim to the employment tribunal, (Adams et al, 2005). The reasons for this lack of action are discussed in chapter 6.

### 2.3 Other detrimental treatment during pregnancy

Other common problems experienced by women while pregnant were:

- Being encouraged/forced to start maternity leave early or being signed off sick against their will (11%) (Adams et al, 2005). Some felt the stress of their situations left them no choice but to start their leave early.

*I just put up with it [jibes and unpleasant comments]. I actually finished when I was only about six months pregnant just to get out. I had to. (Davis et al, 2005)*

- Being discouraged or prohibited from attending antenatal classes in work time. 10% of women were discouraged or prohibited from exercising their right to paid time off for antenatal classes (Davis et al, 2005).

A survey of USDAW members found that 13% of women had lost earnings through being asked to make up time spent attending ante-natal classes.

*My personnel manager tried to tell me that I had to make up time. When I wouldn't back down she said: "Well, shall I go and get myself pregnant, so I can get time off work?"<sup>7</sup>*

- Being given unsuitable workloads  
9% of women said that they were given unsuitable work or workloads whilst pregnant. Women who were pregnant for the first time with an employer were

<sup>6</sup> *Mountford v Pauline Hawkins t/a Jack and Jill Nursery* [2004] 1306875/2003, Birmingham ET.

<sup>7</sup> Delivering for pregnant women. USDAW survey, 2004.

twice as likely to experience this treatment as those who had already been pregnant when working for that employer (Adams et al, 2005). In some cases the work involved health and safety risks.

*A few days after KL, a bar person, announced her pregnancy, the assistant manager told her to move a stack of 40 chairs from one room to another. When she asked why he had picked her to do the job, knowing she was pregnant and there were other staff available, he replied that he did not need to supply a reason.<sup>8</sup>*

*We were working with a lot of hazardous substances and there is a lot of heavy lifting. I was also working with patients with infected diarrhea. But nobody ever assessed such things. (Davis et al, 2005)*

Health and safety is discussed in more detail in chapter 5.

- Reduction in status

*As soon as I told them I was pregnant for a second time, my duties were taken away, gradually eroded. I joined as a Store Manager. By the time I was pregnant with my first child, I was Regional Manager. By the time I went back after having my second child, I found myself as the Store Manager of the smallest store again. (Davis et al, 2005)*

*They made it impossible for me to stay. They side-lined me, demoted me without telling me and gave my job to some one else. (Davis et al, 2005)*

- Denial of promotion opportunities

*They interviewed me and they selected me as head nurse and then once I told them I was pregnant, they took it away from me. They said: "well you can't possibly physically be able to do it, we need somebody, a stable member of staff who's not going to be off sick or anything. So we're offering it to someone else". (Davis et al, 2005)*

- Changes to pay and conditions or withholding of salary increases;

*I normally do 10am-6pm. The moment he realised I am pregnant he increased my hours to 10am-7pm without increasing my salary. He said if I can't do these hours that I should leave the job. He also told me I am not entitled to my annual leave and that my salary will be reduced from 1<sup>st</sup> May. (Practice Manager: Maternity Alliance, 2004)*

- Verbal and physical abuse and harassment:

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<sup>8</sup> *K Lightfoot v The Perfect Pub Company* [2003] 1101292/2003, Ashford ET.

*[My sales manager] came up from behind and held my stomach and you know, I was in a meeting and he didn't agree with what I said so his response was 'oh, ignore her, she's soiled goods now'....I had ignored it as best I could, not maybe internally, but visually, and then he touched me. I know it wasn't in a sexual nature, but it really upset me... I broke down and couldn't handle it. (Davis et al, 2005)*

Women also described many other forms of unpleasantness, such as being shown less respect by managers and colleagues once the pregnancy was made public, being sidelined and left out of decisions, and having changes made to their duties without being consulted. Often the women felt this treatment was designed to drive them out of their jobs.

*He made my life intolerable... saying I wasn't doing my job properly any more ... In the end, it got so bad, he just kept complaining about my work, and he'd never said anything about it before, and saying I wasn't pulling my weight in the office, and he found it difficult to work with me now because he never knew when I was going to shoot off to the toilet and throw up. (Davis et al, 2005)*

#### **2.4 Problems during maternity leave**

Women were just as likely to lose their jobs during maternity leave, though they were understandably not as likely to experience other forms of discrimination Overall, 7% of women reported problems during maternity leave (Adams et al, 2005) including:

- dismissal, redundancy or such bad treatment they felt they had no option but to leave (3%);

*I felt that he was almost bullying me, and I refused to discuss it. In the end I just said, "Look, I'm on maternity leave. I'm really not prepared to come in just yet, I don't feel I'm ready, and I'm perfectly within my rights not to." I just didn't want to go back there. So my solicitor told me to resign. (Davis et al, 2005)*

There are many instances of women who are made redundant during maternity leave being put at a disadvantage compared to other staff, because they have not been consulted in the same way or given the same opportunity to apply for alternative posts due to their absence on maternity leave.

- reduction in salary or denial of pay increases or bonuses

- failure to gain promotion;  
*They had employed a marketing manager above me a week after I had left on maternity leave. They didn't give me an opportunity to apply for the position, they didn't tell me about it, they didn't let me know at all (Davis et al, 2005)*

Women also described communication problems with their employers during maternity leave. Some felt that they received too much contact, making them feel unduly pressured, whilst others received little or no contact, so they felt isolated and ignored. Certain circumstances, such as the employer failing to notify them of promotion opportunities, might also amount to discrimination.<sup>9</sup>

*My boss asked me to do work during my maternity leave. They'd only been in contact to do work. They'd not contacted me for any other reason at all. No flowers when the baby was born, absolutely nothing. (Davis et al, 2005)*

*When I was on maternity leave she would start phoning the house to see whether I was coming back to work...Constant hassle. My GP had to phone personnel at work to tell her to leave me alone, because at that stage I really wasn't fit. (Davis et al, 2005)*

*They didn't get in touch with me or send me a card...They just didn't show an interest in what I was doing (Davis et al, 2005)*

## 2.5 Problems on return to work after maternity leave

Our research found that maternity-related discrimination continued to occur at the point of return and after the return from maternity leave. Almost one quarter of women experienced a problem returning to work.

- 3% were dismissed, made redundant or treated so poorly they felt they had to leave (Adams et al, 2005).

*I was given notice of redundancy ... they used it as an excuse, because the guy there right now is doing my job. Exactly word for word my job, in fact he's driving my car. (Davis et al, 2005)*

- 10% suffered some form of financial loss due to their maternity leave (the majority of which related to a reduction in salary or bonus, including returning to a lower level job) (Adams et al, 2005).

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<sup>9</sup> *Paul v Visa International Service Association* [2001] case no. 6000815/01, 2200174/01, 6001879/01, London Central ET.

*They expected me to come back as marketing executive but report to the marketing manager, who would have been doing my job. (Davis et al, 2005).*

- A further 10% suffered some other form of unfavourable treatment, of which half were given unsuitable work or workloads (Adams et al, 2005).

Other research has shown that overall one in five women who return to work for the same employer after maternity leave returns to a lower level or grade of job, <sup>10</sup> some of whom accept a lower grade job as a trade off for receiving flexible working arrangements.<sup>11</sup> Our research indicates that discrimination on return to work is also a factor in the incidence of reduction in status.

### 3. WHO IS MOST AT RISK OF DISCRIMINATION?

Our research found that pregnancy discrimination is a problem across the whole economy. The similarity in incidence between different sectors, occupations and sizes of employer was more striking than any differences. Despite this, there were some variations in the incidence of discrimination.

#### 3.1 Different parts of the labour market and Great Britain

- Women at either end of the income spectrum were most likely to experience discrimination. For example, a third of (high income) managers and one quarter of (low income) sales and customer services staff experienced financial loss or loss of their job, compared with one fifth of women overall.
- Women working in retail (the second biggest employer of women in Britain) and hospitality/consumer services sectors were most likely to lose their job. More than 12% said they had lost their job due to pregnancy.
- Women working in workplaces with fewer than 10 people were more likely to say they lost their jobs as a result of their pregnancy than those in larger workplaces– 11% compared with 7%. (Adams et al, 2005). This ties in with the general finding of this investigation, that the responsibility of managing pregnancy is particularly acute for micro employers.
- However, there is more evidence overall of unfavourable treatment of pregnant workers in Scotland and England (54 and 50% respectively) than in

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<sup>10</sup> Maternity Rights Survey, Hudson et al, 2004.

<sup>11</sup> Happy anniversary? The right to request flexible work one year on. Maternity Alliance, April 2004.

Wales (38%), where a much higher proportion of private sector employees work in micro enterprises (29% in Wales, compared to 21% in Scotland and 19% in England).

### **3.2 Women with less than a year's service with an employer**

Women who become pregnant in the first year of employment (some of whom are pregnant when they start the employment) are particularly vulnerable to dismissal. One in six (16%) of pregnant women with less than one year's service were dismissed, made redundant, or treated so badly they felt they had no option but to resign, compared with 6% of those with longer service.

These women are also more likely to experience financial loss or other disadvantage: 54% compared to 39% of those with five or more years of service (Adams et al, 2005).

This corresponds with the composition of applicants taking ET claims on the grounds of pregnancy discrimination - nearly half (46%) of the applicants had worked for the employer for less than one year (Gregory, 2004).

The reasons for the particular vulnerability of women with less than one year's service appear to be that:

- Some employers are less tolerant of women who become pregnant in the first year of employment. 8% of employers admitted that pregnancy within the first year of employment was 'frowned upon' within their organisation (Young and Morrell, 2005).
- Some employers remain unaware that dismissal on the grounds of pregnancy is unlawful from the *first day* of employment. They assume that, as with unfair dismissal on other grounds, employment protection only applies after one year's service (EOC, 2005a).

*"It is still not unusual to come across small employers who fail to appreciate that they cannot dismiss a pregnant employee with less than 12 months' service with impunity. (EOC, 2005a)*

- Some employers admitted that they experience resentment on finding out that a recently recruited woman has 'concealed' her pregnancy. Whilst women are not legally obliged to declare a pregnancy during recruitment, a majority of employers (85%) agreed or strongly agreed it would be reasonable for her to inform them (Young and Morrell, 2005). Employer associations we consulted suggested that knowledge of a pending pregnancy was particularly relevant

for short term or temporary contracts, where the need for the worker was immediate and there were cost implications of having to find a replacement soon after appointment.

*It's frustrating for an employer when a women is recruited to do a job and is needed now. If a pregnancy is not disclosed up front it can cause resentment. A woman who conceals pregnancy has absolute protection; this should be explained. It feels unfair to employers. (Employer representative: Young and Morrell, 2005)*

- Some employers are more willing to accommodate the needs of longer serving members of staff.

*A shop manager had dismissed a woman who had commenced employment two weeks before, when she announced her pregnancy. The respondent had had her own family and was not unsympathetic to working mothers, but her view was:*

*'She'd only worked for us for a week and a half, I'm sorry there's no logic in this anywhere at all; if she'd been with us for a couple of years, absolutely, that's a different thing altogether, you do what you can. And if somebody has been with you for two years, they probably know more about the company, more about different jobs in the company and you might be able to move her sideways.'* (Young and Morrell, 2005)

Those who were pregnant for the first time when working for their employer were also more likely to experience discrimination than those who had had a previous pregnancy with that employer (Adams et al, 2005).

### **3.3 Younger women**

Younger mothers are also vulnerable. Our research found that they were twice as likely to lose their job due to pregnancy as older mothers. 12% of women aged 24 or under were dismissed, made redundant or treated so badly they felt they had to leave, compared to 6% of those aged 25 or over (Adams et al, 2005).

### **3.4 Ethnic minority women**

There would also appear to be evidence that pregnant women and new mothers from ethnic minorities are more likely to experience discrimination. The results of our survey can be treated as indicative only as they included a small representative sample of ethnic minority mothers. However this showed that 56% experienced discrimination, compared to 44% of white mothers (Adams et al, 2005).

Some felt the discrimination was based on their race as well as sex:

*I think being Asian it affects us more, because if you are working where English people are working, they will definitely think: 'Why is she just sitting on her backside when we're doing all the work and she's getting paid for that job?' (Davis et al, 2005)*

*Asian women told us that employers or colleagues made assumptions based on their ethnic origin, that they would have 'lots of babies' or that they would choose to stay at home with their child rather than return to work. Managers or colleagues sometimes implied that BME women 'should be grateful to have a job at all'. (EOC Wales, 2004)*

The view of an ethnic minority employers' body was that, in the Asian community, it is accepted that the issue of planning for a family is one that can be discussed by an employer and employee, and that this openness is seen as advantageous for both parties:

*There is a perception that newly wed women will have pressure from their peers to start a family now or in the future. So it's usual to talk about this issue (with employees)...Organisations are able to manage the employer/employee relationship around that openness. (Young and Morrell, 2005)*

### **3.5 Disabled women**

Disabled women face the same range of discrimination as non-disabled women but can also face additional unfavourable treatment stemming from stereotypical reactions from managers and colleagues. For example,

*"The sort of questions people ask is a) 'how did you get pregnant?' And b) 'do you think you should have?'. People ask questions they don't have the right to ask" (EOC Wales, 2004)*

Disabled women described a range of reactions from colleagues, from isolation to an oppressive 'mother hen' approach that involved fussing and being overprotective (EOC Wales, 2004).

### **3.6 Lesbian mothers**

The main concern raised by lesbian mothers was that, in general, neither maternity rights and nor employers' policies recognised their partner as a parent. As a result, partners found it difficult to take time off work for antenatal appointments or to take parental leave following the birth. In addition, some lesbian mothers reported intrusive questioning about how they became pregnant, who the father was and why they wanted to be pregnant (EOC Wales, 2004).

### **3.7 'Atypical' workers: agency workers and women on temporary or fixed contracts**

Although we have not conducted any empirical research into the position of agency workers and women on temporary or fixed term contracts, the investigation has thrown up many examples indicating that their employment status may make them more vulnerable to discrimination.

Maternity Alliance conducted a study into 55 women's experiences of discrimination during pregnancy, maternity leave and on return to work and concluded that 'atypical workers suffered a high level of some of the most serious types of discrimination' including dismissal, non-renewal of fixed term contracts and difficulties getting their employer to pay SMP (Maternity Alliance 2004).

*Michelle Rimmer, a teacher on a fixed-term contract in Liverpool was made redundant without her knowledge whilst on maternity leave. When she phoned up for her P60, she was informed a P45 would be issued instead. She discovered that someone else had been employed to carry out her duties past the end of her fixed-term contract. Her employers had assumed that she would not be returning.<sup>12</sup>*

Women on fixed-term contracts also reported a refusal of training after they announced their pregnancy. Agency workers in our focus groups assumed that they had less rights during pregnancy:

*I think it's all to do with if you work for an agency, usually the benefit you get with an agency is not much because you are only temporary. Once you're in a permanent job they have to do certain things (like risk assessments) forever, so it has to do with the job you're in. (Davis et al, 2005).*

The denial of employment rights to pregnant atypical workers is an area that merits further investigation.

### **3.8 Women who take pregnancy-related sickness absence**

Women who take pregnancy-related sickness absence are at risk from dismissal and redundancy, although it is unlawful to dismiss or disadvantage a woman for this reason.

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<sup>12</sup> *Rimmer v Speke Garston Excellent Education Forum* [2004] case number 2101530/2004, Liverpool ET.

*I was sick a lot [but]...I pulled my weight, and I don't think they liked it, really, because towards the end they said we're going to have to let you go, I didn't even have to work my notice, they just said you don't need to come in any more ... I think they didn't want to give me maternity pay. (Davis et al, 2005)*

*DS worked as a factory operator. For three years her attendance record had been excellent but then she was absent on several occasions with pregnancy related sickness. When the company found themselves in a redundancy situation, they selected her for redundancy and did not consider her for any other available jobs in the factory. The employment tribunal held that she had been selected for redundancy because of her pregnancy-related sickness leave.<sup>13</sup>*

Other forms of discrimination experienced by women who have taken sick leave for pregnancy-related reasons include:

- non payment of sick pay in situations where an employee off for a non-pregnancy related reason would have been paid;
- disciplinary proceedings for sickness absence; and
- pressure on individuals to return to work or make up the time they have taken off.

In cases where employers react badly to pregnancy-related absence, women may feel scared to take further time off. (Davis et al, 2005)

*I felt awful with morning sickness but didn't feel I could take any time off because of what had been said about absences... (Lux, 2004)*

## SUMMARY

Pregnancy discrimination is continuing in all sizes of workplace, economic sectors and occupations, though women with less job security (such as young mothers and women with shorter employment service), are at greater risk of discrimination.

We know from those women who have contacted the EOC and from the many employment tribunal decisions that, behind the statistics referred to in this chapter, there frequently lies a distressing, even harrowing story. As part of this investigation we have attempted to evaluate the impact of pregnancy discrimination on women, and our findings are explored in the next chapter.

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<sup>13</sup> *D A Shotton v Via Systems Tyneside Limited*, [2003], case number 2503197/2001, Newcastle ET.

## CHAPTER 3 - THE IMPACT OF DISCRIMINATION ON WOMEN AND THEIR FAMILIES

The effects of pregnancy discrimination are wide-ranging and at their worst can be devastating for the women involved and their families. Pregnancy discrimination can have a detrimental impact on a woman's:

- physical and mental health and the health of her baby,
- her financial security and that of her family
- her relationships
- her attitude to work and her career.

### 1. Multiple impact

Very few women spoke of a straightforward single impact; the effects were usually more complex with, for example, the worry or upset of the incident leading to stress and/or concerns over finances, home life or health (Davis et al, 2005).

*I was the main earner in our family and my salary was imperative to our day to day living. I am trying to get a job but my experience is within such a small industry that it is proving very difficult. The fact that I am pregnant is also going against me. My relationship with my partner is so strained and I have suffered frequent panic attacks. (Maternity Alliance, 2004)*

### 2. The impact on women's health`

We know from hundreds of employment tribunal decisions that the stress of pregnancy discrimination can result in a loss of self esteem, sleepless nights, depression and other mental health problems. Women also told us about the physical symptoms of stress such as increased blood pressure, tiredness and migraines.

*It was all very stressful and very tiring ... I don't have the words to describe how horrible it was really. I am still shell shocked at what happened I think. The fact that they were able to get away with it. (Davis et al, 2005)*

*I ended up with high blood pressure and I never recovered from my kidney infection and ... the growth of the baby was weeks and weeks behind what it should have been. (Davis et al, 2005).*

Research shows that high levels of stress during pregnancy can also increase the chances of miscarriage and premature birth and can affect the long-term health of the child:

- A study of more than 800 women who had suffered miscarriage found stress had a 'major impact on pregnancy maintenance' (Coghlan, 2004).
- Premature birth is one of the main causes of long-term health problems in children and can increase babies' chances of cerebral palsy, blindness and chronic lung disease (Levete, 2004).
- Anxiety in late pregnancy is associated with higher rates of behavioural and emotional problems in young children (O'Connor et al, 2003).

Women at employment tribunal have said that the stress of their experiences led to miscarriages,<sup>14</sup> and premature births, including cases where the baby did not survive as well as causing their own post-natal depression.

### 3. The financial impact

The financial impact of pregnancy discrimination on women and their families is considerable. The 30,000 women who are dismissed, made redundant or treated so badly they feel they have to leave ('dismissed') may incur:

- loss of earnings during the period they are searching for another job.
- loss of their Statutory Maternity Pay.
- loss of occupational maternity pay and loss of occupational pension, company car or other benefits
- loss of salary when they do return to work.

#### 3.1 Loss of earnings during the period they are searching for another job

Women who were dismissed as a result of their pregnancy lost an average of £221 net income per week while they were out of the labour market (after having taken into account state benefits they received).

The effect of a sudden loss of income can be particularly severe for women who are without partners or are the main wage earners. One lone parent-to-be, a chef, found herself sacked from a well paid job when she was five months pregnant:

*I went to the council offices...and said Oh my god, I'm pregnant and I've just been fired. Reality hit. My rent was £250 a week, which I could very easily afford last week. I was so completely distraught... saying I should have an abortion, I can't afford this child. (Davis et al, 2005).*

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<sup>14</sup> E.g. *MacDonald v Rooke and Rooke – t/a Crimpterm*, [2003], case no. 2301837/03, London South ET; *Davies-Taheri v Proddow Mackay* [2003] case no. 2801787/02, Sheffield ET.

