

*ESRC Seminar 2: Manchester University,
April 2014*

*Austerity measures and access to justice following
pregnancy-related discrimination*

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Structure / aims

- * 1. To introduce pregnancy and maternity-related discrimination - legal framework, the scope of the problem and the “litigation gap”.
- * 2. To highlight the difficulties and dilemmas faced by workers who have suffered discrimination at work as a result of pregnancy or maternity *and want to pursue a claim at a tribunal...* “the hurdles” *and to consider the impact of austerity measures (and other reforms) on this endeavour?*
- * 3. To think about how we might better tackle this problem in the future? Discussion

1. Law, scope and 'litigation gap'

- * **Legal framework –**

- * *Equality Act s18* – “unfavourable treatment” at work on grounds of pregnancy or maternity during ‘protected period’ = discrimination
- * *Employment Rights Act s99* – automatically unfair if reason or principal reason for the dismissal is pregnancy, maternity or childbirth.
- * EU law and case law (e.g. ETD and PWD)

1. Law, scope and 'litigation gap'

- * **Scope of pregnancy or maternity / workplace 'problems' in UK**
 - * **2005** (EOC – now EHRC) estimated 30,000 women a year forced from jobs annually and over half of all pregnant women in employment suffer a related detriment
 - * **Recession** ... growth in the incidence of this type of discrimination (see e.g. Gentleman 2011, Slater and Gordon 2013 and Dunstan 2013)
 - * **Today** - Dunstan, R (2013) Maternity Action Report – estimates that 60,000 treated unfavourably as a result of pregnancy/maternity.

1. Law, scope and 'litigation gap'

- * 'Litigation gap'
 - * Estimated that only 3% of those who experience pregnancy or maternity discrimination at work actually bring a claim to an employment tribunal and that less than 10% take any kind of formal action (EOC 2005), supported by tribunal study – average of 1000 ERA s99 claims registered annually (James 2009)
 - * Implications for
 - * individuals – 'mass irrationality'? (see James, 2009 p?);
 - * social justice - 'tribunals exist for users...' Legatt 2001: p6);
 - * gender equality - defective 'mechanics of equality' (Morris and Nott 1991 : p160).

2. Difficulties and dilemmas of legal action.

* Hurdle 1: Bringing an action

- * *Legal awareness and the importance of legal advice and support* in e.g.
 - * Translating the personal experience into a legal claim (see Busby and McDermot 2012)
 - * Maximising the scope of a potential claim (e.g. including a discrimination claim when = dismissal –see James 2009 and that = exception to 2 year qualification for UD)
 - * Commencing legal action – e.g. ET1 form and complying with procedure within particular time-scale – and articulating the claim / collating the evidence.



2. Difficulties and dilemmas of legal action.



***Austerity measures* compounding the problem?**

Long been problematic area and free legal advice for employment issues has long been overstretched but recently...

- * **abolition of almost all civil legal aid in April 2013** (e.g. see Bowcott 2013);
- * **questionnaire procedure has been abolished (April 2014);**
- * **recent addition of ACAS Early Conciliation (April 2014);**
- * **Introduction of employment tribunal fees*** (within the context of rise in cost of living, pay freezes and cuts to social security).

(*n.b. there was a 79% drop in the number of applications lodged from October to December 2013, compared with the same period in 2012)

2. Difficulties and dilemmas of legal action.

* Hurdle 2: the hearing

- * **Highly formalised** and described by claimants as 'court like', 'intimidating' and 'isolating', and 'bureaucratic, confusing and legalistic' (Dunstan (2013) at 16-17; Denvir et al (2007) cited in Busby and McDermot at 169)
- * **No legal aid for representation** – which has an impact on outcomes and feelings of vulnerability (Genn and Genn 1989 and Genn 1994 and Leonard 1986, 1987a and 1987b and James 2009 at 97-100).
- * **Lack of success** – only a third of our cohort successful here (Dunstan 2013) – weakest claims or restrictive approach at tribunal hearings that 'reproduces stereotypes' and 'fails to engage with the particularities of pregnancy/workplace relationships' ? (see James 2007 and 2009).



2. Difficulties and dilemmas of legal action.

* Hurdle 3: enforcing the claim

- * Many of those who are successful do not even receive their full award – with **one in three receiving none at all!** (BIS press release 01/11/13 cited in Dunstan 2013: p 17)
- * The “greater good” of the claim? Equality Act 2010 s. 124(3) - recommendations relating to the whole workforce – **to be abolished in due course** (Clause 2 of Draft Deregulation Bill)



2. Difficulties and dilemmas of legal action.

Dealing with
Pregnancy
Exhaustion



...Tough hurdles for *all* claimants but **those who are pregnant / recently given birth** are more vulnerable than most ... e.g.

- * Even the most straight forward of pregnancy / birth is tiring – **sickness, back ache, swollen ankles and indigestion** and ‘joys’ of a new baby (includes **broken sleep**) = ‘normal/accepted’ symptoms / outcome
- * More severe conditions/outcomes possible – **high blood pressure, preeclampsia, anxiety, depression, miscarriage and still birth** as well as many post birth health issues for mother and baby (including **cesarean recovery, mastitis and back problems in women**).
- * Single mothers or those lacking support networks of family/friends, those undergoing IVF are even more vulnerable and some may have even greater time pressures than most – e.g. if have other children / care-giving responsibilities.
- * Context of increased social, political , professionalised ‘**intervention**’ in **pregnancy/parenting** – increased choices but the experience is for many more paranoid (see e.g. Ferudi 2002) and intense (see e.g. Hays 1996).

2. Difficulties and dilemmas of legal action.

For our cohort E.g.

- ❑ Stress avoidance is preferable and socially /medically advised... yet legal support all but diminished and process is time-consuming, expensive and intimidating.
- ❑ Imposed time limits are unforgiving and difficult to challenge and compounded by the assumption that a speedy resolution is always preferable (reflected in performance targets and strict approach to out of time applications) – impact at *all* hurdles... e.g. most hearings / enforcement issues will take place in late stages of pregnancy / early motherhood (see James 2009).
- ❑ Fees likely perceived as an even bigger deterrent to legal action - costs of baby merchandise, the likely cost of maternity leave without the security of paid employment and potential loss of future earning capacity and the future cost of childcare .

3. Looking ahead: dispute resolution and pregnancy-maternity/workplace conflicts.

Conclusion:

Neither the interests of individuals nor social justice are being met by the current approach... hurdles always been there but harder to overcome in recent years and especially for more vulnerable 'litigants' – includes those who are pregnant or have recently given birth.

- * **Some light?...** £1 million EHRC funding for investigation into extent of pregnancy and maternity discrimination

- * **Options for future?** (see also Dunstan 2013)
 - * **Reduce size of hurdles** (e.g. repeal fees and re-introduce questionnaire) and/or provide helping hand over existing hurdles (e.g. re-invest in legal support/ advisory services/ representation). Otherwise... 'death by a thousand cuts' is imminent (Hepple 2013).
and
 - * **Re-focus attention** on the majority of women who do not even attempt the first hurdle and support them (and employers/line-managers/ HR) to resolve the dispute before litigation is needed – e.g. better information and investment in pre-litigation support (see new settlement service “YESS”) / procedures?

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See also

YESS (Your Employment Settlement Service) – www.yesslaw.org.uk