

Report on the key failings of the management of staff on maternity leave.

## **Working while Pregnant**

### **Risk assessments:**

1 Under the 3 (1) (a) of the Manual Handling and Safety at Work Regulations (MHSW Regs) every employer must make a suitable and sufficient assessment of any health and safety risks to which its employees are exposed while at work. An additional obligation exists on employers to assess the workplace risks posed to new or expectant mothers or their babies.

The employee's working conditions or hours of work should be altered to avoid any significant risk. If, as a result of the assessment, no changes are required this should be recorded and the employee informed of the outcome either orally or in writing.

2 Risk assessments **must** be carried out where there is a risk to the woman's health. Originally this was a regulation to cover high risk environments (eg radiation in hospitals). However, it is now **best practice** to review all pregnant women's working environment, duties and load. If a woman is working excessive hours, for example, and she raises this as a concern to her health failure to act would almost certainly amount to a breach of the regulations. But it is not the woman's responsibility to raise issues. These should be dealt with in the risk assessment. HR should have a pregnancy "tool kit" that they work through with any pregnant employee and this should include carrying out risk assessments.

3 In addition to the statutory obligation under the Health and Safety legislation above all employers owe a general duty of care to employees. Pregnancy and maternity can be times of stress for working women. Many do not want to raise issues related to their pregnancy as they fear being seen as weak or somehow less able to do their job. Employers need to be alert to this and comply with their duties towards them.

### **Identified breaches**

Given the health issues of her earlier pregnancy(s) Rebecca Chapman's (RC) employer should have, at the very least discussed a risk assessment and raised the question of excessive work load and risk to mother and baby with her. I understand that this was not done.

1 Failure to do so amounts to a breach of the duty of care and possibly the MHSW Regs. In addition, the failings contribute to the narrative that the employer either does not appreciate or understand their legal obligations towards pregnant employees or does not care.

## **On Maternity Leave**

### **Contact during maternity leave:**

- 1 An employer **may** make "reasonable contact" from time to time during an employee's maternity leave under 12A (4) of the Maternity and Parental Leave Regulations.
- 2 The employee **should**, in any event, be informed of any changes that affect her including promotion opportunities or vacancies which arise during maternity leave. If not, there is a risk that the employee could have a claim for unfavorable treatment contrary to section 18 of the Equality Act 2010 and/or unlawful detriment contrary to section 47c of Employment Rights Act 1996 and/or wrongful dismissal.
- 3 A woman may work during maternity leave for up to ten days for her employer (referred to as "keeping-in-touch" or KIT days) without bringing her OML or AML to an end. These KIT days are completely different to the obligations set out above to keep in contact with the employee during maternity leave by line managers. KIT days should be agreed between employer and employee and no pressure can be put on the woman to work KIT days if she does not want to. The woman should be paid for the days worked.

### **Identified Breaches**

- 1 RC was not kept properly informed of promotional opportunities, re-organisational change, vacancies etc. during her maternity leave. RC was invited to several meetings but the invitation arose during an informal/social meeting when she happened to see her line managers. These proposed meetings were delayed month after month and RC was the one chasing for the meetings to happen.
- 2 KIT days were not offered to RC. This is a basic and fundamental failing and would constitute clear evidence of less favourable treatment and therefore discrimination. Best practice is to ask the employee what if any KIT days she would like to work before going on maternity leave. In addition, establishing the amount of contact she would like and the format (email, newsletter, access to internal systems etc.) is helpful to her and the employer as expectations are more likely to be met.
- 3 During RC's maternity leave almost every contact with LP was initiated by RC. As an active member of the community she was able to keep in touch with colleagues in an informal way. This enabled her to keep connected to an extent. However, the obligation to maintain contact during her maternity leave is on the employer. This is particularly so when change is taking place and these obligations were not met by LP and amount to less favourable treatment connected to pregnancy and maternity leave and therefore discrimination.

## **Informing RC of changes while on maternity leave**

1 As explained above an employer must keep an employee on maternity leave informed of changes in the organisation. In addition, the Maternity and Paternity Leave Regulations create a layer of protection for any pregnant woman or one on maternity leave in the event of redundancies in the work place.

2 It is unclear if RC's post was made redundant. It is arguable that it was. If a redundancy situation arises during an employee's maternity leave and "it is not practicable by reason of redundancy" for the employer to continue to employ her under her existing contract, the employee **is entitled** to be offered a suitable alternative vacancy (where one is available) to start immediately after her existing contract ends. This obligation is on the employer to proactively look for and offer the new role. If two candidates are in line for one job the woman on maternity leave takes priority and must be offered the job.

3 If an employee is dismissed where the only (or principal) reason for her dismissal or selection is related to pregnancy, birth or maternity leave, the dismissal will be automatically unfair as well as discriminatory.

## **Identified breaches**

1 The change in RC's role was not communicated to her properly. Not only was there a lack of clarity about the changes, there is evidence that she was not informed of changes in a timely manner. She should have been advised of the proposed changes before they took place, not presented with a fait accompli.

2 RC should have been offered the full-time EA post and she was not. Nor was she told of other roles. RC had no opportunity to explore continuing in her role on a part time basis or as a job share.

3 RC was told of a possible job that, at first glance, sounded reasonable alternative employment. However, no job description was provided despite repeated requests by RC. When she was given the job description the role had altered substantially and did not amount to "reasonable alternative" work.

## **Return to work**

1 Where the employee has taken any period of Additional Maternity Leave and there is some reason (other than redundancy) why it is not reasonably practicable for the employer to permit her to return to the same job (for example, if there has been a reorganisation):

- The employee is entitled to return to a different job which is both suitable for her and appropriate in the circumstances
- The terms and conditions must not be less favourable than they would have been had she not been absent.

### **Identified breaches**

Two days before RC's return to work she had no job, no office and there appeared to be no serious attempt to address the situation by her line managers. RC made all the running and found a creative solution to a situation that was totally unacceptable. LP narrowly avoided a tribunal claim for sex discrimination, unfair dismissal and breach of the Part Time Workers regulations and breach of the Maternity and Paternity Leave Regulations. Fortunately, the situation was resolved because she took the initiative.

### **Inaccurate advice from HR**

I was concerned to hear that an HR advisor told RC that the proposed job involving legal work was deemed suitable alternative work. On comparing the new role with RC's previous role it was clear that the role was not suitable. The advice given by HR was inaccurate and unsupportive. HR does have a balance to strike between the interests of the employer and the employee. However, such poor advice would be evidence of an organisation that did not understand or did not care about their obligations to woman who are pregnant or on maternity leave.

### **Options**

- 1 One option is to do nothing. This is likely to end up with expensive settlements or worse litigation. In addition it will result in increased staff turnover, low morale and an increased burden on managers. When things go wrong they take more time to sort out.
- 2 Training and education of line managers and HR on their duties regarding pregnant employees and those on maternity leave. ACAS provides excellent cost effective training.
- 3 HR should develop a pregnancy tool kit that has a list of advice for the employee, guidance for managers and a check list for actions HR should assist managers with during pregnancy and maternity leave and on the return to work.

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