The loss of earnings is exacerbated by the fact that women who are dismissed during pregnancy feel strongly that it would be hard to get a job as a pregnant woman, so they are unlikely to look for another job while still pregnant. (EOC Wales 2004.) In addition they are less likely to return to work within the usual period after childbirth than other women: 62% as opposed to 75%. (The reasons for this are explored in 'The impact on women's attitudes to work and their career' on page 44.)

We have been unable to measure the total cost of lost earnings and pension contributions for these women, as there is insufficient data on how long it takes them to find employment, or to measure the effect on their careers of being involuntarily out of work for a period of time.

### **3.2 Loss of their Statutory Maternity Pay**

Women dismissed before they were 26 weeks pregnant missed out on an average of £1500 in statutory maternity pay. Overall, women who lose their jobs before qualifying for SMP<sup>15</sup> miss out on an estimated £12m annually in SMP (Elias and Hogarth, 2005). The EOC has recognised that this is a problem for women and has proposed that, if a pregnant woman is dismissed before the qualifying week, her employer should still be liable to pay SMP.<sup>16</sup>

### **3.3 Loss of occupational maternity pay and loss of occupational pension, company car or other benefits**

9% of employers provide a higher level of maternity pay on top of SMP. This is known as occupational maternity pay and is received by 39% of women. If they are dismissed from their job during pregnancy, the entitlement to this pay is generally lost.

Some women also receive other employment-related benefits, such as a pension or company car and, if dismissed, the amount of losses can be substantial.

### **3.4 Loss of salary when women do return to work.**

Dismissal and financial loss due to pregnancy has a knock-on impact on earnings once the women have returned to work. Women who did not experience dismissal or financial loss received a rise of 7% in their average hourly earnings after their pregnancy, whilst those who did experience it saw rises of only 2% on average (Elias

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<sup>15</sup> The 15<sup>th</sup> week before the expected week of confinement.

<sup>16</sup> See EOC response to DTI consultation: Work and Families, Choice and Flexibility, May 2005.

and Hogarth, 2005). The total annual cost in loss of earnings for these women is estimated at £66m.<sup>17</sup>

Those on **low incomes** – e.g. women working in routine occupations, such as sales and customer services - suffer the greatest financial impact. They are more likely than skilled or senior workers to be dismissed due to pregnancy or maternity discrimination and less likely to return to work, and the knock-on effect of discrimination on their future income is proportionately higher. When they return to employment, those who have lost their job or suffered other financial loss receive an income around 14% less than they could have expected had there been no discrimination. This means that a woman who could have returned on a salary of £10,250 returns to employment at £9,000 per year (Elias and Hogarth, 2005).

By contrast it appears that high income earners do not experience lower wages on their return to work. Perhaps somewhat surprisingly, the hourly earnings of women in senior occupations on their return from maternity leave were 8% higher for those who had suffered discrimination than for those that had not encountered it (Elias and Hogarth, 2005).

A reduced salary on return to work can have a long-term impact on earnings, particularly when combined with a loss of career status:

*In terms of my career, I'm 33 but I'm back where I started aged 20 in terms of my salary, holiday pay and likely promotion prospects. Civil Servant and new mother.*

Ironically the fear of losing their income also inhibits women from attempting to stop discrimination by pursuing their grievances at work or at the employment tribunal, and may force them to stay in, or return to, a hostile workplace:

*I was worried, thinking I'm going to have this other baby, if I don't stay in this job then I'm not going to have any money. It's almost like being backed into a corner, I thought my boss was thinking, 'I know you need this money, I know you're not going to do anything else, so you'll do as I say'. (Davis et al, 2005)*

However women on a low income are overrepresented in employment tribunal cases that proceed to a hearing.<sup>18</sup>

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<sup>17</sup> Elias and Hogarth, 2005. The calculation is made on the basis of hourly earnings rather than annual earnings because there is a general decrease in women's annual earnings post-pregnancy due to the prevalence of returning to part-time work.

#### **4. The impact on women's relationships**

While some women managed to keep their problems at work, others found that they encroached on their home life and that their relationships with their partners were adversely affected.

*It was hard for my husband because I was always talking about it, constantly talking about it, constantly on websites looking for my rights, constantly speaking to the Equal Opportunities Commission, and then marking things and showing him when he got home, and it also made my husband very angry.... but of course he was worried about the financial side of things.*

*... I used to come home and cry ...my husband got fed up of me coming home and got fed up of me telling him about my day. (Davis et al, 2005)*

And sometimes women said that the physical exhaustion of sustaining unsuitable workloads meant they spent most of their time at home sleeping.

#### **5. The impact on women's attitudes to work and their career**

Pregnancy discrimination affects women's immediate work situations, but also their attitudes to work in general and the terms under which they return to paid employment.

Our research found that women who felt poorly treated by their employers were less likely than others to return to their old jobs after maternity. Over three quarters of those who described their employer as "very" or "quite" supportive had returned to work, compared to 63% of those who said their employer was "not supportive".

One in eight mothers (12%) who were working at the time they were interviewed agreed that the way in which they had been treated during pregnancy, while on maternity leave and after returning, had made them consider stopping work altogether. This proportion rises to a fifth of those working for retail establishments.

In fact, women who had experienced discrimination during pregnancy were six times more likely to consider giving up work all together than those who had not (Adams et al, 2005).

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<sup>18</sup> Half of the applicants whose cases were heard by the ET earned less than £8,000 p.a. and half of the remainder earned less than £16,000 p.a. (Gregory: *Pregnancy Discrimination at Work: a Review of Employment Tribunal Decisions from May 2002 to December 2003*. EOC, 2004.)

*Deep down, you know all employers are different, but at the time I just couldn't face going back to anybody like that. So to find another job was totally out of the question. (Davis et al, 2005).*

Women described a loss of confidence as a result of their treatment:

*In effect I have two barriers to get across, first getting back into the job market after taking a break to look after my baby, and second the dent this whole experience has had on my confidence. How will I explain during an interview with a potential employer what has happened to me? (Davis et al, 2005).*

*I'm very nervous, actually [about returning to work]. I'm really nervous because I haven't worked for so long; I'm so nervous and almost claustrophobic. What am I going to be like? (Davis et al, 2005).*

Some resolved only to go for jobs for which they were overqualified, either because they had lost faith in their own abilities or because it would be less stressful and require less commitment.

*I said to my husband I swear I'll never go back to a blue chip. I'd happily work in Pizza Hut rather than go back there, I really would. (Davis et al, 2005)*

A number of women told us that their experiences had led them to reassess their whole attitude to paid work.

*To be quite honest, it made me think, when it comes to employers, sometimes it's not always fair to give your pound of flesh, because it doesn't pay off... I just think I wouldn't put myself out the way I did before. No way. I wouldn't do it. (Davis et al, 2005)*

## **SUMMARY**

Our investigation has found that the impact of pregnancy discrimination can be very severe for many of the women who experience it, in terms of their financial situation, their career, health and relationships. It can affect their whole family, undermining its financial and emotional security at a time when stability is important. It also affects women's access to work and the labour markets because of its long term impact on women's attitudes to work.

The investigation therefore sought to understand how situations giving rise to pregnancy discrimination occur and to identify the root causes of this type of treatment. We also wanted to understand from employers and employer representatives the challenges they faced in accommodating pregnant women and the reasons for non-compliance with the law on pregnancy and maternity. Our findings are given in the next chapter.

## CHAPTER 4 - THE PROBLEMS OF MANAGING PREGNANCY

### Key points

- A lack of knowledge and understanding of maternity rights is to blame for most non-compliance.
- Inadequate planning and dialogue is exacerbating the disruption and uncertainty that make it so hard for employers to manage pregnancy positively.
- A pregnancy presents disproportionate cost problems for micro employers and can cause cash flow problems
- Around 10% of managers express negative attitudes which could allow discriminatory behaviour to occur.

### The inclusion of employers in the investigation

The findings and conclusions outlined in this chapter have been drawn from the wide-scale research and consultation conducted with employers and employer associations, including:

#### Research:

- An in-depth survey of 750 employers across Great Britain,
- Research in Wales into small and medium enterprises
- Focus groups into small employers researched by Acas
- A survey of HR professionals.<sup>19</sup>

#### Consultation:

- Large and small employers represented on our external advisory board
- Written responses to our consultation documents
- Meetings and conferences with employers, employer associations and solicitors who represent employers in England, Scotland and Wales.

### 1. MANAGING PREGNANCY SUCCESSFULLY

The majority of employers have positive attitudes to pregnancy in the workplace. 57% of women said they were allowed more flexibility in terms of their hours after announcing their pregnancy and 55% said their employers were more sympathetic about the tasks they were asked to perform (Adams et al, 2005).

In addition to the minimum statutory maternity pay (SMP), 9% of employers pay occupational maternity pay (OMP). The more senior a woman, the more likely she is

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<sup>19</sup> In conjunction with Personnel Today.

to receive maternity pay above the statutory minimum. Almost two thirds of women working in public administration and defence receive OMP compared to 26% in 'other services' and 23% in distribution. Whether a woman receives OMP is also associated with working in a larger establishment, having long service, being represented by a trade union and the number of worklife balance policies provided by her employer (Bonjour and Lissenburgh, 2004).

Many employers achieve good practice in managing maternity, even though they do not offer extra levels of maternity pay. Both large and small employers have informed us how embedding best practice in managing pregnancy enabled them to minimise the difficulties of managing maternity and to maximise the levels of women returning to work from maternity leave (see Annex 2 for case studies). They achieved this by, for example:

- training line managers how manage pregnant employees fairly and effectively;
- promptly carrying out an individual risk assessment and reviewing it regularly;
- planning well in advance how to cover the maternity leave period ;
- keeping in touch with the woman while she is away;
- giving her the opportunity to work flexibly on return if she wishes;
- organising a thorough induction when she returns.

Nevertheless, 45% of the women we surveyed described treatment that, if proven, would be a breach of legislation (Adams et al, 2005). Clearly a significant proportion of employers are not only ignoring best practice – they are failing to comply fully with the law.

## **2 . WHY ARE SOME EMPLOYERS NOT COMPLYING WITH THE LAW?**

There are a number of possibilities, but a combination of our research and our in-depth consultations with employers, employer bodies, lawyers and experts suggests that only a minority, in the region of 10% knowingly break the law. For the majority, we believe that a lack of thorough knowledge and understanding of maternity rights is at the heart of the problem.

### **1 A lack of knowledge and understanding of maternity rights**

Our research has uncovered significant gaps in employers' awareness of pregnancy and maternity rights. The evidence shows that many businesses do not understand their obligations towards pregnant women as well as they think they do.

More than a quarter of employers (27%) in our in-depth survey could not name a statutory pregnancy or maternity entitlement without being prompted. Only around half of the respondents were able to cite maternity leave or maternity pay (Young and Morrell, 2005). Small employers were much less likely to know a statutory entitlement (30% could not name one, compared with 6% of medium and large workplaces).

Awareness of health and safety responsibilities appears to be particularly low, as discussed further in chapter 5.

Line managers are generally the first point of contact for the pregnant employee, but also often the least well informed. Only 56% of respondents in our employer survey thought their line managers were fully aware of their responsibilities towards pregnant women. Some employers, particularly in small workplaces, have unjustified confidence in the ability of their line managers to comply with the law (Young and Morrell, 2005).

Small employers often have problems keeping abreast of employment law, because they usually have no dedicated HR function. They have to comply with many regulations pertaining to their businesses and so tend to look for information about them on a 'need to know' basis – i.e., once they are forced into dealing with a pregnancy and not before.

*When [these employers] set up employment legislation wasn't a key consideration...they carry on until a problem confronts them, e.g. SMP, SSP, someone in the Reserves being called up.*

*(Employer organisation quoted in Young and Morrell, 2005).*

In particular micro-employers (those with fewer than 10 employees) say they do not have time to read up on employment rights and just want to get on with their business without interference or distraction (COI, 2003). Since pregnancy is a rare event for a micro-employer (on average once every ten years), they are more likely to see it as a peripheral issue not worthy of their time and resources.

Even larger employers' managers were not well informed. Around three quarters of human resources professionals we surveyed said line managers' lack of knowledge about maternity rights had an 'adverse impact' on their organisation's ability to manage pregnancy. HR managers often found it difficult to ensure good practice was applied consistently across the organisation.<sup>20</sup>

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<sup>20</sup> Personnel Today online questionnaire, 2004

### **1.1 Lack of awareness of Statutory Maternity Pay**

Lack of knowledge can also lead employers to incur unnecessary costs or to wrongly assume that they will have to pay for maternity pay. While Acas research among small employers found SMP was rarely raised spontaneously as a problem area, some did not know they could reclaim more than 100% of the cost of SMP, or that this was more than the amount large companies could reclaim. Others thought they had to meet the costs of the first six weeks of maternity pay themselves (Acas, 2004).

Research among Welsh SMEs also showed that many small businesses did not have a detailed awareness of how to reclaim the full amount of Statutory Maternity Pay (SMP) and so did not claim the rebates to which they are entitled (Leighton and Evans, 2004).

### **1.2 Effect of lack of awareness**

Lack of knowledge can foster widely held myths about managing pregnancy. For example, many employers and even some representative bodies mistakenly believed that employers were not able to contact women on maternity leave.

Lack of knowledge also leads to some basic misconceptions. It is not lawful to treat a woman less favourably on account of her taking pregnancy-related sickness absence. Yet some employers believe they will not be discriminating if they treat a sick pregnant woman in the same way they would treat anyone else who was off sick or unable to fulfil their contract.<sup>21</sup>

Our evidence suggests that many cases of unfavourable treatment may be related to misunderstanding caused by a lack of clarity in the legislation. This can lead to line managers being unsure about how to manage a situation and getting it wrong as a consequence.

Employers at EOC Equality Exchange conferences told us they find it difficult, for example, to calculate holiday entitlements, the level of maternity pay and the timing of maternity leave. They also identified some common areas of dispute and misunderstanding:

- pregnancy-related sickness cannot be regarded in the same way as other types of sickness in disciplinary proceedings but employers find it very difficult to identify whether sickness is pregnancy-related;
- employees are entitled to reasonable paid time off to attend antenatal employment but it is often difficult to agree exactly what is 'reasonable';

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<sup>21</sup> Information from Acas Helpline.

- many are unsure what job a woman can be offered if there has been a restructuring during maternity leave;
- what constitutes a risk to a woman and her unborn child's health and safety?;
- what is an appropriate level of communication during maternity leave?

Disputes on these areas can arise very quickly and be compounded by a manager's or employee's lack of knowledge of maternity rights. This can lead to a serious, and perhaps permanent, deterioration in the employment relationship.

## **2 Lack of dialogue and planning**

There are many practical difficulties in managing pregnancy, most of which are felt most keenly in small workplaces. But we found that a lack of dialogue and inadequate planning are exacerbating – in some cases causing - the uncertainty and disruption that make life so hard for many. Just a fifth of those we surveyed, for example, had developed pregnancy guidelines for managers.

Our research into employers found that the chief difficulties for employers are:

- uncertainty about the return, and
- managing the disruption caused by the maternity leave period – such as sharing increased workload among remaining staff and training and settling in replacements (Young & Morrell, 2005).

### **2.1 Uncertainty about the return**

Almost 30% of employers we surveyed said the uncertainty over whether the employee would return to work after maternity leave was very difficult for them. It was often seen as a more significant problem than the maternity leave itself for SMEs (Young and Morrell, 2005).

We consulted employers further on why this was such a problem and found that employers are often not aware they have a right to discuss the return to work with an employee, both before she goes on leave and while she is away. And not all realise that employees not only have to set an expected date of return, but also have to give their employer notice of any change to this date.<sup>22</sup>

*Our member companies reported some frustration at their inability to communicate with the employee while she is on maternity leave. (EEF response to EOC consultation)*

*Normally you hear from them when the statutory maternity pay runs out. Small employer in focus group. (Acas, 2004)*

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<sup>22</sup> Acas focus groups on pregnancy at work, 2004

Consultation with large employers in Scotland revealed that this was a common problem. Research among Welsh SMEs found that, while some knew they had a right to make formal arrangements about the date of return to work, they felt uncomfortable enforcing this right, either because it went against the friendly ethos of their company or because they felt it would be seen as an unreasonable imposition or even harassment.<sup>23</sup>

*I have now heard a number of employers state they could not contact the employee as it would be seen as harassment. (EOC, 2004)*

Those employers who were aware of the need to give notice of an intention to come back to work early, considered that the period of notice was too short to enable proper planning. It wasn't long enough, for example, to give notice to the maternity leave cover.

Some employers also felt the law was weighted in favour of women who were dishonest or deliberately unclear about their intentions. Several Welsh SMEs, for example, said they had been 'messed about' by pregnant employees but there was nothing they could do, whereas there were 'all sorts of sanctions if we step out of line' (Leighton and Evans, 2004).

*The annoying thing is that they say they are coming back but maybe they have no intention of coming back. You have to keep their job open, which is fair enough, but then you take on a series of temporary people and then they say they are not coming back. You think, "If you had told me that six months ago I could have had someone decent doing the job. It is very frustrating". (Acas, 2004)*

Some employers believe that, even if women do indicate honestly when they intend to return to work, they often change their minds later. Some therefore take the view that it is not worth the effort even to discuss returning to work with a pregnant employee.

*They don't know how they are going to feel until the baby comes. They can tell you yes, that they'll be back in however many months, and then everything changes. (Small employer in focus group, Acas, 2004)*

However research indicates that, to the contrary, the likelihood of a woman returning to work is influenced by discussion with her employer.

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<sup>23</sup> Leighton & Evans, 2004

## **2.2 Maximising the likelihood of return and retention**

The majority of women do return to work after maternity leave. In our survey 70% of all pregnant women in employment returned to work for the same employer after maternity leave. A further 11% returned to work but to a different employer. Overall, however, three fifths of women worked shorter hours on their return to work than they did pre-pregnancy.

Some employers achieve return rates of over 90%, though this may not be possible for all employers as some women are less likely to return to work than others, for example:

- those in smaller workplaces;
- those in the lowest occupational group (69% compared to 83% of managers and professionals); and
- those with the lowest level of qualifications.

Although some women will inevitably change their mind about whether or not to return to work after they have had the baby, interestingly, research shows that, in the vast majority of cases, there is very little difference between women's intentions prior to going on maternity leave and their actual behaviour when maternity leave finishes. 8 out of 10 of all women who intend to return full time do so, and 9 out of 10 of all women who intend to return part-time do so. This suggests that it is a lack of communication between employee and employer about the women's intentions that is to blame for much of the uncertainty.

**Table. Women's intentions before going on maternity leave and actual behaviour 12 months after giving birth.**

	<b>Intention</b>	<b>Actual Behaviour</b>
Do no paid work	20%	28%
Work part-time	54%	51%
Work full-time	26%	21%
Total	100%	100%

(Houston & Marks, 2003).

This research also shows that with planning and support before maternity leave, a woman is much more likely to return to work, saving the employer from the costs and disruption of finding and training a permanent replacement (Houston & Marks, 2003).

In addition, almost half of all parents say that a supportive employer is important in helping women return to work (Daycare Trust, 2000).

Employers have also informed us that it can be even more disruptive if the woman returns from maternity leave for only a short period and then leaves her employment. In our research about 16% of returning mothers left their employer after having returned – 6% to stop working altogether and 10% to move to another employer. However women are much more likely to leave their employment after return if they have experienced either discrimination or a lack of flexibility. Our research showed that 13% of women who left their job after returning to work gave as the reason for leaving that they had been treated so badly they had to leave. A lack of flexibility towards women returning to work with a small baby had an even greater impact on whether they continued in their employment. Women whose employers were inflexible regarding their hours of work or time off to cope with the child's illness were much more likely to leave after having returned to work than those who did not (18% left their employment compared with 8% of those who did not experience these problems).

Employers can also increase their chances of retaining new mothers by offering some flexibility in working hours. 22% of women who left after returning to work gave unsuitable hours as the reason for leaving (Adams et al, 2005).

*In 2000 our organisation had few women returning to work after their maternity leave. The loss to the organisation was not just the costs of replacing these individuals but also the less visible costs of severed client contacts and loss of skilled organisational knowledge. We therefore set about implementing maternity and family-friendly practices and introducing an open, positive culture so that employees would feel comfortable discussing their pregnancy with us from an early stage. The picture is very different in 2004: 90% of pregnant employees have returned to us after their maternity leave. For the 10% (actually one person) that did not return, this was a positive choice. (Diabetes UK, 170 employees)*

### **2.3 Disruption caused by managing maternity leave**

Managing maternity is regarded unequivocally as a 'problem' by small employers, and can engender 'near panic' when an employee announces she is pregnant.<sup>24</sup> The 'time and trouble' costs involved in losing an often vital employee for up to a year was considered the most significant aspect for small businesses (Acas, 2004). This included time spent training and settling in a temporary replacement ('very difficult' according to 18% of employers (Young and Morrell, 2005)), as well as the business and clients lost as a result of losing the pregnant employee's knowledge and contacts. It could also include the time spent retraining the individual if her role or the company itself had changed during her maternity leave.

In practice, only around 40% of smaller employers recruit temporary cover for someone on maternity leave (DTI, 2002). Small firms explained that this was because they found it difficult to attract applicants to temporary positions; second, some felt it was not worth recruiting and training someone for such a short period; and third, agency staff usually paid at a higher hourly rate (Leighton & Evans, 2004).

Conversely, where no temporary replacement is appointed, the extra workload falling on other employees can lead to resentment, and the absence of a member of staff can lead to a potential loss of business and clients.

However, our investigation found the disruption and practical problems associated with pregnancy are being exacerbated by the failure of many employers to prepare effectively for pregnancy among the workforce and build it into their business planning. Unlike most other forms of employee absence, the eventuality of a member of staff becoming pregnant one day can be catered for in advance. Similarly a pending maternity leave can be discussed and planned for. As noted above, many employers lack the time, knowledge and resources to do that, while others may avoid it because of the fear that the problems are too complex.

### **2.4 The benefits of planning and good practice**

Our investigation heard evidence from many employers that setting up a two-way dialogue with pregnant employees from a very early stage in the pregnancy is vital.

*Maternity can be managed if you create an environment in which employees are encouraged to talk about maternity leave early on.  
(Diabetes UK)*

Without well established dialogue it is very hard for employers to establish with pregnant staff in advance the level of contact there will be during maternity leave.

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<sup>24</sup> Acas, 2004

Some SME owners described how it was possible successfully to establish communication between the employee and employer during the period of leave, enabling the employee to answer work-related questions that might arise in her absence, but also helping to keep her feeling involved in the company and therefore more likely to return.

*We tend to keep in touch with them via emails, phone calls and so on. We tend to do it so there is still the feeling that they are the employee and they have still got ownership of the company. (SME owner in Manchester : Acas, 2004)*

Many organisations that responded to our investigation, including very small ones, told us that the practical difficulties were not insurmountable, but that adopting good practice in managing pregnancy, and ensuring line managers followed it, was crucial to minimising the difficulties of managing maternity, including covering absences and the uncertainty over the return to work (see Annex 2).

The firms most successful in achieving this were those with a clear sense of their staff as human capital in which they need to invest. Leadership from the senior management or owner was critical for success. We found examples of how firms organised work to plan for prolonged maternity leave absence, through policies of, for example, multiskilling and self-managing teams. Others had built closer relationships with freelance staff so they could call on them to cover absences more effectively (Leighton and Evans, 2004).

*It is absolutely crucial that everyone in the office is kept completely up to date with training and the work from clients. (Welsh SME, quoted in Leighton and Evans, 2004)*

### **3. The financial costs of managing pregnancy**

Small employers in focus group were asked:

*So, if one of your staff comes to you and says, 'I'm pregnant', what is your first reaction?*

Their response was:

*"Nightmare!"  
"Expense."<sup>25</sup>*

In our survey of employers 35% of employers believed that pregnancy placed an 'undue cost burden' on their organisation. The following types of respondents were most likely to say this:

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<sup>25</sup> Acas, 2004.

- those in workplaces where women made up at least half the workforce (46% of employers in workplaces with a roughly even gender split thought this compared with 37% in majority female workplaces and 25% in majority male workplaces);
- those in medium and small workplaces (35%) compared to large workplaces (22%).

The financial costs of managing maternity cannot easily be defined or quantified. Employers face both quantifiable and less tangible costs in managing maternity, regardless of whether they choose to take on temporary maternity cover. Those who recruit a temporary replacement<sup>26</sup> may incur recruitment and training costs of £5,300 to £7,000<sup>27</sup> or employ agency staff at a higher hourly rate. Another cost which is not recoverable is that of suspending a pregnant employee on full pay on health and safety grounds - although this happens in less than 1% of cases (Adams et al, 2005 ; USDAW, 2004 ).

However, the unquantifiable 'time and trouble' costs of managing a pregnancy and losing an employee for up to a year are often considered a more significant problem for small businesses. These include less easily defined expenses such as the 'time cost' involved in training and over-seeing replacement staff or, for those employers who do not cover the maternity absence (in some cases because they are unable to find a replacement with the requisite knowledge and skills), the cost of business and clients lost on account of reduced capacity or a temporary employee's lack of knowledge and experience (Acas, 2004).

*It's the hidden costs ...the time it takes to get that [new] person trained up, and that's a money-time issue. It's other people having to step in and do things that they didn't otherwise have to do, and that can have a cost in many different ways. It goes on and on. (Small employer in focus group: Acas, 2004)*

The costs of complying with employment regulations in general is proportionately higher, by almost 35%, for businesses with fewer than 20 employees than for those with more than 50 (Baldwin, 2004).

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<sup>26</sup> The DTI estimated that 70% of larger employers and 40% of smaller employers recruited temporary cover to replace someone on maternity leave (DTI, 2002).

<sup>27</sup> Estimated average cost of recruitment and training: Recruitment Employers Confederation, 2004.

*Just because a company's smaller, it has no less legislation attached to it than the bigger ones. It still has to comply with everything that the bigger ones do but it has to do it on less money. We have not got an unlimited pot. You've only got one cake and you can only split it into so many pieces. (Female manager at a garage with 10 employees: Young and Morrell, 2005)*

Employers who adopt good practice by, for example, ensuring an overlap period between the pregnant employee going on leave and her replacement starting work, may incur an additional expense for the business:

*With this situation you know some time in advance that a key member of staff is going to be going on maternity leave, so in order to plug the gap you are actually looking to recruit and train up prior to their departure. So immediately you are carrying two salaries, and you're not getting any help from the government with that. (Small employer in focus group: Acas, 2004)*

Whilst every business faces these costs, they are proportionately much heavier for micro businesses. By reason of a woman going on maternity leave, the firm loses 10% or more of its workforce for a period of time that can be as long as 12 months, and will have either to bear this loss or bear the loss of a replacement.

We were informed by small employers we consulted in England, Scotland and Wales that a pregnancy in a micro-business (less than 10 employees)<sup>28</sup> can spell at best cashflow problems and at worst the threat of closure.

*The reality of operating in a competitive economy means that even minor changes in costs can be detrimental to a business. The challenge is balancing the desire to be fair with the reality of running a competitive business. (Small business owner in Wales: Leighton and Evans, 2004)*

The Government already recognises that it should reimburse small employers for pregnancy which is why it pays 104.5% of statutory maternity costs for small employers.

Faced with a choice between compliance and the perceived effect on their bottom line, some employers may decide not to comply with pregnancy and maternity legislation (Acas, 2004; Leighton and Evans, 2004). 13% of employers we asked said the cost burden of managing maternity may cause some to discriminate on grounds of pregnancy (Young & Morrell, 2005).

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<sup>28</sup> About 1 million of the 1.2 million enterprises with employees in the UK employ 1–9 employees, with about 30–35,000 pregnancies occurring annually in micro businesses (Small Business Service, 2004). In Scotland and Wales the proportion of SMEs is greater than in England.

*Smaller employers perceive (rightly in some cases) that the costs of compliance are too high. I have dealt with actual dismissals in these circumstances. (Solicitor, quoted in EOC, 2004)*

This ties in with the other findings of the investigation, for example, that women working for micro employers workplaces are more likely to lose their jobs as a result of their pregnancy than those in larger workplaces and have a lower return rate after maternity. In addition, small employers are overrepresented in pregnancy-related employment tribunal cases that go to a hearing.<sup>29</sup>

### **3.1 Costs of administration of SMP**

There are also difficulties in managing the costs associated with SMP, classed as very difficult by 16% of employers (Young & Morrell, 2005). Many small employers say that they have to look up the regulations from scratch. Both large and small employers felt that the calculation of, and the processes surrounding reclaiming SMP were bureaucratic, complex and time-consuming. The government is consulting on the option of taking responsibility for direct payment of SMP. Whilst many larger employers have computerised payroll systems, this option would be of substantial benefit to many SMEs.<sup>30</sup>

*Members feel they are currently unpaid benefits agents for government. A lot now falls on their shoulders, including SMP, students loans, company, CSA, etc. (Young and Morrell, 2005)*

## **4 Negative workplace attitudes towards pregnancy and maternity**

Almost 40% of employers believed that an adverse workplace culture was the most likely cause of a manager discriminating against a pregnant women - for example, if there are widely held negative attitudes towards combining work and family (Young & Morrell, 2005). Most employers did not consider the practical problems of dealing with pregnancy to be the most likely causes of discrimination by comparison with the workplace culture.<sup>31</sup>

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<sup>29</sup> Gregory: *Pregnancy Discrimination at Work: a Review of Employment Tribunal Decisions from May 2002 to December 2003*. EOC, 2004.

<sup>30</sup> See EOC response to DTI consultation: *Work and Families: Choice and Flexibility*.

<sup>31</sup> The reason why a manager might discriminate was attributed to: the burden of managing or arranging cover (15%), the cost burden (13%) and generally poor or bad management (10%).

The connection between negative attitudes and the adverse treatment of pregnant individuals is reinforced by the fact that women whose employers react unfavourably at the point when a woman announces her pregnancy are much more likely to suffer discrimination. Overall about 5% of women said their employer was unsupportive or had a negative reaction to the announcement of their pregnancy, but this rose sharply to 25% of those who were dismissed or felt forced to leave, and 15% of those who suffered financial loss.

Research has shown that despite progress in the provision of family friendly working environments, negative assumptions about employing mothers persist, including:

- women workers who become pregnant are a burden (Low Pay Unit, 2002:1)
- pregnancy leads to staff being late, unreliable, or unable to do overtime due to childcare commitments, and increased levels of absenteeism to accommodate childcare problems (James 2004).

Research indicates that many employers associate female employees with motherhood regardless of whether they intend to have a family:

*... women's family responsibilities are one of the primary concerns employers had about women workers. 42% of employers, without prompting from interviewers, brought up the images of motherhood and family when they talked about women. Employers often made these characterisations of women as mothers without empirical knowledge of their actual family situations. (Kennelly, 1999)*

Some of the women in our focus groups who had suffered discrimination said that culture would be the number one factor in their future choice of employer:

*I'm not necessarily that interested in their policy and I won't go and sit there and read it, but I'd want to have a real clear understanding of the atmosphere and the whole ethos of the company. (Davis et al, 2005)*

Our evidence suggests that between 10% and 20% of employers hold views that may allow discriminatory practices to occur:

- 8% of employers agreed or strongly agreed that 'pregnancy within the first year of employment is frowned upon within this organisation';
- 16% of employers thought pregnancy and/or having young children could affect decisions regarding career progression;
- 17% of employers thought pregnant women 'generally tend to be less

- committed to work than other team members’;
- 12% did not agree that ‘women returning to work after maternity leave were just as committed to work as the rest of the team’;
- more than a quarter of employers (28%) disagreed that it was worth training someone who was pregnant, even though it is unlawful to deny training on this basis (Young and Morrell, 2005).

In general, respondents in small workplaces were more likely to hold negative personal attitudes regarding whether it is worth training a pregnant women and whether women abuse their maternity rights.

We found a number of reasons for these attitudes:

- Ignorance and fear – workplaces that had recently experienced pregnancy were less likely to hold negative views than those that had not (Young & Morrell, 2005).
- A belief that maternity legislation is becoming more biased towards the employee, that all the rights are on the employee’s side and all the responsibilities on the employer’s (Acas, 2004). This may not be based on accurate knowledge of the law: small employers tended either to be unaware of or to play down employees responsibilities towards them such as notice periods or evidence of antenatal appointments.
- A belief that some pregnant women abuse their rights (Young & Morrell, 2005).
- A lack of awareness of the business benefits that family-friendly practices, including managing pregnancy positively, can bring. A view, mirroring that of the wider society, that combining work and caring responsibilities is a predominantly female juggling act, rather than one involving both parents. This militates against a work culture in which combining parenthood and employment is seen as the norm.
- Some employers do not think they have a role in ensuring employees can successfully combine work and parenthood.

*We’ve got a couple of women directors ... but they have no children and they say “You can’t do this job and have kids at the same time”... We’ve had cases where they’ve asked women “What do you do with your kids in the summer, who looks after them?” at interview stage, or asked about their childcare arrangements. (Young and Morrell, 2005)*

It is worth noting, however, that our research among women who had suffered discrimination found a measure of sympathy with some of these views. Some could understand the preference of employers to recruit someone who would not go on maternity leave in the near future. And some felt having training delayed (rather than cancelled), could be justified if there was a risk the employee would not return, as long as this was discussed with the employee first.

*I can see an employer's point of view. What's the point of employing you now when you're 12 weeks pregnant or whatever, in a few months time you're going to be saying 'I'm on maternity leave now' and you might not even come back so I can see that point. (Davis et al, 2005)*

## **2. THE COST OF DISCRIMINATORY AND POOR PRACTICES FOR EMPLOYERS**

Employers who dismiss, make redundant or treat pregnant women so badly they have to leave will in the majority of cases need to recruit and train a replacement. The total direct recruitment costs to replace women who lose their jobs due to pregnancy discrimination is estimated to be in the region of £80m to £120m depending upon whether only direct costs are taken into consideration, or whether indirect costs (such as lost time with customers, time taken for new staff to get up to speed, costs of agency staff) are also taken into account (Elias and Hogarth, 2005).<sup>32</sup>

The cost to employers of paying redundancy pay and/or the legal costs of defending cases at an ET as a result of dismissal, is estimated at a further £11m (Elias and Hogarth, 2005). In addition, an employer who loses a claim at the Employment Tribunal will be liable to pay compensation. Although average compensation levels in cases of pregnancy-related dismissals are low,<sup>33</sup> some compensation awards are substantial.

## **3. NON-RECRUITMENT OF WOMEN OF CHILDBEARING AGE**

We did not set out to investigate whether women were being discriminated against at the recruitment stage because of their pregnancy, or even because of the possibility

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<sup>32</sup> These figures were calculated using the Chartered Institute for Personnel Development (CIPD) survey of recruitment and the population estimates of the total number of women who were dismissed within different occupational categories.

<sup>33</sup> See page 73.

of their getting pregnant. However, in the course of the investigation we have been struck by the number of employers who have openly admitted that they will not recruit women of childbearing age for this reason. Research, albeit limited, supports this. In an online poll, 80% of HR professionals said their organisation would think twice before employing a woman of childbearing age.<sup>34</sup> Acas held focus groups with 19 small employers, some of which admitted that they had already unlawfully discriminated in this way. Some were unrepentant, while others regarded this as a matter of regret.<sup>35</sup> A survey of companies in 1996 found that 'almost a third of SMEs would not employ, promote or train women of childbearing age'.<sup>36</sup>

This is a hidden form of discrimination, as it is generally difficult for individuals to prove the reasons for their non-recruitment. It is however unlawful for an employer to apply a practice or policy of not recruiting women of childbearing age.<sup>37</sup> This remains the case even though an employer may not actually reject any applications from individual women, if the practice of the employer is to discourage women from applying, or to fill vacancies only on a headhunting or word of mouth basis.

Despite its illegality, small employers believe that what they see as a trend towards greater rights for the employee, and more generous maternity provision, will increasingly discourage employers from recruiting women of childbearing age. This has the potential to affect a huge number of women: the definition of woman of childbearing age is thought to be growing even wider now that women are having children later - anywhere from '25 to 40' (Young and Morrell, 2005).

However, some employer representatives felt very strongly that this wasn't an issue amongst their members:

*Few employers discriminate on the basis of (child bearing) age, because this is such a wide range....Employers would shoot themselves in the foot. (Employers' organisation representative: Young and Morrell, 2005).*

In fact women now make up nearly half of Britain's' workforce and the proportion is growing, with eight out of every ten new vacancies expected to be filled by women. The non-recruitment women of childbearing age not only means that employers waste the talent that is open to them, but creates a productivity gap in the economy.

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<sup>34</sup> Croner consulting online poll of 110 HR professionals, November 2004.

<sup>35</sup> See also Opinion Leader Research, 2004.

<sup>36</sup> PPC, 1996.

<sup>37</sup>Section 37 SDA. The EOC can bring proceedings against any person who contravenes this section.

This is therefore an issue which merits further investigation.

## **SUMMARY**

Many of the problems experienced by employers in managing pregnancy stem from a lack of awareness and understanding of the relevant legislation. (The reasons for this lack of understanding, particularly the complexity of the law, are considered in chapter 6.) But other problems occur because of lack of dialogue and planning, the financial costs of managing pregnancy for micro businesses and negative attitudes or cultures in workplaces.

Our recommendations seek to address employers' problems of managing maternity by proposing:

- measures to increase employers' understanding and knowledge of maternity rights, including the simplification of the legislation;
- steps towards better planning and dialogue between employers and employees;
- the provision of enhanced support for the micro and small employers who find it hardest to manage pregnancy; and
- incentives towards compliance and changing the workplace culture.

(See Chapter 7 *What are the solutions?*)

A further aspect of managing pregnancy for employers is the legal requirement to protect the health and safety of new and expectant mothers. Employers' awareness of, and compliance with, the health and safety requirements for pregnant women is considered in more detail in the next chapter.

## **CHAPTER 5 - HEALTH AND SAFETY PROTECTION**

### **Key facts**

- The systems for protecting the health and safety of pregnant women are commonly unknown or ignored.
- Nearly half of women did not know they were entitled to a risk assessment.
- 50% of pregnant women did not receive a health and safety risk assessment.
- Even women who work in seemingly benign environments are at risk.
- Risk assessments are not always carried out well. 15% of the women who had an assessment said that it did not identify all the risks.
- Just 8% of employers had written guidelines to help managers carry out assessments.

### **Our research and consultation on health and safety**

The findings in this chapter, and our recommendations to address the problems identified, are drawn primarily from:

#### **Our research**, including questions in:

- The in-depth survey of 750 employers across Great Britain.
- The research in Wales into small and medium enterprises.
- The focus groups into small employers researched by Acas.
- Our survey of legal advisers.

#### **Our consultation with:**

- Employers and employer representatives.
- The Health and Safety Commission, the Health and Safety Executive, and local authorities.
- Acas and Citizens Advice.

## **1. WHAT ARE THE RISKS FOR NEW AND EXPECTANT MOTHERS?**

Pregnancy is not an illness and if sensible precautions are taken there is no reason why the vast majority of new and expectant mothers should not continue to work. However, pregnancy and maternity do put women at an increased level of risk from some substances, working environments or activities.

Pregnant women and their unborn children are at risk from chemical and biological hazards. Yet women can also be at risk from seemingly mundane aspects of everyday working life, such as manual handling, long hours, or spending long periods standing up. Studies suggest that:

- 20% of premature births are caused by occupational factors, leading to occupational fatigue.<sup>38</sup>
- Premature birth is more likely among women who worked for more than 42 hours a week, stood for more than six hours a day or had low job satisfaction.<sup>39</sup>
- Physically demanding work (such as heavy and/or repetitive lifting or load carrying, manual labour or significant physical exertion) or standing for more than three hours per day may significantly increase a woman's risk of adverse pregnancy outcome.<sup>40</sup>
- Standing and walking at work during the second trimester may present a particular risk for preterm delivery.<sup>41</sup>
- In addition, high levels of work-related stress can be damaging in both the short and longer term.<sup>42</sup>

### **What health and safety protection exists for pregnant women at work?**

The Management of Health and Safety at Work Regulations 1999 contain specific provisions to safeguard new and expectant mothers in the workplace.

- Firstly, when employers are conducting their general duty to carry out a risk assessment for all their employees, they must assess any specific risks to new and expectant mothers which might affect any women of childbearing age at the workplace.
- Secondly, when employers receive written notification from an employee that she is pregnant, has given birth within the previous six months or is breastfeeding, they must conduct a specific risk assessment.<sup>43</sup>
- And when a risk assessment shows that there are risks or hazards, the employer must take steps to remove these or provide the woman with suitable alternative work. If this is not possible, she should be suspended on full pay.

Case law has established that the failure to provide a risk assessment for new and expectant mothers can amount to direct sex discrimination, contrary to the Sex Discrimination Act.<sup>44</sup>

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<sup>38</sup> Mamelle, no date

<sup>39</sup> Saurel-Cubizolles et al, 2004

<sup>40</sup> Mozurkewich et al, 2000

<sup>41</sup> Henriksen et al, 1995

<sup>42</sup> Leveté, 2004, Hobel and Culhane, 2003.

<sup>43</sup> HSE website [www.hse.gov.uk/mothers/law.htm](http://www.hse.gov.uk/mothers/law.htm)

<sup>44</sup> Hardman v Mallon [2002] IRLR 516 EAT.

## 2. THE LOW LEVEL OF RISK ASSESSMENTS

Our research has revealed that this system is simply not working for new and expectant mothers. Only 50% of women who worked while they were pregnant said they had received a health and safety risk assessment and, for certain groups, this figure was even lower:

- Only 35% of those working more than 40 hours per week.
- Only 38% of those who worked in 'Business Services'.
- Only 39% of 'professionals'.
- Only 39% of those earning more than £30,000 pa.<sup>45</sup>

In the retail sector, 71% of USDAW members who worked while pregnant did not receive a risk assessment or did not know whether or not they had had one.<sup>46</sup>

In addition, 15% of women who had a risk assessment believed that not all the risks that had been identified were dealt with by their employer (Adams et al, 2005). Examples of recommended adjustments which were subsequently disregarded included: frequency of breaks, amount of overtime to be worked, and physical adjustments such as having a second member of staff present to do physical work such as lifting boxes (EOC Wales, 2004).

Our consultation with the HSE showed that these levels of compliance, though low, are a reflection of the low level of general risk assessments (i.e. those which employers are required to undertake for all their employees). The non-compliance is not specific to pregnant women.

### 2.1 Is the low level of compliance a problem for pregnant women?

It appears that more risk assessments are being undertaken in higher risk occupations, and less in more office based occupations. Women in manufacturing were the most likely to have a risk assessment (56%) and those doing manual work to have risks identified (55%). Those in business services were the least likely to have a risk assessment (38%) or risks identified (21% of these).<sup>47</sup>

However, there is a need for individual assessments for **all** pregnant women. Even seemingly benign working environments such as offices may present serious risks, such as heavy lifting or work-related stress. The fact that an employer has undertaken a generic risk assessment covering all employees which has not

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<sup>45</sup> Adams et al , 2005

<sup>46</sup> USDAW, 2004

<sup>47</sup> Adams et al, 2005

highlighted any risks is insufficient to ensure protection against risk once a woman becomes pregnant. Each woman has a unique medical history and experience of pregnancy. Our research suggests that where assessments do take place, risks to be addressed are identified in nearly half of cases.<sup>48</sup>

### 3. WHY IS COMPLIANCE SO LOW?

#### 3.1 Lack of awareness

Lack of awareness is a major factor.

Employees do not have a good knowledge of the relevant health and safety regulations:

- Just over half (54%) of USDAW members who worked while pregnant knew they had a right to a risk assessment and only 25% knew of the right to suspension on full pay for health and safety reasons.<sup>49</sup>
- Many women working for agencies or in temporary work, who in our focus groups were mainly black and ethnic minority women, felt that because they were in temporary positions they were not entitled to the same benefits, (such as risk assessments) as permanent staff.<sup>50</sup>

Employers have a similar lack of awareness:

- When employers who had had a pregnant worker within the last 3 years were asked to state the statutory entitlements of pregnant women, just 8% mentioned the right to a risk assessment.
- Only 8% of employers said they had developed guidelines for line managers relating to the health and safety of new and expectant mothers (Young and Morrell, 2005).

Qualitative research with Welsh SMEs also indicated a low awareness of the health and safety legislation (Leighton and Evans, 2004). Legal advisers we surveyed identified the health and safety provisions as the area of maternity law about which the employers they advised were least aware. Even large employers told us they needed more information about risk assessments.

#### ***How to address the lack of awareness***

The question of how to raise the awareness of employers and individuals is an important one, given the context of generally low levels of awareness of health and

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<sup>48</sup> Adams et al, 2005

<sup>49</sup> USDAW, 2004

<sup>50</sup> Davis et al, 2005

safety issues. The HSE accept that even general risk assessments are currently not the norm.

New and expectant mothers are not a priority area under the current Health and Safety Commission (HSC) strategy, *Revitalising Health and Safety*, but the HSE believes that they will benefit from measures taken under some of the HSE's priority areas, such as work-related stress, musculoskeletal disorders and 'slips and trips'. The HSE has also agreed to use its current initiatives to raise awareness of the need for risk assessments for pregnant women.<sup>51</sup>

If the HSE 10 year vision for 2010 - that risk assessments will 'become the norm' – is achieved, this is likely to bring about a rise in levels of compliance for pregnant women too. Research shows that employers who already carried out risk assessments as a standard requirement for their staff were more likely to be aware of their additional obligation to conduct a 'bespoke' assessment for pregnant employees and to be confident in their ability to do so.<sup>52</sup>

Our recommendation for a written statement will increase the number of risk assessments undertaken for pregnant women. It will inform all pregnant women and their employers of the requirement and need to undertake a risk assessment. It will also advise the woman to notify her employer in writing of her pregnancy as early as possible, so that the employer can take steps to safeguard her health.<sup>53</sup> Some women delay informing their employers of their pregnancy in case it causes trouble.<sup>54</sup>

Another possibility we have identified for consideration is for pregnant women to be provided with a short, self-completion questionnaire enabling them to start to identify hazards in their job. If they were asked to pass the completed questionnaire to their employer, this would act as a catalyst to setting the risk assessment process in motion. It would not diminish the duty of the employer to carry out a risk assessment. The aim would to encourage women to participate in the process.

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<sup>51</sup> Such as Workplace Health Direct, the forthcoming Occupational Health pilot schemes and the Worker Safety Adviser Challenge Fund.

<sup>52</sup> Acas, 2004.

<sup>53</sup> Most pregnant (64%) women notify their employers before 12 weeks. A third do so between 12-20 weeks though 2% leave it until after 21 weeks (Adams et al, 2005).

<sup>54</sup> E.g. *Moorhouse v Eurorunner Logistics Management Limited*, [2005], case no. 1302786/2004, Birmingham ET.

### 3.2 Uncertainty as to how to conduct an assessment

Some employers lack confidence about conducting a risk assessment. Employers at the EOC's Equality Exchange conferences explained that they frequently felt unqualified to judge what is dangerous for a pregnant woman to do and that this can lead to disputes between the line manager and employee. The ACAS helpline receives many queries from employers, particularly small businesses, wanting to carry out an assessment, but unsure how to do so or where to obtain assistance.

Some guidance is available. The HSE provides information on protecting the health and safety of new and expectant mothers on their website and three publications (one for women, one for health professionals and one for employers). However the publication for employers costs £9.50, whilst we would like to see it provided free of charge to small employers. The HSE helpline also provides information: 1% of queries relate to pregnancy (about 200 per year).

We believe that the level of employers' confidence in their ability to identify and remove risks will be much increased if they have access to a model risk assessment appropriate for their sector. The HSE has suggested that trade unions and employer organisations work together to produce model risk assessments appropriate for their sectors. One trade union, USDAW, is already working with major employers in the retail sector to achieve this.

### 3.3 Inadequate dialogue and communication

Managing the health and safety needs of pregnant women is also characterised by inadequate dialogue between employer and employee. As the HSE and some best practice employers have both told us, much of it is a matter of common sense and communication. Small changes, can make an enormous difference, such as permitting a heavily pregnant employee to travel to work outside rush hour.

*Being allowed flexi time has enabled me to travel at off peak times making me more comfortable (pregnant employee).*

But conversely, changes made without dialogue - however well meaning - can make women feel that the scope of their job is being reduced:

*Everybody is given the opportunity to go out to Africa (but) that was never offered to me... I was just told I had been ruled out because I was pregnant and because of the insurance and things like that. I was 4-5 months at the time. They said that I wouldn't be able to carry the equipment. (Newsroom worker quoted in Davis et al, 2005)*

In the absence of discussion between the employer and individual, an employer may make job changes that are counterproductive from a health and safety point of view. One in 10 supermarket workers said they were moved to the checkout after announcing their pregnancy, though checkout operators lift approximately one ton per four hour shift, according to HSE estimates.

*I was on the grocery section and had problems lifting so I was moved on to checkouts. But that was just as bad as they expected you to pack, plus the bump got in the way (not enough room) and it's not as easy to get off to go to the toilet. (Supermarket worker)<sup>55</sup>*

### **3.4 No deadline**

At the moment there is no time limit after being informed of the employee's pregnancy by which an employer is required to carry out a risk assessment. A specified period for completion of the risk assessment would add certainty to the process.

### **3.5 Women do not complain to the HSE or the employment tribunal**

Some women, although aware that they are entitled to risk assessments from their employers, are too stressed at that time to pursue the matter when a risk assessment does not materialise:

*I never really looked into it. I got to the stage where you know I was quite heavily pregnant and I was feeling quite tired and the pressure of work was getting to me. So I just thought I'd leave it. (Advertising sales worker in a communications company quoted in Davis et al, 2005).*

Our research showed that only a fifth of those who did not have a risk assessment (or who had one but the risks were not addressed) approached their employer or outside body to complain about the lack of assessment.<sup>56</sup> It seems likely that this low level of complaints is a result both of the lack of knowledge that an assessment should take place and the strong desire many pregnant women had not to 'make trouble' at work.

Where an employer fails to protect a pregnant employee's health and safety, she has two options:

- **Option 1.** She can make a complaint to the body responsible for ensuring that the health and safety regulations are complied with. Who this is depends

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<sup>55</sup> USDAW, 2004.

<sup>56</sup> Adams et al, 2005.

on the work place. The HSE has responsibility for premises such as factories, farms, hospitals and schools while local authorities are responsible for offices, shops, bars, restaurants and other service sector premises in their area.

However the HSE receives very few complaints from individuals – around 50-70 per year. Some women resign from their employment because of health and safety risks without seeking help from the HSE to enforce their rights. We consider that this may be due to lack of awareness of the HSE's role.

*W worked in a small workshop that manufactured wax lampshades using with chemicals such as epoxy resin. She asked repeatedly for a safety mask after being told by the manufacturer of the chemicals that the strongest mask available should be used, but her employer took no action, only offering to buy a mask if she paid half. She eventually resigned.<sup>57</sup>*

**Option 2.** She can take a sex discrimination claim to the employment tribunal. However, it is very rare for an individual to bring a claim of sex discrimination due to her employer's failure to conduct a risk assessment unless she is adding it in with other claims, such as unfair dismissal. This area of law is unclear because the SDA makes no mention of risk assessments.<sup>58</sup> A more explicit route for an individual to take action to enforce her right to a risk assessment may assist individuals to enforce their right.

### 3.6 Lack of enforcement

The information that we have received from the HSE and from local authorities suggests that very little action is taken to enforce the regulations requiring a risk assessment for pregnant workers. Arguably, because enforcement rates are very low - whether by the HSE and local authorities or by individuals themselves - employers have little incentive to comply with the legislation.

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<sup>57</sup> *Ward v Spectrawax Lighting* [2002] case number S/402136/01, Edinburgh ET.

<sup>58</sup> Although it seems that EC law would treat any failure to undertake a risk assessment in relation to a pregnant woman or a woman who has been pregnant, as sex discrimination.

However the HSE does not believe that greater compliance with the regulations is best achieved through additional enforcement. It regards persuasion and guidance for employers as more effective strategies, often highlighting the business case.<sup>59</sup> In any event, the limited resources at the HSE's, and local authorities', disposal would make it extremely difficult to effectively enforce the regulations due to the sheer number of workplaces.<sup>60</sup> Some stakeholders we consulted did not wish to see the HSE divert more of its scarce resources towards new and expectant mothers and away from other areas for which it has responsibility.

Some employers readily understand both their legal obligations and the business benefits of good health and safety policies and procedures, such as increased staff morale, retention and commitment.<sup>61</sup> However, in our view, these are not readily understood or accepted by all employers and the legal obligation needs to be backed up by effective enforcement, as well as good dissemination of the business case. The Government has a role here in ensuring that the relevant agencies have sufficient resources to carry this out.

### **3.7 The financial implications of having to suspend a pregnant woman on full pay**

Employers' concern about the possibility of having to suspend a pregnant woman on full pay may also be a factor in non-compliance. Small employers have described the difficulties that finding alternative work or suspending a woman would cause:

*The problem is the suspending on full pay. I know it's necessary, because obviously you've got no alternative work if you're a small company. If you have to suspend them on full pay then it would be a body blow, as you'd have to get someone else in. I'm not saying you shouldn't do it, but...*

*In our florist there's not really any other jobs we could move them to, if a risk assessment highlighted a problem. And there are lots of 'bad' things in a florist – wet leaves on the floor, serrated cutters, things like that.*

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<sup>59</sup> Although the House of Commons Committee on Work and Pensions inquiry in 2004 criticised what it perceived as a move away from enforcement towards guidelines and advice. It also argued that Government should commit substantially more resources to the HSE in order for it to effectively enforce the regulations.

<sup>60</sup> Great Britain has approximately one million workplaces with employees and, on average, a business premises can expect a visit from a health and safety inspector every 20 years (House Of Commons Work and Pensions Committee, 2004).

<sup>61</sup> See Annex 2 for examples of good practice.

*I'd [be happy to] do all that [risk assessment] up until the last point. A small organisation like me could never suspend a woman on full pay. I can't afford it. (Acas, 2004)*

Employers we consulted said that, given the size and typical turnover of micro employers, any support to cover these costs would considerably assist the micro employer in fulfilling their obligations. A pregnant staff member may represent a large proportion of the workforce and the additional costs of a health and safety suspension will be a significant extra cost for micro employers.

#### **4. THE EFFECT OF SUCH LOW COMPLIANCE**

Failure to conduct a risk assessment is not merely a technical legal point. It can have real and long lasting effects on the woman and her unborn child. It can also cause the souring of the employment relationship, leading women to resign or be dismissed, resulting in employment tribunal cases and weakening some women's attachment to the labour market in the longer term. Whether or not a risk assessment is conducted influences women's views on how supportive their employer was during their pregnancy, and this has a knock-on effect on the likelihood of their returning to work after maternity.<sup>62</sup>

Some women believe that not having a risk assessment led to a miscarriage or premature birth:

*I was lifting trays of meat, blocks of cheeses, boxes of fish. Having to lean into deli counters. Being left to work nine hours without a break. Going home at 9 p.m. and starting work at 7 a.m. the next day. I had no risk assessment. My manager never asked me how I was coping. I had to leave nine weeks before I had planned. I collapsed at work and was admitted to hospital twice until my baby was born. She was very small and underweight, they think due to the conditions I worked under. Supermarket worker quoted in USDAW, 2004.*

*I was still lifting, bending and having to pull cages towards the end of the pregnancy. This resulted in me having to go off sick and having my baby three weeks early. Supermarket worker quoted in USDAW, 2004.*

*I didn't receive a risk assessment nor were my work duties lightened. When I was 7 1/2 weeks pregnant I started to bleed. I was not offered any transport home and I had to walk. Two weeks later I lost my baby and I was off work for four days. Supermarket worker quoted in USDAW, 2004.*

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<sup>62</sup> 61% of women who felt their employer was very supportive had had an assessment. But, of those who felt their employer was not supportive, only with 16% had had an assessment (Adams et al, 2005).

Others have described how their working conditions led to them being signed off sick.

*A worked on the reception of a housing association in the West Midlands. Her job involved dealing with some angry and potentially violent clients. Her requests for a risk assessment were ignored. The human resources section said they could not do a risk assessment until they had received the MAT B1 form. A spent long hours without being able to take a break or get a drink because the reception team was understaffed at that time. Eventually, she became unwell and was signed off sick by her GP due to work-related stress. (Woman who contacted the EOC website)*

*J worked for a cable and telecommunications company as an applications systems analyst. When she requested a risk assessment at three months pregnant, her manager laughed at her. J was given a new area of responsibility which required her to walk to several floors of the building carrying large bundles of documents. When she raised this as a concern, her manager did not treat it seriously, describing how she had carried on working despite a broken ankle. J was unable to work up to her expected due date, as she had planned, due to stress. (Woman who contacted the EOC website)*

Where the lack of a risk assessment leads to a pregnant woman taking sickness absence, this can then lead to her dismissal. Two examples of cases of unfair dismissal and sex discrimination arising from this situation are:

*A, who worked in a shop covering several floors. No risk assessment was carried out despite A asking for it repeatedly and quoting the relevant regulations. After she began to feel unwell due to the amount of walking up and down stairs, A was signed off sick by her GP. Whilst on sick leave, the shop closed down and she was dismissed rather than being offered a post in a different branch.<sup>63</sup>*

*J, an office administrator who, after informing her employer of her pregnancy, was told that she would have to spend three weeks working at another branch. The journey involved several changes of public transport. J began to feel tired and unwell and asked if she could share this work with another employee, but her request was denied. Her GP then diagnosed her as having a high risk of a miscarriage. Her request to cut down her travel time was also denied. When, eventually, she was signed off sick, her employer dismissed her.<sup>64</sup>*

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<sup>63</sup> *Annab v UTH Limited* [2002] case number 1808016/01, Leeds ET.

<sup>64</sup> *Johnston v MCA Ltd* [2002] case number 2500495/2002, Newcastle ET.

Some pregnant women soldier on, exposing themselves to risks, but worried that the consequences will affect, or have already affected, the health of their unborn child.<sup>65</sup>

*I know he should have done a risk assessment, but I don't think he did because working in a dental surgery you've got mercury and amalgam and stuff like that around and they didn't warn me from going near it. (Dental assistant, quoted in Davis et al, 2005)*

*When I first found out I was pregnant I worked in the theatre recovery room. So we are obviously in contact with the anaesthetic gases and suchlike which can be hazardous. But there wasn't really anything directly from the bosses. (Nurse, quoted in Davis et al, 2005)*

*I had a risk assessment and she said I was fine to do everything still. That's when she said 'You're pregnant, not ill'. I should have been given lighter duties as some of the residents can be violent. I had 12 people in my group and every one was violent. (Psychiatric care assistant quoted in Davis et al, 2005)*

Although it may appear a minor issue, low compliance is leading to significant costs for individual women, employers and the economy more generally.

## SUMMARY

It is clear that, currently, the system for protecting the health and safety of new and expectant mothers is not working. There is widespread non-compliance with the legal requirement to conduct a risk assessment. This appears to be due not just to a lack of awareness of the health and safety requirements, but also to the lack of external compulsion to comply. It is important that employers understand both the legal requirement and the business case for protecting the health and safety of new and expectant mothers. Our recommendations to address these issues are set out in chapter 7.

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<sup>65</sup> Women's experience of pregnancy discrimination in Wales, Lux, 2004.

## **CHAPTER 6 - IS THE LAW ON PREGNANCY AND MATERNITY WORKING?**

### **Key Facts:**

- The law has not proved effective in preventing pregnancy related discrimination. This is partly because pregnancy law is complex and confusing, and requires simplification; but there is also a gap in the law protecting women returning to work from maternity leave.
- The law is operating in a vacuum without the support and guidance for individuals and employers needed to back it up.
- Enforcement of the law relating to pregnancy and maternity leave depends upon a woman taking action herself to address her complaint either internally or at an employment tribunal. But very few women enforce their rights as taking a claim is very stressful and many fear the employment consequences.
- Both individuals and employers would prefer to resolve disputes without going to the employment tribunal, yet there are insufficient mechanisms for resolving disputes in the workplace.
- The time limits for taking enforcement action are very short given the extra pressures pregnant women face, and the steps for taking an employment tribunal are cumbersome.
- Tribunal claims often present a lose/lose situation for employees and employers.

### **The context**

As part of our investigation we assessed the effectiveness of legal protection for pregnant women and new mothers in Great Britain, with respect to both the prevention of discrimination through the substantive law and the resolution of complaints either in the workplace or at tribunal. What we found overwhelmingly was that, despite being unlawful for at least 20 years, pregnancy discrimination remains widespread: the statutory provisions that make it unlawful to dismiss or to treat a woman less favourably due to her pregnancy or maternity leave have not proved effective. We sought to understand the reasons for this.

### **Our research and consultation on the effectiveness of the legal and advice system**

The findings and conclusions outlined in this chapter have been informed by the following research and consultation conducted as part of our investigation:

**Research:**

- Questions in the survey of 1000 women exploring what action was taken by women who faced disadvantage at work.
- 12 focus groups with women (from England and Scotland and Wales) who had recently had a baby and had worked during their pregnancy.
- In-depth interviews with 35 women (in England and Scotland) who believed that they had faced some form of pregnancy-related discrimination in the workplace.
- A survey of 57 individuals who contacted the EOC helpline Wales in 2003.
- A review of pregnancy-related Employment Tribunal decisions from May 2002 to December 2003.
- A survey of legal advisers on how the legal system relating to pregnancy and maternity can be improved.
- A survey of Chairmen of the Employment Tribunals on how the tribunal system operates in cases of pregnancy discrimination
- A comparison with the legal provisions protecting pregnant women in other countries .<sup>66</sup>

**Our consultation with:**

- Groups of legal experts and advisers.<sup>67</sup>
- Individuals, lawyers and advice agencies representing individuals.
- Employers and employer representatives.
- Acas and Citizens Advice.

**HOW SHOULD THE LAW ON PREGNANCY AND MATERNITY WORK?**

The law should prevent pregnancy discrimination in these ways:

- First and foremost, it should prevent women from suffering discrimination at the outset where possible. Compensation is no substitute for job security and dignity in the workplace. The law needs to facilitate compliance by providing a clear and logical framework of rights and responsibilities that employers and employees can work within, and by ensuring that compliance mechanisms (the

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<sup>66</sup> Heron, A. (2004) *Pregnancy discrimination: some international comparisons*. EOC.

<sup>67</sup> See annex 1 for composition of groups, together with the *Report on consultation on the effectiveness of the legal and advice systems*. Palmer 2004.

system of incentives and deterrents that ensure the law is generally obeyed) are adequate.

- Second, the law should provide a standard against which women can evaluate their treatment, and facilitate the raising and resolving of disputes in the workplace without fear of negative consequences.
- Third, where prevention or resolution have not been achieved, the law should provide effective formal mechanisms for women to enforce their legal rights through the courts and to gain redress for their treatment.

## **1. A CLEAR AND LOGICAL FRAMEWORK OF RIGHTS TO PREVENT DISCRIMINATION**

If employers are to comply with their legal duties, they must be able to access and understand the law relating to pregnancy and maternity. As previously explained, while most employers express a willingness to comply with the law, a lack of knowledge and understanding hinders their ability to do so in practice.

One reason for this lack of understanding is the underlying complexity of the current legal framework. The essence of the law and the effect of most of the legal provisions is simply to require employers not to treat pregnant women, and women who have been pregnant, any worse than if they had not become pregnant. However, this simple principle is obscured by the complexity of the legal provisions that are intended to guarantee these rights. There are currently areas of the law that are so complex and vague that even academics are uncertain how to interpret them. The problems they cause, however, are far from academic – they lead to escalating disputes and bad feeling that can sour and ultimately destroy the employment relationship.

More than two thirds of HR professionals believed the complexity of the law had an adverse impact on the ability of their organisation to manage pregnancy (Personnel Today, 2004).

Small employers told us that the maternity legislation is not always effective at separating ‘good’ employers from ‘bad’. Its complexity gives even well-intentioned employers the impression that they can be in breach of their responsibilities, just because they overlook a ‘technicality’ (Acas, 2004). Individual women are also uncertain about their rights.

***The jigsaw of rights and responsibilities***

The law regulating the treatment of women workers who are pregnant, on maternity leave or returning from maternity leave, is located in numerous Acts and regulations, European directives and case law. These rights and responsibilities are in real need of codification. They are not set out in a way that is explicit or coherent; they are often complex and sometimes inconsistent; they contain grey areas that are the subject of ongoing legal argument; and there are some unnecessary and unjust exceptions, restrictions and gaps.

Provisions relating to pregnant women can be found in:

- The Sex Discrimination Act 1975 (SDA) which protects women against pregnancy discrimination in relation to a wide range of activities;
- The Employment Rights Act 1996 (ERA) which confers certain rights upon employees when pregnant, on maternity leave and returning from leave;
- The Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312) (MPLR) which confer rights upon employees to maternity leave and rights to return to work after maternity leave;
- The Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) which require employers to undertake risk assessments for new and expectant mothers;
- The Equal Pay Act 1970 (EPA) which requires women workers to be afforded equality with male workers in relation to pay and other contractual benefits (with the exception pay during maternity leave: it does not entitle women workers to receive full pay during the leave period);
- The Equal Treatment Directive 76/207/EEC (ETD) which requires that EU member states outlaw sex discrimination, including pregnancy discrimination, in the field of employment and occupation. This Directive has been amended by Directive 2002/73/EC (ETAD);
- Article 141 of the EC Treaty which requires that EU member states guarantee the application of the principle of equal pay for male and female workers;
- The Equal Pay Directive 75/117/EEC (EPD) which requires that EU member states outlaw discrimination in pay and all aspects of remuneration;

- The Pregnant Workers' Directive 92/85/EEC (PWD) which requires that EU member states implement measures to encourage improvement in the safety and health of pregnant workers and workers who have recently given birth or who are breastfeeding. In particular, Article 10 of the Pregnant Workers Directive provides that 'Member States shall take the necessary measures to prohibit the dismissal of workers... during the period from the beginning of their pregnancy to the end of the maternity leave save in exceptional cases not connected with their condition which are permitted under national legislation.'<sup>68</sup>

A summary of the current rights and responsibilities in relation to pregnancy at work is at Annex 4.

### **Problems with the legal provisions**

We have found that the main reasons why the law is not accessible and readily understandable are:

#### **1.1 It is not currently possible to understand some of the legal provisions simply by looking at the relevant statute, such as the ERA or SDA, because they have to be read in conjunction with separate regulations and/or case law.**

For example:

- section 47C of the ERA gives an employee the right not to be subjected to any detriment by her employer if done for a 'prescribed reason'. A prescribed reason is not defined in the ERA. An employer has to go to the MPLR<sup>69</sup> to ascertain that a prescribed reason includes pregnancy and the taking of maternity leave.

Case law has established that a woman does not have to compare her treatment with that of a man in order to claim sex discrimination where she has been less favourably treated due to pregnancy,<sup>70</sup> but the SDA does not explicitly say this. This is an issue that continues to cause confusion for women and courts. Some Employment Tribunal decisions still compare women to men in pregnancy SDA claims.<sup>71</sup>

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<sup>68</sup> Several EC countries have interpreted Article 10 so as to place greater restrictions on the circumstances in which an employer can dismiss a pregnant worker. (See Annex 3.) Arguably Article 10 requires a greater restriction of the circumstances in which an employer can lawfully dismiss a pregnant worker in GB.

<sup>69</sup> Regulation 19

<sup>70</sup> *Webb v EMO Cargo* C-32/93 [1994] IRLR 182 ECJ; (No. 2) [1995] IRLR 645 HL.

<sup>71</sup> For example, *Madarrassy v Nomura International plc* ET case no: 2204098/01.

We believe that the Sex Discrimination and Equal Pay Acts should be amended to reflect recent developments in case law, and to explicitly outlaw sex discrimination on the grounds of pregnancy. A current opportunity to do this is presented by the draft regulations that are intended to implement ETAD.<sup>72</sup>

## **1.2 Some aspects of the legislation are complex, inconsistent and uncertain.**

For example:

- The rights and benefits a woman is entitled to during Ordinary Maternity Leave (OML) are different to her rights during Additional Maternity Leave (AML).<sup>73</sup> We welcome the Government's proposals to simplify the law relating to maternity leave, and fully support the proposal that the distinction between OML and AML be removed (DTI, 2005).
- The calculation of SMP is unnecessarily complex and onerous for employers. But in addition, certain aspects of the current rules on eligibility and calculation mean that not all pregnant women are eligible for SMP. For example, women are rendered ineligible for SMP if: they are dismissed – even if unlawfully – before the week at which they would qualify for SMP; are off sick for the whole of the 8-week reference period and only receive statutory sick pay (SSP); or become pregnant again whilst on a period of unpaid maternity leave.
- The different categories of workers covered by the ERA and SDA mean that those defined as 'employees' under the ERA and the MPLR have a different but overlapping set of rights to those defined as 'workers' under the SDA.<sup>74</sup> As a result, self-employed women and those working under contracts for services do not receive some of the maternity rights available to employees.
- The circumstances in which holiday entitlement and bonuses accrue during maternity leave are the subject of continuing legal argument.

*The interaction of maternity absence and accrual of rights, such as bonuses and holiday, causes real difficulties; not assisted by the lack of clarity in the legislation and case law. Even the guidance and*

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<sup>72</sup> The EOC has submitted a full response to the government's consultation paper, *Equality And Diversity: Updating The Sex Discrimination Act*.

<sup>73</sup> Section 71(4) ERA; Regulation 9 MPLR; Section 73(4) ERA; Regulation 17 MPLR.

<sup>74</sup> The SDA protects a wide category of "workers" which includes contract and agency workers and partners in firms.

*distinctions drawn by the ECJ cause difficulties in providing a definitive view. (Legal expert, EOC, 2004)*

Lack of clarity about rights can lead to conflict and the souring of the employment relationship. It means that not even employment law experts can give clear, unequivocal advice on what employers must do in a given situation.

### **1.3 There are gaps in the protection for new mothers returning to work**

Although existing legislation does outlaw most forms of pregnancy discrimination, the ‘reasonably practicable’ exemption in the MPLR puts some maternity returners at a disadvantage compared with other employees. Women have very little bargaining power when they return to work after Additional Maternity Leave: employers are currently entitled to offer them a different job, under the MPLR, if it is not ‘reasonably practicable’ for them to return to their previous one. Unlike the normal contractual position for employees whose jobs are being changed or restructured, under the MPLR employers are not required to give any notice of proposed job changes or to consult with a view to agreeing any changes to the job.

Women working for small employers do not have a definite right to return to their old job due to the small employers exemption. This exemption, which excludes employers with less than 5 employees from the ‘automatic’ unfair dismissal provisions<sup>75</sup> and in certain circumstances exempts them from the requirement to permit women to return after maternity leave, is incompatible with the ETAD.<sup>76</sup>

#### **Action to address these problems**

To address these serious and fundamental problems, we are recommending that the following actions be taken:

- The law relating to pregnancy and maternity should be harmonised and simplified.
- All women returning from maternity leave should be entitled to notice of and consultation about proposed change to their job, where it is not ‘reasonably practicable’ for them to return to their previous one.
- The small employers exemption should be removed.

However, though the complexity of our current legislation would be much reduced by harmonisation and simplification, its effectiveness in combating pregnancy

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<sup>75</sup> Where the dismissal is for a reason connected to pregnancy, childbirth etc: Section 99 ERA.

<sup>76</sup> And should not be retained beyond October 2005.

discrimination will remain limited. This is because it deals with single instances of discrimination when they occur but it is not geared to tackling the underlying causes of inequality in a systemic way. We believe that the responsibility for ensuring compliance with maternity rights and the responsibility for driving change should be taken up by the state, not be left to individuals (see below, *Shifting the onus of responsibility for preventing pregnancy discrimination*).

## **2. OBSTACLES TO RESOLVING DISPUTES IN THE WORKPLACE**

There will remain a small minority of employers who break the law, either inadvertently or deliberately. Where this happens, a pregnant woman must be in a position to assert her rights - wherever possible, through informal means in the workplace, but also, if necessary, through the courts.

If still in employment, most employees' first approach will be to their line manager. Thereafter, if the problem remains unresolved, an individual will usually have to raise a grievance internally under the statutory dispute resolution procedures and then, if necessary, to proceed to an employment tribunal claim.

But the majority of the 200,000 women who experience pregnancy discrimination each year take no action to assert their rights, either within the workplace or beyond. 71% of those who suffer dismissal or disadvantage take no action at all, not even to raise it with their line manager or employer. Even of those who are dismissed or lose their jobs (30,000 annually), four-fifths write off their loss without taking any action or seeking advice, even though it may cost them their SMP, their income and future job prospects.

Our research survey into 1000 women found that only 8% of women who experienced discrimination or unfavourable treatment at work took any formal action to resolve the problem, whether by taking a formal internal grievance, by obtaining specialist legal advice or by taking an employment tribunal claim. Only 3% filed an ET claim. Many more women thought about taking formal action than actually did so (Adams et al, 2005; Lux, 2004).

We believe that there are four prerequisites for women to be in a position to take action. Our research has found that none of these is currently being fully met.

- Women need to be aware of their rights, so they can recognise their treatment as an illegal act or omission rather than, say, a personal issue between them and their manager.
- There needs to be a culture of resolving disputes in the workplace, so that women feel able to take up their grievance with their employer, without fear of being labelled as a troublemaker or liability, or put under undue stress or pressure.
- Women need to be able to explain their rights clearly to their employer and point to a standard or benchmark against which their treatment can be measured and to which they can ask their employer to adhere.
- Women need sufficient advice and support to be able to take their complaint to a tribunal if the matter remains unresolved, and be confident that they will not be victimised as a result.

## **2.1 Lack of awareness of rights**

The failure of women to take any formal action against discrimination appears to be in large part due to a lack of awareness about their rights. 45% of those who experienced discrimination or unfavourable treatment said they did not take any action, not even raising it with their manager or employer, because they did not recognise it as a problem. However, the more serious the detriment, the more likely women were to recognise it as an employment problem: only 8% of those who had been dismissed, made redundant or treated so badly that they had to leave did not recognise it as an employment problem. (Adams et al, 2005).

Women saw the treatment as 'something that happened to them and was dependent upon individual managers within an organisation and not organisational culture' (Davis et al, 2005).

## **2.2 Fear of the consequences of complaining**

Both individuals and employers would prefer to resolve disputes without resorting to the employment tribunal. For this to happen, it is vital that women feel able to take up problems confidently with their line manager or HR department without being victimised or labelled a troublemaker. However, women do not feel able to do this. Our research shows that only a third of women who had experienced pregnancy-related disadvantage raised the matter with their employer or manager (Adams et al, 2005).

Research in Wales found that in general women who experienced adverse conditions during their pregnancy felt more vulnerable and less able to stick it out or try to work out the problem with their employer – they felt they had no option but to resign (Lux, 2004).

As our investigation has highlighted, in a situation where many pregnant women already feel they are viewed as a liability and many employers see pregnancy as an undue burden, most women are reluctant to take any action that risks further alienating their employers (Adams et al, 2005; Young and Morrell, 2005). Our research explored the reasons for this and found that:

- They did not want to get into trouble at work – they were afraid they would lose their job or damage their future employment prospects (25%) (Adams et al, 2005).

*I returned from maternity leave to my post as regional manager but I was demoted to being a branch manager. When I made a formal complaint, I knew I was sealing my fate. A week later I was dismissed. (Sarah Vince-Cain, whose employment tribunal claim was successful. )*

- They were hoping to negotiate part-time work on return.

*It's all very well to say I have rights, but I'll need to return to this job and I want to believe there's a chance my employers might agree to my returning on reduced hours. I'm prepared to sacrifice some legal rights to this end, although I feel very aggrieved.' (Maternity Alliance, 2004)*

- They were concerned about references when looking for other work (Maternity Alliance, 2004).

*They told me there was no a job anymore because my contract had expired but, to me, it hadn't expired. And I thought "don't make a fuss here, you want to leave on good terms because you're going to have to fall back on these people for when you want a reference for your next job". So I thought there's no point in being nasty about it. They were quite shocked because my boss said to me "We thought you'd be angry but you're quite mature about this". (Davis et al, 2005)*

- For some, thinking ahead to how it might impact on their future job prospects was enough to stop them taking further action against their employer.

*I complained to my line manager about the treatment that I had received, but nothing was done about it and I didn't want to take it any further in case I was sacked and it might make it difficult to find another job. (Davis et al, 2005)*

If women are to feel sufficiently confident to assert their rights in the workplace without fear of negative employment consequences, then they must be certain of protection from victimisation as a result of having made any complaint – whether in the workplace or to the tribunal. Equally there must be clear protection against victimisation for having contacted an external body or for having raised an internal grievance.

Advice by itself is not sufficient. Citizens Advice have found that: ‘many aggrieved workers, even when advised of their rights, are reluctant to approach their employer for fear of suffering victimisation and, ultimately losing their jobs - pregnant women and new mothers are particularly vulnerable in this regard’ (Dunstan, 2000).

There is already protection against victimisation in the SDA, but we recommend making the existing protection more comprehensive so as to expressly protect a woman who has taken action to assert any of her rights relating to pregnancy and maternity leave.

### **2.3 Stress of taking action**

Women in our research gave the following reasons for not taking any action to pursue a grievance:

- the prospect was too daunting or too stressful, and given their pregnancy they had enough to cope with already (29%) (Adams et al, 2005). Some women were concerned that the stress would damage their pregnancy, and some were even advised by their GP not to take the matter further.
- They did not want to make life more difficult at work.

*I don't know whether I should have done more, but at the time I found it very difficult being pregnant and having two children at home and to be battling with this woman at work as well. (Davis et al, 2005)*

- They did not have the external support they needed.

*The problem was that my manager didn't believe me when I told her what ACAS had said about my rights. It would have been useful if there had been more direct contact between ACAS and my employer. (Davis et al, 2005)*

## **2.4 No standard or benchmark**

If they are to pursue an issue with their employers, women have to be able to explain their rights easily and point to a standard or benchmark against which their treatment can be measured and to which they can ask their employers to adhere. In the absence of a Code of Practice there is no written standard they can use. Given the complexity of the different rights and responsibilities outlined above, this makes it difficult for most to assert their rights confidently and persuasively in a way that their employer – or its legal advisers – cannot dispute.

A statutory Code of Practice would help provide an authoritative basis for resolving complaints and encouraging negotiations. It would also be educative and helpful in effecting cultural and attitudinal change about pregnancy and maternity leave.

## **3. WHERE RESOLUTION FAILS: IS LEGAL REDRESS EFFECTIVE?**

Contrary to the popular conception of a ‘compensation culture’, the vast majority of women would prefer to forego their rights than seek legal redress for discrimination.

Whilst 17% of women who experienced problems considered filing a claim at an Employment Tribunal, only 3% actually did so (Adams et al, 2005).

The ET statistics for England, Scotland and Wales are, as we suspected, the tip of the iceberg: only 1,300-1,500 cases per year are filed at the tribunal, of which only one quarter reach a hearing (EOC estimate). Many women choose to stay on in unpleasant and sometimes unsafe working conditions or simply leave their job, rather than enter into legal conflict.

### **3.1 Reasons for reluctance to take a claim to the Employment Tribunal**

The reasons for pregnant women’s reluctance to take a tribunal claim were similar to those applying to workplace complaints:

- Lack of awareness and advice.

Women are usually able to get preliminary employment advice if they need it, the first port of call for most women being their local Citizens’ Advice Bureau. But our research results show that only 5% of those who had a pregnancy-related problem sought any advice at all, whether from a union, CAB, advice agency or solicitor

(Adams et al, 2005).

- Fear of victimisation

*[There's] no way would I go to a tribunal - your cards are marked - your employment future is in jeopardy and your time with your child is marred with this issue. ( A manager who contacted the EOC)*

*I didn't want my name dragged through the papers, which could have happened. I didn't want to lose my job because I was thinking then what would I do, I would have to go for interviews. (Davis et al, 2005).*

- Fear of stigma

*Woman who had lost a tribunal case against her employer:*

*It's a stigma that I don't know how to get rid of. I am going to have to go to work, but I don't know how people are going to react to this. I don't want people to know that I took my employer to court because they might think I am that type of person (Davis et al, 2005).*

- Fear of the stress involved.

*I wanted to take the case further but because I felt that the stress would have been too much for me. I had had a miscarriage before and I was scared that stress would lead to a similar situation.*

*...I decided that I didn't want the stress because it was my first pregnancy.*

One-third of all ET claims are withdrawn by the claimant before the case reaches a hearing and research by the DTI has found that in half of such cases this is because the applicant considers there is too much, stress, difficulty, fuss or expense involved in continuing.<sup>77</sup>

There is also some evidence that women may be accepting settlements of their claims for inadequate compensation. Around half of the respondents to our survey of legal advisers said that they knew of cases where women had settled their pregnancy discrimination claims at too low a level (after taking into account the amount of losses, the likelihood of a claim succeeding and other relevant factors).<sup>78</sup>

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<sup>77</sup> Findings from the 2003 Survey of Employment Tribunal Applications, ERRS No33, DTI, August 2004.

<sup>78</sup> *How can the legal system be improved?* Survey of legal experts (unpublished). EOC (2004). The levels of settlements is an issue which requires further exploration.

- Lack of access to representation

The lack of free access to representation added to the stress of bringing a claim and made women less likely to consider lodging a claim while they were pregnant. Lack of representation was also felt by Chairmen hearing cases in the employment tribunals to put women at a disadvantage when it came to fighting their case (EOC, 2005). For example, women who take a claim to the tribunal frequently do not make all the legal claims they could, because they do not appreciate that they have rights under both the SDA and ERA (EOC, 2005).

Litigation will always be stressful, but can be manageable with proper support and representation.

We therefore recommend:

- an increase in the capacity of existing services to offer advice and support to those individuals who wish to enforce their claim;
- greater investment in the transfer of expertise from bodies such as the EOC to HR advisers, Citizens Advice Bureaux and legal advisers.

### **3.2 Additional barriers to taking Employment Tribunal proceedings**

Taking legal action also has additional difficulties which act as barriers:

#### ***Time limits***

A number of women indicated that, even if they had had access to representation they would have been unlikely to lodge their claim within the time limits due to their pregnancy. In the main a three-month time limit applies to the bringing of proceedings in the Employment Tribunal.<sup>79</sup> There is some scope for an extension, but this depends on the exercise of the tribunal's discretion and it is often denied.<sup>80</sup>

This means that women with pregnancy-related complaints often have to focus on lodging their claims - usually a complex and stressful process - at the same time as having to prepare for or cope with a new baby, and in some cases facing pregnancy-related health issues (Maternity Alliance, 2004). Some evidence suggests that the time limits combined with pregnancy may be an even more important barrier than the

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<sup>79</sup> The exception to this is for equal pay claims, EPA Sections 2(4) and 2(ZA).

<sup>80</sup> E.g. *O'Herlihy v The Passionate Pub Company Ltd* [2003] case number 1501857/03. A pub manageress who was dismissed was denied an extension of time although only two days late in filing her claim. She had had a pregnancy -related illness resulting in hospitalisation and needed to find somewhere to live because her accommodation had been linked to her employment.

absence of representation (Lux, 2004). On balance, the legal experts we consulted considered that removing or relaxing the time limit for filing a claim at an employment tribunal would be 'a substantial factor' in making access to the system easier.

Some legal advisers also took the view that a longer time limit would permit more complaints to be resolved:

*My view is that many more pregnancy claims could be resolved if the parties were not forced into early litigation. A limitation period of 6 months for employment tribunals would in my opinion be a positive step and would assist negotiations and workplace resolutions.<sup>81</sup>*

We are therefore recommending that the statutory time limits for claims connected with pregnancy and maternity (in particular under the SDA, the ERA and MPLR) be extended. Comparable amendments would be required to the Employment Act 2002 (Dispute Resolution) Regulations 2004 so that any requirement to lodge a grievance before instituting proceedings in the employment tribunal was subject to the new time limit.

#### ***The new statutory grievance procedures.***

In most cases, before being eligible to take an ET claim, claimants must first submit a written grievance to their employer and, where appropriate, attend hearings under the grievance procedure.<sup>82</sup> Pregnant women face particular difficulties in complying with this requirement, especially if they are absent from the workplace or concerned about the effects of stress on their pregnancy or care of their new baby. We are concerned that this requirement is proving an additional obstacle to women.

#### ***The fear of losing the claim.***

Some women did not pursue a claim because they did not feel they had a good enough case or that they could prove that it was linked to their pregnancy. Some feared colleagues would not act as witnesses for them in case it affected their own working environment. In practice, about half of the women who pursue their complaint to its conclusion lose their case, often because they cannot prove their pregnancy or maternity leave was the reason behind their treatment.

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<sup>81</sup> Solicitor. *How can the legal system be improved?* Survey of legal experts. EOC (2004)

<sup>82</sup> Employment Act 2002 and Regulations made under it.

In most cases of pregnancy-related dismissal or redundancy the employer does not cite pregnancy as the reason.<sup>83</sup> As one employment tribunal acknowledged: 'prejudice and discrimination particularly with pregnancy-related dismissal are not likely to be overt'.<sup>84</sup> The most common reasons given for dismissal relate either to the pregnant worker's conduct or capability or to financial reasons and the demands of the business.

*S worked as a nursery nurse. Whilst pregnant, she was dismissed on the grounds that her care of the babies was inadequate. The tribunal found that the allegations against S were spurious and had been put together after the event. The real reason was so that the nursery would not have to cover an employee's job whilst she was on maternity leave.*<sup>85</sup>

However sometimes the Employment Tribunal finds it hard to believe that that an employer would dismiss a pregnant worker who was otherwise competent merely because she was pregnant<sup>86</sup> or, in the absence of proof to the contrary by the applicant, the Employment Tribunal sometimes accepts the respondent's explanation, although in some cases the dismissal has occurred within days of the announcement of the pregnancy.<sup>87</sup>

In some EU countries the burden of proof rests with the employer to show that the dismissal is not pregnancy-related.<sup>88</sup>

### **Loss of job**

Even those that do win invariably lose their job and can find it difficult to find equivalent work. Half of applicants report lower status, lower paid employment or even unemployment afterwards (DTI, 2004).

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<sup>83</sup> Pregnancy-related unfair dismissal litigation at employment tribunals in England and Wales: a Study of 1842 cases. Grace James 2002.

<sup>84</sup> *Baxter v Beggars Limited* [1996] 20962/96 Truro ET.

<sup>85</sup> *Smith v Knowles t/a Conkers Nursery* [2002] case number 2406310/02, Manchester ET.

<sup>86</sup> E.g. *Chan v Fiction Clothing* [2004] case number 2205733/2003, London Central ET.

<sup>87</sup> For examples, see *Pregnancy-related unfair dismissal litigation at employment tribunals in England and Wales: a Study of 1842 cases*. Grace James 2002.

<sup>88</sup> Heron, A. (2004) *Pregnancy discrimination: some international comparisons*. EOC. See Annex 3.

***The low levels of compensation***

In sex discrimination cases, awards for injury to feelings in pregnancy dismissal cases are lower than the awards in other sex discrimination cases.<sup>89</sup> This is an area of concern given that the level of loss is likely to be higher in cases of pregnancy and maternity discrimination due to the difficulty of re-establishing in the labour market whilst pregnant or with young children. It is difficult to make a judgment as to why this is without examining the facts and circumstances of individual cases but half of ET chairmen we surveyed felt that it was not seen to be as serious as other forms of discrimination that came before the Tribunal, such as those that involved physical assault and a long-term pattern of discrimination. The reasons given included that:

*It's usually a one off event, not a long term pattern of discrimination.*

***The costs of taking a claim***

On average the total cost of taking a claim to a tribunal for an individual is £4,609, the majority of which is spent on professional advice (Elias and Hogarth, 2005).

Employers' costs are considerably higher. On average they spend over £5,000 on legal representation and 13 days of their own management time defending the case (Elias and Hogarth, 2005). A higher proportion of employers are able to afford specialist legal representation. Yet many of them are also dissatisfied with the system. A quarter of small businesses think that employment tribunals are unfair and a further 39% of firms consider the system to be very unsatisfactory (FSB, 2004).

For both employees and employers, therefore, the employment tribunal is generally a lose-lose scenario.

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<sup>89</sup> EOR figures for awards for 2003. The average award for injury to feelings was £3,084 for dismissals due to pregnancy and was the lowest average award of injury to feelings of all seven categories of discrimination. (The seven main categories were harassment; total dismissals; dismissals not due to pregnancy; dismissals due to pregnancy; victimisation; recruitment and promotion; and terms and conditions). This compares with an average of £3,685 for injury to feelings for all sex discrimination claims in 2003. (EOR issue number 133).

#### 4. SHIFTING THE ONUS OF RESPONSIBILITY FOR PREVENTING PREGNANCY DISCRIMINATION

The current law protecting pregnant women and women who have been pregnant presently operates remedially. A woman who is wronged by any failure to comply with the law must take enforcement action. The majority do nothing. No government or other body intervenes on a woman's behalf and there is currently no duty upon employers to demonstrate compliance with the law. There is therefore little incentive for employers to comply with the law and little deterrent for them not to comply.

As a result most pregnancy discrimination is going unchallenged and unmonitored. As we have shown, individual litigation is not the most effective way to combat systemic discrimination. In any event, legal advisers representing women were agreed that that job security and protection from dismissal is far more valuable to women than compensation for loss of job.

Even losing a tribunal claim does not always fundamentally change employer attitudes towards pregnant employees and their duties in respect of them. Employers who took part in our case studies and had faced a claim of discrimination and lost, had often pursued the case on principle. None of those interviewed believed that their action had been discriminatory, rather that the women were dismissed due to financial problems with the business necessitating redundancies, or because of a record of poor performance. They were generally critical of the tribunal process finding it biased and 'stacked against' small businesses. A discrimination claim often resulted in a tightening-up of procedures and greater documentation. The impact varied for individual employers from a more wary management style and a loss of faith in the legal system to a loss of trust in employing women of child-bearing age (Young and Morell, 2005).

The law can act as a persuasive force for change, but it is not currently being used in this way.

*There is clear evidence that employment-related discrimination remains endemic even in relation to those grounds which have been the subject of more or less comprehensive legislation. One of the most significant reasons for this is the individualistic enforcement mechanisms which apply. Legal challenges to discrimination rely on already (relatively) disadvantaged individuals having the resources (financial, emotional and informational) to take existing, past or prospective employers to tribunal. The chances of success without legal representation are slim in discrimination cases and the employment repercussions even for successful claims alarming.<sup>90</sup>*

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<sup>90</sup> Aileen McColgan; *Achieving Equality at Work*: IER, London 2003.

We consider that the law should now move away from a model which principally depends upon individual action, towards one which imposes proactive obligations on employers and others involved in activities that touch upon the social and economic interests of women. This would shift the onus of responsibility for tackling pregnancy discrimination onto those who have the power and opportunity to effect change.

The new duty on the public sector to promote gender equality will provide an unprecedented opportunity to drive through culture change, by shifting the focus from what employers must not do, to a requirement to think and act proactively.

We are recommending that the new gender equality duty for public sector bodies or the accompanying guidelines should include measures requiring public sector employers to address pregnancy discrimination. Any public sector duties could also be used to effect change in the private sector. We believe that consideration should be given to extending some positive obligations to the private sector to address pregnancy discrimination, analogous to those of the public sector under the new gender equality duty.

Public procurement policies may also be used – where lawful and appropriate – to compel change in the private sector.

However, any new proactive duties cannot replace an individual woman's entitlement to a remedy.

## **5. FURTHER CHANGES TO THE SYSTEM UNDER CONSIDERATION**

Since starting this investigation the government has issued a consultation document on work and families, 'Choice and Flexibility' (DTI, 2005) which consults on several issues raised by the investigation. In particular the proposals to simplify the current system would address the current complexity of pregnancy and maternity law. The government has also announced the establishment of two reviews: the 'Equalities Review' and the 'Discrimination Law Review' (announced on 25 February 2005 jointly by the Equality Minister and Minister for the Cabinet Office in a joint DTI and Cabinet Office release). These reviews provide a timely opportunity to examine the causes of discrimination and to consider whether the law is adequate, as it stands, to address them.

## SUMMARY

Despite the legal provisions for the protection of pregnant women, the legal system is failing to protect women from pregnancy discrimination, much of which is going unchallenged and unmonitored. It often relies on individuals, and their families, to gamble their health, wellbeing and employment prospects in order to take action against their employers. Very few women are willing to do this. Our proposals will make the law clearer and easier to access. But, in any event, individual litigation is not the most effective way to combat pregnancy discrimination.

Some other EC countries have legal provisions which offer stronger protection from dismissal for pregnant women.<sup>91</sup> However we consider that the highest priority in Great Britain must be to increase the level of compliance with our existing law. Our recommendations in the following chapter are designed to achieve this.

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<sup>91</sup> See Annex 3.

## CHAPTER 7 - WHAT ARE THE SOLUTIONS?

In the interim report of this investigation, we made some early recommendations for tackling pregnancy discrimination and suggested some further possible solutions. We then consulted employers and other interested parties on these proposals,<sup>92</sup> looking in particular at whether:

- they would provide a real solution by changing behaviour and attitudes, and have a lasting impact, and whether
- they were realistic, both in terms of making proportionate use of scarce resources and being largely acceptable to stakeholders.

Following the consultation and extensive further research which has revealed the huge scale of the problem, we have firmed up some of those early suggestions and devised further recommendations for tackling pregnancy and maternity discrimination. We believe the following recommendations strike a balance between women's need to be able to combine work, pregnancy and motherhood without losing their jobs, income and prospects, and the genuine challenges faced by some employers in managing pregnancy in the workforce. They are proportionate and realistic and many have the support of large and small employers, as well as trade unions.

No single recommendation can provide the whole answer. Our recommendations are designed to be mutually supportive. For example, the written statement of responsibilities will alert both employer and employee to the existence of the other resources we are recommending, such as the pregnancy management toolkit, Code of Practice, financial support for micro-employers and, where disagreements arise, sources of advice.

### **Aims of the recommendations**

The purpose of our recommendations is to achieve the following changes, which are essential if the level of pregnancy discrimination is to be significantly reduced:

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<sup>92</sup> The consultation took the form of:

- a questionnaire issued directly to employment umbrella organisations
- a downloadable version of the questionnaire on the EOC website.
- structured interviews with key employer organisations (e.g. CBI, BCC) – who in several cases collated a single response on behalf of the membership.
- an interactive survey run by Personnel Today magazine for HR professionals
- focus groups with small employers run by COI Communications for Acas
- research carried out by EOC Wales into SMEs in Wales.
- consultation with employers, including, for example, SMEs in Scotland.

- To increase employers' and individuals' knowledge and understanding of maternity rights.
- To encourage and facilitate better planning and dialogue between employers and employees.
- To provide enhanced support for micro and small employers.
- To improve the level of, and quality of, health and safety risk assessments.
- To make the legal and advice system work better in preventing pregnancy discrimination and providing redress where it occurs
- To change workplace culture and attitudes, and provide incentives towards compliance.

We also make proposals to provide for future monitoring of the impact of the recommendations in reducing pregnancy discrimination.

## **A. TO INCREASE EMPLOYERS' AND INDIVIDUALS' KNOWLEDGE AND UNDERSTANDING OF MATERNITY RIGHTS**

### **Written Statement**

We have consulted widely on the most reliable way of getting information to both parties about their rights and responsibilities in relation to a pregnancy at the right time. There is very strong support for a written statement, produced by Acas, to be given to a woman at her first antenatal or GP visit, with instructions to hand her employer a duplicate copy when she gives notice of her pregnancy. This will provide crucial information and raise awareness at the earliest possible stage. Because it will be handed to the employer at the time that the woman announces her pregnancy, it will reach those employers, especially small employers intent on running their businesses, who read information only on a need-to-know basis. The statement will:

- contain a separate information sheet for the woman's partner to ensure they have accurate information at an early stage;
- explain the rights that employers have, such as reclaiming SMP;
- direct employers and individuals to the toolkit and code of practice (see below) and a range of sources of further advice;
- act as a catalyst to commencing the dialogue between employee and employer;
- help women and their families to judge whether they are experiencing discrimination or unfavourable treatment.

The written statement has the support of other advisory bodies including the Health and Safety Executive (HSE), Citizens Advice and legal advisers, together with the Department of Health and health unions such as the CPHVA, RCM, RCM Wales and RCN. In Scotland and Wales, the Scottish Executive and the NHS in Wales have expressed support.

We recommend:

**A written statement of maternity rights and responsibilities** for every pregnant woman and her employer.

The statement would be widely advertised, e.g. by poster in GP surgeries. However, not all pregnant women access antenatal care at an early stage in their pregnancy, or even sometimes at all,<sup>93</sup> and we therefore also encourage the NHS to find other avenues to reach those women.

Fathers and partners also need information. The DTI, for example, has recently recommended that employers allow fathers take time off to attend antenatal appointment with their partner without losing pay.<sup>94</sup> The written statement would provide a good opportunity to raise awareness of this.

### **Sector-specific toolkits on managing pregnancy for employers**

Employers widely acknowledge that they would benefit from practical guidance - aimed at 'front line' managers - on each stage of maternity, from when the woman announces her pregnancy until she is settled back into work after maternity leave. In Scotland employers said that all sizes of business need more information, and that this would benefit employees too. The need for health and safety information was given particular emphasis. Small businesses in Wales said that a toolkit tailored to their requirements was important.

HR professionals told us:

*I would welcome a very clear document directed at managers which explains the process from start to finish in very simple terms.*

*A practical toolkit will be very helpful for both the employer and employee, with a flowchart to determine what and when action should be taken (Personnel Today, 2004).*

<sup>93</sup> Maternity Alliance (2004b) *Experiences of Maternity Services: Muslim Women's Perspectives*.

<sup>94</sup> Fathers-to-be and Antenatal Appointments: A good practice guide. DTI, 2004.

But for employers to take it seriously, the guidance needs to be relevant to their businesses. Some sectoral bodies and employer associations have already expressed a willingness to work with the EOC to adapt the toolkit to fit their sector or membership<sup>95</sup> and to distribute them.

We recommend:

**A toolkit for employers, prepared by the EOC, with a separate version specifically tailored to the needs of small employers.**

**Employers and trade associations should adapt the toolkit and distribute to their own members and/or their own sectors.**

These toolkits will:

- provide a suggested framework for proper planning and dialogue;
- give guidance on difficult management issues, such as covering maternity leave absences and planning the return to work;
- contain model risk assessments appropriate to the sector;
- include model policies, ideas for good practice and sample letters;
- raise employers' awareness of the particular maternity and pregnancy related issues faced by disabled and ethnic minority women;
- show how better communication and dialogue can improve the experience of managing pregnancy to such an extent that it brings positive benefits for both the employee and the business.

### **One website**

According to research with small employers, the majority make use of the internet as their main source of information on maternity legislation.<sup>96</sup> Employers we consulted would like to see a single authoritative online source of information on maternity rights. We consider that it is important for the DTI to provide one Government website bringing together all the information employers need on pregnancy and maternity requirements and good practice, as already envisaged in the DTI consultation paper *Choice and Flexibility*.

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<sup>95</sup> HSBC and the British Retail Consortium, for example, have agreed to advise on and trial a toolkit relevant to their sectors.

<sup>96</sup> Acas, 2004.

## **B. TO ENCOURAGE AND FACILITATE BETTER PLANNING AND DIALOGUE BETWEEN EMPLOYERS AND EMPLOYEES.**

In addition to increasing awareness, the written statement and toolkit will also provide key methods of explaining to both parties (individual and employer) their responsibility towards maintaining effective communication and dialogue at each stage of the process and indicating how to do so.

However, additional measures are required to achieve more effective communication during maternity leave and planning for the return.

### **‘Green light’ to request return date**

Employers must be in a position to plan for a woman’s return to work from maternity leave in order to keep disruption to a minimum. To achieve this, employers need greater certainty about whether a woman will return to work, and the hours she wishes to return, in good time beforehand. It would, however, be inappropriate to penalise the relatively few women who may not be in a position to reply or whose circumstances may alter, requiring a change of plan. In any event a woman’s decision about return is often dependent on receiving information from her employer, such as whether she will be permitted to work part-time.

Thus the goal of increasing certainty for employers can best be achieved by providing a framework for communication under which employers have the right to request women to indicate their return dates in sufficient time to plan. We welcome the different options put forward for consultation by the DTI for enabling employers to maintain appropriate contact with employees and to seek notice of return to work plans.<sup>97</sup> However we believe that it would be counter productive to impose any legal obligation on women to confirm their return date.<sup>98</sup>

We recommend:

**A ‘green light’ for employers to ask women to indicate their return dates in good time before the return, wherever possible.**

<sup>97</sup> DTI consultation paper, Choice and Flexibility, 2005.

<sup>98</sup> For reasons, see EOC response to DTI consultation: Work and Families: Choice and Flexibility. May 2004.

Guidance on the green light would be included in the written statement, Code of Practice and the toolkit for employers, including model letters on how to seek information from women on maternity leave within the boundaries that are necessary for the protection of individuals on leave. The appropriate interval after the baby's birth, before the employer makes contact, will be the subject of further Government consultation.

### **Enhancing women's ability to plan**

To enhance women's ability to plan their return to work after maternity leave and to respond to the employer's request for an indication of their return dates, a source of comprehensive advice will be needed. The development of a 'Parents Direct' type service offering guidance and information to mothers about their options after the birth of the child, as proposed by the Government,<sup>99</sup> would help employer and employee alike.

### **Duty on employers to give notice of changes to a returner's job after AML**

In planning the return, it is also important that returning mothers are given appropriate notice of, and consulted about, any proposed changes to their job on return. A gap in the current law means that - unlike the normal contractual position for employees whose jobs are being changed or restructured - under the MPLR employers are not required to give any notice of proposed job changes or to consult with a view to agreeing any changes to the job.

This gap needs to be removed in order to:

- reduce the scope for disputes and misunderstandings about the return to work;
- encourage employers to think carefully before making any changes to the returner's role, thus reducing the scope for inadvertent non-compliance; and
- enable proper discussion of the options.

So we recommend that the Government should introduce a new duty that:

**Employers be required to give notice of any proposed change to the woman's job on return from additional maternity leave, and to consult with the individual about the alternative post offered, which must be equivalent to her original post.**

<sup>99</sup> Choice and Flexibility. The planned national development in England of childcare centres by 2010, and plans for expansion in Scotland and Wales, will also help to reduce some of the difficulties facing women as they consider their options for returning to work.

## **C. TO PROVIDE ENHANCED SUPPORT FOR MICRO AND SMALL EMPLOYERS.**

### **Financial support for micro employers**

Financial assistance for micro employers would offset the disproportionate costs for micro employers, and enable them to manage pregnancy positively, with a view to retaining the woman's skills during pregnancy and on return to work. This would benefit some of the most vulnerable groups of women in the workforce, including those without union representation and those from ethnic minorities.

Small businesses across England, Scotland and Wales view financial assistance as a definite priority, and over 90% of HR professionals considered it would be helpful (Personnel Today 2004).

*A pregnant staff member may represent the majority of the workforce and the additional costs will be a significant burden on micro employers whose annual turnover may be very small. Any support to cover these costs would considerably assist the micro employer in fulfilling their obligations. (FSB Scotland response to consultation)*

So we recommend:

**Government financial support for micro employers, in the form of either a universal or means-tested grant or reimbursement of some of the costs, such as recruitment, training or health and safety.**

### **Responsibility for administering payment of SMP**

SMP is complicated by the fact that two Government departments are involved; the DWP to administer the policy and guidelines relating to SMP and the Inland Revenue to administer repayment of SMP.

Small businesses have said that they would welcome any initiatives to simplify the process of administering SMP. Conversely, many larger employers informed us that they would prefer to continue to use make payment themselves as they had introduced computerised systems for administering SMP.

We welcome the DTI's consultation on the case for introducing a direct payment scheme<sup>100</sup>, as stated in our response to the consultation, we believe that employers should be given a choice of either transferring the responsibility for payment of SMP to a direct payment scheme by the government or of continuing to make SMP payments themselves.

In addition, there is scope for simplification of the criteria for deciding eligibility for and calculating the amounts of SMP due, as these are overly complex. (See below: *Changes to the make the legal and advice system work better*)

### **Human resources support**

Whilst most large companies have a human resources (HR) department, with knowledge of employment legislation and experience in accommodating pregnancy, the majority of small employers do not have their own HR function. Due to the relative infrequency of pregnancy for many small employers (1 every 10 years) and the complexity of the regulations and practical challenges, HR support is particularly necessary to help small employers both with compliance and in achieving the business benefits of adopting best practice.

In 2004 the DTI set up a shared human resources pilot scheme for small businesses.<sup>101</sup> The pilot demonstrated that professional HR advice demonstrably improved small companies' confidence in complying with employment issues,<sup>102</sup> particularly where SMEs were provided with a tailored, personal service based on their needs.

We recommend that:

**The Government should provide access to one-on-one HR or equivalent support for small employers without HR functions to help them deal with pregnancy and maternity.**

<sup>100</sup> Work and Families: Choice and Flexibility'. DTI, 2005.

<sup>101</sup> In response to a recommendation from the Better Regulation Task Force.

<sup>102</sup> Shared human resources pilots: final report. DTI, 2004.

## **D. TO IMPROVE THE LEVEL OF AND QUALITY OF HEALTH AND SAFETY RISK ASSESSMENTS**

The essential health and safety needs of pregnant working women are being widely ignored or taken for granted. A much greater emphasis on the need for individual risk assessments, of good quality, is needed to provide adequate safety protection and to reduce the number of health and safety-related problems. In order to achieve this, action is required from the HSE and local authorities, the Government, employers and employer associations.

### **Increasing awareness of health and safety rights and responsibilities**

The first step is to increase employers' awareness of their obligations. The HSE has a crucial role to play in achieving this and has already agreed that it will make use of any relevant pilot projects and initiatives it undertakes to raise awareness amongst employers. We would also like to see the HSE guidance for employers on how to conduct risk assessments for pregnant women provided free of charge to small employers.

### **Preparing model risk assessments**

To address employer's lack of confidence about conducting a risk assessment. We recommend that:

**Trade associations and sectoral bodies should work in partnership with trade unions to prepare model risk assessments for their sector. This process should be facilitated by the HSE.**

### **Enforcing the obligation to undertake a risk assessment**

For those employers who do not accept the business case, increased awareness and guidance needs to be backed up by effective enforcement. The EOC and other stakeholders we have consulted, recognise however that the resources of the HSE and local authorities for enforcement are very limited.

We therefore recommend that :

**The Government takes steps to ensure that every employed pregnant women receives an appropriate risk assessment, whether this be achieved through the HSE, employers or other means.**

As part of such steps, we believe that individuals need to be made more aware of their right to a risk assessment, the potential risks to be addressed and how to complain in the absence of an assessment to enforce their own right to a risk assessment. Our investigation identified the following possibilities for achieving this, which we believe merit further consideration by the Government:

- a short self completion questionnaire to help women assess hazards in the workplace, together with information about the role of the HSE. (This would not be intended to detract from the employer's responsibility for conducting the risk assessment) and/or
- giving pregnant women a clear legal right to a risk assessment within a specified period of time of notifying their employer of their pregnancy, together with the right to take legal action if no, or no adequate, risk assessment is undertaken or if the risks are not properly addressed.

## **E. TO MAKE THE LEGAL AND ADVICE SYSTEM WORK BETTER IN PREVENTING PREGNANCY DISCRIMINATION AND PROVIDING REDRESS WHERE IT OCCURS**

### **Statutory Code of Practice**

Many legal experts and HR professionals we consulted believed that the complex jigsaw of maternity rights can deter some employers from even trying to understand their obligations. Moreover there is currently no guidance on many of rights. As a result, both individuals and employers have to judge for themselves the extent of their rights and responsibilities. Employers informed us that, in the absence of any guidance, it is difficult for them to be certain what is required of them, e.g. what constitutes 'reasonable' time off for antenatal care.<sup>103</sup> This uncertainty also contributes to the concern, felt by nearly half of employers, that some women 'abuse their rights' (Young and Morrell).

As explained in the previous chapter, much of the law on the more complex aspects of maternity, such as pregnancy-related sickness, is derived from case law and cannot be found in the legislation. As one HR professional put it:

*If the guidance was all in one place and took into account the various legislation and case law then that would be the single biggest thing to make a difference. (Personnel Today 2004)*

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<sup>103</sup> Employers who attended EOC Equality Exchange conferences on pregnancy.

A statutory Code is required to:

- provide a single point of reference for all legislation relating to pregnancy and maternity and clear guidance, including cross-referencing to other relevant legislation such as flexible working and parental leave;
- establish a benchmark standard for managing pregnancy in the workplace;
- provide a basis for resolving complaints in the workplace through negotiation (trade unions have described how other codes are successfully used in this way).

In recommending the Code, we recognise the need to avoid adding to the existing regulatory burden on businesses. We have also taken into account the views of some employers and employer associations we consulted that there should be no further legal changes in this area whilst employers are still coming to terms with changes made in 2004. However, the Code will in our view assist employers by providing essential clarification of the law and much needed statutory guidance on how to interpret it.

So we recommend:

**A statutory Code of Practice on pregnancy and maternity law. (Additional funding will, however, be required for the EOC to prepare and consult on the Code.)**

A Code of Practice could also provide a basis for resolving workplace disputes.

The benefits of more workplace resolution would include:

- a reduction in the number of employment tribunal hearings, with a commensurate reduction in the stress and cost for both employees and employers; and
- maintaining more women in their existing jobs.

For claims to the Employment Tribunal, the Code would be taken into account in the proceedings, and would assist in the determination of tribunal claims. It would also ensure that both parties fully understand the law before proceeding to a hearing. In our view this would probably reduce the proportion of employment tribunal claims that proceed to a full hearing, as currently some respondents continue to defend a claim based on a poor understanding of the law.<sup>104</sup>

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<sup>104</sup> EOC Survey of Employment Tribunal Chairmen, 2004.

### **Simplification and harmonisation of maternity legislation**

The written statement and Code of Practice recommended above will address some of the factors we have identified as inhibiting the law from preventing pregnancy discrimination, in particular the lack of awareness of the law. However, although the Code can give guidance reflecting the law as it stands, it cannot remove confusion caused by ambiguity or inconsistency in the existing legal framework.

There is substantial scope for simplifying the complexity of current maternity legislation by:

- consolidating legal provisions and case law;
- removing unnecessary exemptions and inconsistencies; and
- harmonising different parts of the legislation.

Organisations representing small employers, such as the FSB, strongly support the need for less complex legislation, as an important step towards enabling compliance.

So we recommend that:

**The Government should simplify equality and employment legislation and address the aspects of employment law relating to pregnancy and maternity that require harmonisation and clarification.**

### ***Simplification of rules for calculating SMP and making the rules fairer***

There needs to be a simplification of the criteria for determining eligibility for SMP, and calculating the amounts of SMP due, as these are overly complex.<sup>105</sup> The rules render certain categories of women ineligible for SMP, such as women who are unfairly dismissed before qualifying for SMP or women who are absent on sick leave.<sup>106</sup>

As proposed in the EOC response to Choice and Flexibility, we suggest that the Government brings together interested parties to consider ways of simplifying the rules for calculating SMP and to review the rules for determining eligibility for SMP.

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<sup>105</sup> Such as the rules for calculating continuous employment and the definition of employee. See EOC response to DTI consultation: Work and Families: Choice and Flexibility, May 2004.

<sup>106</sup> Women who are off sick for the whole of the 8-week reference period but only receive statutory sick pay (SSP) do not qualify for SMP, as the rate of SSP is below the lower earnings limit.

### **Workplace resolution and fear of victimisation**

The EOC wholeheartedly supports the Government's focus on finding mechanisms for employment-related disputes to be resolved in the workplace before the employment relationship becomes irretrievably damaged. But our investigation has found that the aim of encouraging issues to be resolved in the workplace is being undermined, in the case of pregnant workers and new mothers, by women's fear of raising a complaint (whether formal or informal) due to their fear of negative employment consequences.

We believe that there needs to be clearer protection from victimisation for having taken formal or informal action, contacted an external body or raised an internal grievance. There is existing protection from victimisation under the SDA, which make it unlawful to treat a woman less favourably because she has done what is usually known as a 'protected act'.<sup>107</sup> But these provisions do not explicitly protect a woman who takes action under the ERA, MPLR or other statutory provisions. It is true that, because of overlaps in the law, many complaints that fall within the ERA and MPLR arguably also amount to sex discrimination<sup>108</sup> and that in such circumstances women taking any action under them would already be protected from victimisation under the SDA.<sup>109</sup> However, the absence of explicit protection means that there is no simple reassurance that can be offered to all women asserting their rights, and that the genuine fears of women contemplating asserting their rights cannot be entirely addressed. For example, if the protection from victimisation were clearer, it could be simply explained in the written statement.

We recommend:

**Making the existing protection against victimisation, for a woman making a complaint to her employer, more comprehensive** - so that she can be certain of protection from victimisation as a result of her having made any complaint – whether in the workplace or to the tribunal - that any of her maternity rights have been infringed.

<sup>107</sup> I.e. taken action under the SDA, the EPA or the Pensions Act 1995 - Section 4 SDA read with the unlawful acts created by Part II SDA.

<sup>108</sup> within the scope of the SDA or the EPA.

<sup>109</sup> Section 4(1)(d) SDA.

### **Time limits and hearings at the Employment Tribunal**

For those cases which cannot be resolved in the workplace and which result in an employment tribunal application, the time limit for commencing tribunal proceedings presents a significant barrier to the ability of women to exercise their legal rights at a particularly vulnerable time. So we recommend:

**The three-month time limit for registering a pregnancy or maternity-related unfair dismissal or sex discrimination claim should be extended for pregnancy-related claims. A parallel extension of time will be required for lodging a statutory grievance.**

We recognise that the Government will need to consult on how the time limit should be modified.

### ***Specialist employment tribunal chairmen***

It is important that claims at the Employment Tribunal are heard by chairmen with specialist understanding of pregnancy-related discrimination. The EOC therefore supports existing steps being taken by the Employment Tribunals Services in Scotland and England & Wales to train ET chairmen specialising in discrimination law (including in pregnancy-related discrimination).

### ***The role of trade unions***

Our investigation recognised that trade unions have a significant role to play in preventing and resolving pregnancy discrimination. Almost one in three women in the workforce is a trade union member and, as such, are eligible to receive the support of their union in the event of a problem at work. Unionised workplaces are more likely to offer extra-statutory entitlements, but nevertheless women in these workplaces experience pregnancy-related problems.<sup>110</sup> Yet our research showed that few women experiencing a problem related to their pregnancy took the opportunity of involving their union: just 1% of all women who experienced a pregnancy-related disadvantage had consulted a trade union representative.<sup>111</sup>

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<sup>110</sup> USDAW found that 13% were asked to work additional hours to make up for time spent attending antenatal appointments, 16% said that their employer's attitude towards them became more negative after they announced their pregnancy, and only 30% recalled having a risk assessment (USDAW, 2004).

<sup>111</sup> Adams et al, 2005

Some unions have recently taken measures tackle pregnancy discrimination for their members. In the light of the widespread discrimination which this investigation has uncovered, we believe that there is further scope for the Trades Union Congress and other individual trade unions to take steps to increase their women members' awareness of their rights when pregnant and on maternity leave, together with the support the union can offer. This might be achieved, for example, by running publicity and information campaigns, and training individual union representatives specifically on pregnancy and maternity.

But, in addition to union representation, other sources of support and representation are required for those women who are non-unionised. Some groups of women who are most vulnerable to pregnancy discrimination have low rates of union membership.<sup>112</sup>

### **More support for individuals whose rights have been infringed**

For those individuals who need to take legal steps to assert their rights, there needs to be sufficient access to support and representation.

To achieve this, we recommend that there should be:

- **An increase in the capacity of existing services to offer advice and support to those individuals who wish to assert their rights and/or take legal action, and**
- **Greater investment in the transfer of expertise from bodies such as the EOC to HR advisers, Citizens Advice Bureaux and legal advisers.**

## **F. TO CHANGE TO WORKPLACE CULTURE AND ATTITUDES, AND PROVIDE INCENTIVES TOWARDS COMPLIANCE.**

### **Gender equality duty for public sector bodies**

Prevention is the most effective solution to the problem of pregnancy discrimination. Currently the only remedy is after-the-event action by individuals – and this by itself has been ineffective in reducing the level of pregnancy discrimination. Legal advisers representing women were agreed that that job security and protection from dismissal is far more valuable to women than compensation for loss of job. The new duty on the public sector to promote gender equality will provide an unprecedented

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<sup>112</sup> For example, pregnant women aged under 25 are more at risk of losing their job than older women, but only 15% of that age group are members of a union (Hicks and Palmer, 2004).

opportunity to drive through culture change, by shifting the focus from what employers must not do, to a requirement to think and act proactively.

We recommend that:

**The new gender equality duty for public sector bodies or the accompanying guidelines should include measures requiring public sector employers to address pregnancy discrimination. Consideration should be given to extending some positive obligations to the private sector to address pregnancy discrimination, analogous to those of the public sector under the new gender equality duty.**

### **Use of procurement**

Public sector bodies are in a position to bring about an increase in compliance with maternity rights by the private sector and voluntary bodies through the use of procurement. Poor management of pregnancy and maternity puts the completion of a contract at risk, for example, where contractors fail to conduct risk assessments for pregnant staff or are unable to manage the maternity absence.<sup>113</sup>

We recommend that:

**When contracting out, public authorities should specify equality standards, including reinforcing the requirement to undertake pregnancy risk assessments, and assurances of an adequate maternity absence management system.**

### **Changing workplace culture**

While most employers strive to manage pregnancy positively, a significant minority have workplace cultures that foster negative attitudes and affect managers' decisions.

Employers need to be convinced of the business case and the public policy reasons for protecting pregnant women and those on maternity leave, and of the reasons why they have a legitimate role, along with the Government and individuals, in providing that protection. As one employer representative put it:

*This area of the law needs to be re-presented from the ground up...a statement of women's role in the labour market...why it is economically sensible to treat women in this way...Argue the case for pregnancy in the*

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<sup>113</sup> An example of a high-risk areas is where female employees undertake strenuous manual handling work – such as in the elder care and child care sectors.

*broader context of women's contribution to the economy. (Young and Morrell, 2005)*

So we recommend:

**With Government support, major employers and their representative bodies, along with their trade unions, should communicate consistent and positive messages about the benefits to employers and wider society of supporting pregnancy and maternity.**

### **National Family Strategy**

In addition we need a national culture which supports parents who work and views childbirth as a parental rather than just a female issue. The current disparity between fathers' and mothers' entitlement to leave and pay means that women are inevitably seen by employers as the main childcarers. As one legal adviser put it: 'Men aren't on the radar because their leave is so limited'.<sup>114</sup>

Our research shows that fathers want to play a greater role in caring for their newborn babies. 94% of fathers take some leave from work during the first 8 weeks of their child's life, and 70% of all fathers said they would like to be more involved in the care of their child than they are currently. Our research also found that 83% of fathers support a policy enabling mothers to transfer leave to fathers.<sup>115</sup>

We recommend:

**A National Family Strategy should be adopted in England, Scotland and Wales that increases parental choice, through an improved framework of paid leave for mothers, fathers and carers, better access to flexible working and quality childcare.**

Specifically, the EOC wants to see a National Family Strategy that provides:

- Choice, with effective financial support and flexibility to families in managing their caring and working roles, including an improved framework of paid leave

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<sup>114</sup> *Report on consultation on the effectiveness of the legal and advice systems. Palmer 2004*

<sup>115</sup> Thompson, Vinter and Young (June 2005), *Dads and their babies: Leave Arrangements and the First Year*. EOC Manchester.

for mothers, fathers and carers, better access to flexible working and no pension penalties.

- Quality, universal, community-based childcare and extended schools for children aged 0-14, affordable and accessible for all.
- A comprehensive, flexible care service infrastructure, to provide care tailored to the needs of the individual and the carer.

This strategy should help women return to work more easily and effectively after maternity leave. By emphasising the caring responsibilities of both male and female employees, it should enable the development of a business culture that supports and values **all** efforts to combine work and family effectively. It will provide a modern and reliable infrastructure of childcare support from which both parents, and their employers, will benefit.

## **PROPOSALS TO PROVIDE FOR FUTURE MONITORING OF THE IMPACT OF THE RECOMMENDATIONS IN REDUCING PREGNANCY DISCRIMINATION.**

This investigation has, for the first time, revealed the extent of pregnancy-related discrimination. Systems now need to be put in place to provide for future monitoring of pregnancy discrimination.

### **Future Government research**

Currently, there are no regular surveys or other data collection which will allow any analysis of future trends in incidence. The EOC will not be in a position to further conduct research on this scale on the issue of pregnancy discrimination.

We therefore suggest that the Maternity Rights Survey – or other similar survey carried out on a regular 3 or 4 yearly basis - should measure the incidence of pregnancy discrimination from the perspectives of both individuals and employers.

### **Review of progress towards increasing the level of health and safety risk assessments**

The impact of the health and safety recommendations will need to be reviewed regularly (on a 3 or 4 yearly basis) to establish whether they are having the desired impact in increasing the level and quality of risk assessments for pregnant women.

We urge the Government to ensure that future government research projects collect the necessary data to enable a review of the level and quality of risk assessments

being undertaken, together with the impact that any lack of risk assessments is having on pregnant women.<sup>116</sup>

### **Review of impact of statutory dispute procedures**

Initial information from legal advisers indicates that the new statutory dispute procedures may be presenting an additional barrier to women seeking to make a claim of pregnancy or maternity-related discrimination.

It is therefore important that when the Government monitors and reviews the operation of the new statutory dispute procedures, data is collected to establish whether the requirement of taking an internal grievance before proceeding with a claim is adversely affecting women's access to the employment tribunal in cases of pregnancy and maternity-related discrimination.

### **Monitoring measures to combat pregnancy discrimination**

The DTI is best placed to monitor the effectiveness of the measures taken to combat pregnancy discrimination as a result of this investigation.

## **NEXT STEPS**

The EOC will now forward this report with our recommendations to the relevant Secretaries of State, seeking a response to our recommendations by 30 September 2005. Some of the recommendations are already under consideration by the government, such as the written statement and green light. There are also plans for a pilot scheme of the written statement by the NHS in Wales. If accepted, these recommendations may be implemented in the short term.

Others are more long-term in nature, yet their implementation is essential as part of the range of measures required to reduce the level of pregnancy discrimination.

Many of the recommendations – which have been formulated through our consultations and with the assistance of the advisory board, have already gained widespread support. There is an unprecedented desire for change. We believe that these recommendations provide the opportunity to achieve this change and ensure that pregnancy discrimination becomes a problem of the past. Everyone now has greater expectations.

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<sup>116</sup> One efficient means of obtaining this information would be the DTI's regular Maternity Rights Survey, which we understand is to be next conducted in 2006/7.

## ANNEX 1 - METHODOLOGY OF THE INVESTIGATION

### 1. RESEARCH

#### *Research commissioned by the EOC*

Adams, L., McAndrew, F. and Winterbotham M. (2005) *Pregnancy discrimination at work: a survey of women*. EOC Paper Series 24.

Cronin, E., South, F. and Thewlis, M. (2005) *Pregnancy discrimination at work: a secondary analysis of the 2002 Maternity Rights Survey*. EOC.

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Gregory, J. (2004) *Pregnancy Discrimination at Work: a Review of Employment Tribunal Decisions from May 2002 to December 2003*. EOC.

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Leighton, P. and Evans, R (2004) *Pregnant women at work: a survey of small business employers in Wales*. EOC.

Lux, S. (2004) *Women's experience of pregnancy discrimination in Wales: a survey of EOC Helpline callers in 2003*. EOC.

Maternity Alliance (2004) *Pregnancy discrimination survey*. EOC.

Maternity Alliance (2004) *Pregnancy discrimination at work: a review of experiences of disadvantaged groups*. EOC.

Young, V. and Morrell, J. (2005) *Pregnancy discrimination at work: a survey of employers*. EOC Working Paper Series 20.

Young, V. and Morrell, J. (2005) *Pregnancy discrimination at work: a survey of employers in Scotland*. EOC Paper Series 21.

Young, V. and Morrell, J. (2005) *Pregnancy discrimination at work: a survey of employers in Wales*. EOC Working Paper Series 22.

We also commissioned several questions on omnibus surveys in January 2005 and September 2003.

### **Research carried out by the EOC**

EOC (2004) *How can the legal system be improved?* Survey of legal experts. (Unpublished.)

Report on consultation on the effectiveness of the legal and advice systems. Palmer 2004.

EOC (2005) *How well is the Employment Tribunal system working in cases of pregnancy discrimination?* Survey of employment tribunals chairmen. (Unpublished).

EOC Wales (2004) *Time to Deliver. Putting an end to pregnancy discrimination in Wales*. Equal Opportunities Commission Wales.

### **Other research carried out for the investigation**

Personnel Today (2004) *Survey of Human Resource Professionals*.

Personnel Today published an online questionnaire on their web site which sought feedback on the investigation's recommendations. Over 1000 HR professionals completed a questionnaire.

Acas (2004) *Pregnancy at Work: Research to explore experiences of employers in small firms*, prepared for Acas and COI Communications by Craig Ross Dawson.

Acas carried out three focus groups with small employers to discuss their experiences of managing pregnancy and maternity. A full report is available at:

[http://www.acas.org.uk/publications/pdf/research\\_PregnancyAtWork.pdf](http://www.acas.org.uk/publications/pdf/research_PregnancyAtWork.pdf)

### ***Other evidence cited in this report***

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Hudson, M., Lissenburgh, S. and Sahin-Dikmen, M. (2004) *Maternity and Paternity Rights in Britain 2002: Survey of Parents*. DWP.

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McColgan, A. (2003) *Achieving Equality at Work*. Institute of Employment Rights.

Mamelle, N. (no date) *Pre-Term Delivery and Work*. ILO Encyclopaedia of Occupational Health and Safety, Reproductive System, [www.ilo.org](http://www.ilo.org)

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Mozurkewich, E.L. et al (2000) Working conditions and adverse pregnancy outcome: a matter-analysis. *Obstetrics & Gynaecology*, Volume 95, number 4, April 2000.

O'Brien, M. and Shemilt, I. (2003) *Working fathers: earning and caring*. EOC Research Discussion Series.

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## 2. CONSULTATION

### ***Employers and employer associations***

Written responses to the consultation documents issued in September 2004 were received from:

<b>England and Wales</b>	<b>Scotland</b>
Recruitment Employers Confederation	FSB Scotland
Forum of Private Business	Scottish Trade Union Congress (STUC)
Institute of Directors	Association of Scottish Businesswomen
Small Business Council	Stow College
Federation of Small Businesses	Scottish Environmental Protection Agency
British Chambers of Commerce	City of Edinburgh Council
EEF	South Lanarkshire Council
Confederation of British Industry	Scottish Prison Service
Highlands and Islands Enterprise	Pitman Training Centre Edinburgh
Harbourne Products Ltd	Hall Marketing
USDAW	Dundee College
Disability Rights Commission	Scottish Leadership Foundation
Hall Marketing	Dumfries & Galloway Fire Brigade
Barclays Bank plc	Juno Consultants
HBOS (Halifax Bank of Scotland)	

Meetings of the EOC's Equality Exchange were held on the investigation in England, Scotland and Wales and were attended by over 150 employers. Also a 'business breakfast' for employers was hosted by Lloyds TSB.

Meetings to discuss good practice in managing pregnancy were held with the following:

- Barclays Bank
- Cooperative Financial Services
- Diabetes UK
- West Yorkshire Housing Association
- MacPherson Mystery Shopping Ltd
- Telford and Wrekin Borough Council

Other feedback and comments were received from:

City Projects  
A-Plant Ltd  
Learning and Skills Council  
Revive  
Borders Contact Centre Solutions  
Erwin Sick Ltd  
Horatio Myer & Co  
Bedford Citizens Housing Association  
Molnlycke Health Care Limited

***Legal and advice specialists***

A scoping meeting in London in January 2004 was attended by representatives from Palmer Wade, Maternity Alliance, Citizens Advice and Matrix Chambers.

Representatives of the following attended a discussion on the current legal system and possible recommendations held in London in March 2004.

Anderson Strathern WS  
Cloisters  
Collins Benson Goldhill  
CRE  
Employment Tribunals, Edinburgh  
Eversheds  
Free Representation Unit  
Industrial Relations Services,  
Legal Services Commission  
London Law Centre  
Matrix Chambers  
Nabarro Nathanson  
OECD  
Old Square Chambers  
One Parent Families  
Richmonds Solicitors  
Thompsons  
TUC

A meeting of the Discrimination Law Association in London in March 2004 discussed the investigation and was attended by representatives from:

Matrix Chambers  
Richard Hutchinson & Co, Nottingham  
Hatcher Brenner, Norwich  
Bindman & Partners  
Palmer Wade  
Humberside Law Centre  
Maternity Alliance  
Paddington Law Centre

Representatives of the following solicitors and voluntary organisations attended a meeting in London in March 2004:

Charles Russell  
Freshfields  
Liberty  
Maternity Alliance  
National Childbirth Trust  
National Council for One Parent Families  
Palmer Wade  
Russell Jones & Walker  
Working Families

A discussion was held in Cardiff in April 2004 to discuss how the legal system could be improved was attended by representatives from Cardiff CAB, Edwards Geldard, Morgan Cole, Loosemores, Eversheds, Capital Law and Hugh James.

### ***BME groups***

A discussion was held in Cardiff in May 2004 attended by representatives from Welsh Refugee Council, Women's Workshop, Displaced People in Action, Sisters in Action, MEWN Cymru, ABCD, Sanatan Dharma Mandal Hindu Community Centre and Iranian Community.

Representatives from CRE, Acas, USDAW, Maternity Alliance were consulted as part of a racial equality impact assessment on draft recommendations.

### **3. INFORMATION FROM INDIVIDUAL WOMEN**

Over 500 responses were received to a questionnaire asking for people's experiences of working while pregnant.

#### ***Disabled women***

A discussion on particular problems faced by disabled women was held in Cardiff in June 2004 facilitated by Disability Wales.

### **4. EXPLORING AND TESTING THE RECOMMENDATIONS**

In addition to the consultation with employers and employer organisations described above, we explored the investigation's recommendations with:

- Department of Trade and Industry
- Department of Health
- Women and Equality Unit
- Acas
- Health and Safety Commission/Executive
- LACORS
- Citizens Advice
- Royal College of Midwives
- TUC Equality Officers Group

## ANNEX 2 - EXAMPLES OF BEST PRACTICE

### **Case study: Stow College, Glasgow.**

The college believes the reason it has never experienced problems in managing pregnancy and maternity is because senior staff have made it explicitly clear that pregnancy and maternity leave are not “big issues.” Senior staff within the college have gone on periods of extended maternity leave, with some returning on a part-time as well as full-time basis. The college argues these examples have helped to create a culture and attitude among staff that maternity, paternity and flexible working arrangements are part of a package of terms and conditions that serves to attract and retain high quality staff.

### **Planning for maternity**

Some SMEs have made organisational changes to ensure absences such as maternity leave can be accommodated, such as a policy of multi-skilling and self-managed teamworking. When a long-term absence, such as maternity leave, occurs there will be positive discussion among the team, coordinated by the manager, as to how this should be dealt with.

### **Case study: Language and translation service**

This small firm gave a lot of thought to how it would respond to maternity leave. It introduced multi-skilling, training and built closer relationships with freelance staff so that they might cover maternity absence more effectively:

*"It is absolutely crucial that everyone in the office is kept completely up-to-date with training and the work from clients".*

### **Case study: Ashstead Plant Hire**

The company provides a toolkit to all managers. This is a CD case consisting of cue cards on all matters relating to people management. It includes recruitment, selection, performance management, employee relations, maternity and paternity, training and development and equal opportunities. All managers are issued with a hard copy of the toolkit and it has also been placed on the intranet so managers can refer to the details on line. It offers standard letters for managers to use in all employee relations matters.

### **Case Study: MacPherson Mystery Shopping and Research Ltd.**

As a small employer, Mrs Macpherson realised the importance of planning for pregnancies in advance after she and one of her administration staff both became pregnant. In order to ensure that the business could be covered at all times, she decided that every member of staff should be trained to do another person's job,

instead of one person being indispensable to a job. She found that, although it was expensive to start with, in the long run it was cheaper than taking on agency staff.

***Case Study: West Yorkshire Housing Association.***

Periodically, West Yorkshire Housing Association looks at all of the jobs in the organisation and identifies which would definitely need a replacement to be externally recruited should the employee become pregnant, go off on long-term sick leave, or be absent for any other reason for a long period. If an employee who holds one of these posts becomes pregnant, the recruitment process can swiftly begin.

**Managing pregnancy prior to Maternity Leave**

Good practice employers start managing the pregnancy as soon as they receive notification, and ensure a good two-way dialogue with the pregnant employee at a very early stage.

***Case study: Scottish Environmental Protection Agency***

Line managers are guided through pregnancy risk assessments by staff with Health and Safety responsibilities. Most field staff are restricted to office-based duties during their pregnancy in order to prevent risks such as Leptospirosis exposure. All laboratory workers are assessed and any pregnancy-related risks are immediately dropped from their workload.

***Case study: Mercury Facilities Management, a subsidiary of City Holdings Ltd.***

After a female painter announced her pregnancy, a health and safety risk assessment was carried out promptly and identified a risk associated with some of the paints she was working with and with working at height. She stopped using the specific paints immediately and the team altered their working pattern so she did not have to work at height or where this paint was in use. This meant she could carry on working through her pregnancy.

***Case Study: Barclays Bank***

Pregnant employees can ask a colleague if they would be prepared to act as their buddy, usually starting about two months before maternity leave begins. The two people involved decide between themselves how often they will meet up or communicate. The relationship may last throughout the maternity leave period and during the return to work. The buddy is someone with whom the employee can talk in confidence about any concerns or problems they may have.

***Case Study: West Yorkshire Housing Association***

West Yorkshire Housing Association operates a 'wind down' period leading up to maternity leave. During this period, the pregnant employee gradually reduces her

workload and begins to hand over tasks to colleagues. This period helps the organisation get a better understanding of the impact of that person going on maternity leave as well as reducing the demands on the woman in the later stages of her pregnancy.

### **During Maternity leave.**

Good practice employers agree in advance the level of contact that there will be during maternity leave and provide for different options. Some encourage communication between the employee and employer during the period of leave. This not only enables the employee to answer work-related questions that might arise in her absence, but also helps to keep her feeling involved in the company and therefore more likely to return.

#### ***Case study: SME, Manchester***

“We tend to keep in touch with them via emails, phone calls and so on. We tend to do it so there is still the feeling that they are the employee and they have still got ownership of the company. We keep them up to date with what is happening, and if anything new is coming out, and if they want it then we will email anything to them. We try to do that so that when they come back they are not feeling as though they are coming back into a whole new organisation.”

#### ***Case Study: CIS***

CIS staff on maternity leave receive copies of an internal newsletter (CIS Newsview) and other publications such as staff bulletins. They also receive all the latest vacancy notifications and, when they are ready, will be invited to attend appropriate staff briefings, training sessions or any other events which may be of interest.

#### ***Case study: West Yorkshire Housing Association***

The employee can decide how they would like to keep in touch with the organisation during their maternity leave. Options include receiving the staff newsletter, minutes from meetings or even coming into work to attend particular meetings. Some might choose not to keep in touch at all.

### **The Return to work**

Good practice employers plan for the return to work so that uncertainty is minimised and employees can settle back into work as easily as possible.

#### ***Case study: SME, London***

“The one that is on maternity leave at the moment is a real loss to us because she is just the right sort of person and is a good front person. Nevertheless we are becoming fully computerised and she can work at home so we can do some sort of back-up. So it really depends where they are in terms of the structure of the job. But

if it is in the drafting areas or specification there is a certain amount of back up and things you can run from home, so it depends.”

***Case Study: Diabetes UK***

During the period before maternity leave, the employee and their line manager start talking about the return to work. The woman is given the opportunity to identify the hours she would like to work. Diabetes UK then investigates how this can be accommodated and starts to make plans as soon as possible.

***Case Study: Barclays Bank***

Staff returning to work after maternity leave have one week of reorientation. This allows them some flexibility in working hours and also provides any training that is necessary to get them back up to speed and 100% confident and competent in their role. Both line managers and employees are provided with a booklet to help them plan this week.

***Case Study: West Yorkshire Housing Association***

Employees and line managers are encouraged to start talking about the return to work well before maternity leave begins. On return to work, the employee has an induction to identify changes that have taken place during her time away and any training needs, and to discuss her new working pattern if that has changed. After three months, there is a review meeting to discuss how things are going with her job, whether she is happy with her hours of work and to identify any support that may be necessary. The induction and three-month review also cover health and safety.

## **ANNEX 3 - SOME INTERNATIONAL COMPARISONS**

Maternity rights in other EU countries can be quite different from those in the UK (Heron, 2004). This annex provides some examples.

### **Protection from dismissal related to pregnancy and maternity**

- The burden of proof rests with the employer to show that a dismissal is not related to pregnancy in Norway and Finland.
- Dismissals do not come into effect until maternity or parental leave end in Norway.
- Employers in Finland may only make a redundancy during maternity leave if their operations completely cease.
- Dismissals during pregnancy and maternity leave are prohibited in Austria, France, Germany, Italy and the Netherlands except in special circumstances, such as gross misconduct, which differ slightly from country to country.
- Protection is extended beyond maternity leave in Austria, Germany, the Netherlands.

### **Approval of dismissals and resignations by an external body**

- Dismissals of pregnant women in the Netherlands, Germany and Austria must be authorised by an external body.
- Italy and Germany resignations of pregnant employees must be notified to government.
- An employee in Norway who is dismissed must be kept in their job until the fairness of the dismissal has been determined by a court.

### **Health and Safety at Work**

- Pregnant and breast-feeding workers in the Netherlands can take extra paid breaks.
- Paid breaks for breast-feeding are available in Germany and Italy.
- Employers in Finland who do not have adequate expertise to carry out a risk assessment must engage an external expert.
- Employers in Finland, Italy and the Netherlands can obtain reimbursement of the pay for women suspended on health and safety grounds.

### **Recruitment**

- In Finland, all unsuccessful job applicants are entitled to a report from the employer setting out details of the person who was appointed.

### **Time limits for filing a legal claim**

- There is no time limit in France and a limit of one year in Finland.
- In Norway the court may disregard the time limit when requested by the employee and when it is considered reasonable to do so.

### **Information for employees**

- In Germany, employers must visibly display the legislation relating to pregnant women.

Note that the legal rights referred to here refer only to new and expectant mothers rather than all employees unless this is stated explicitly.

## **ANNEX 4 - CURRENT RIGHTS AND RESPONSIBILITIES**

### **Under the Sex Discrimination Act 1975**

- Women workers, including temporary and fixed-term staff, have the right not to be dismissed or treated less favourably for any reason connected to their pregnancy or maternity leave. It is sex discrimination for an employer to refuse to appoint or promote, refuse sick pay, withdraw training, select for redundancy, worsen terms and conditions or unfairly criticise or harass due to pregnancy or maternity.
- A worker who issues legal proceedings under the SDA is protected from victimisation.
- A worker also has the right not to be dismissed or treated less favourably for sickness absence which is pregnancy-related.

### **Under the Employment Rights Act 1996**

- Every employee, regardless of length of service, has the right not to be dismissed for any reason connected with her pregnancy, childbirth or maternity leave.
- Maternity rights include 26 weeks ordinary maternity leave for all employees.
- 26 weeks additional maternity leave for employees with 26 weeks service by their sixth month of pregnancy.
- Right to SMP for employees who have worked for their employer throughout their pregnancy and have earnings above the lower earnings limit. Employers are entitled to be reimbursed 92% of SMP by the Inland Revenue. Small employers receive 105%.
- Right to return to the same job after ordinary maternity leave and to the same or, if not practicable, an equivalent job after additional maternity leave.
- Right to paid time off for antenatal classes.
- Right to suitable alternative work if made redundant while on maternity leave.

### **Under the Management of Health and Safety At Work Regulations 1999**

If a risk assessment highlights a health and safety risk, the employer must take the following steps:

- adjust working conditions to avoid the risk and, if this is not possible;
- change the employee's work to avoid the risk and, if this is not possible;

- redeploy the employee to suitable alternative work, and if this does not exist;
- suspend the woman on full pay.

Breach of the regulations in respect of risk assessments does not give rise to any liability under the ERA, but can amount to unlawful sex discrimination if a disadvantage is thereby caused.

## **Equal Opportunities Commission Helpline 0845 601 5901**

(Calls charged at local rates)

Interpreting service available for callers to the Helpline

Typetalk service available on 18001 0845 601 5901

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**Women. Men. Different. Equal.**  
Equal Opportunities Commission