Maternity Rights In The UK: Light At The End Of The Tunnel?

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Abstract

Maternity rights in the UK have from the outset aroused controversy on account of their intricacy and failure to apply to all working women. This article charts the historical development of such rights and highlights in particular the influence of European Union law in widening their ambit. It also sets out the current statutory provisions and describes how case law has at the same time compounded the problems of complexity and attempted to construe the legislation in a purposive manner. The article concludes by noting recent legislative changes and assessing their potential to resolve the existing problems as well as their effect on bringing the UK into line with its European Union partners.

Introduction

The ability to avail oneself of the right to maternity leave is an important and fundamental right for thousands of working women. Yet despite the fact that it is now almost 25 years since maternity rights were first introduced in the United Kingdom (UK), it is only since 1993 that they have been of universal application within the paid workforce. In contrast to the system in other European Union (EU) countries, UK legislation as originally enacted restricted the right to maternity leave to those employees who fulfilled a service qualification of continuous employment and restricted further, or in some cases excluded completely, the rights of part-time workers.

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During the 1990s, however, the UK was forced to lift these restrictions by the application of EU law. In 1991 the unfavourable treatment of part-time workers was alleged to be contrary to the EU equal pay and equal treatment provisions, and the adoption of a new EU directive on pregnant workers in 1992 meant that the right to maternity leave could no longer be dependent on a period of continuous employment, although this was still possible for maternity pay.

Whilst these amendments to the law widened the ambit of the statutory rights, it could nevertheless be argued that exercise of the rights at a practical level became more difficult. This was because rather than implementing the directive by absorbing its requirements into the existing legal provisions, the UK Government chose to comply by enacting a new set of provisions for those women with insufficient service to tap into the current entitlements. An already complex system thus became even more complicated and confusing, in particular because in some respects the new system ran parallel to the old, and in others it overlapped with it. To make matters worse, case law, in its efforts to construe and make sense of the statutory provisions, has interwoven them with common law contractual principles.

The aim of this article is to trace the development of maternity rights in the UK and to describe the current provision of maternity leave both paid and unpaid. It will also examine recent case law concerning in particular the legal position of women who are unable to return at the end of their leave and note moves to construe the statutory provisions in a purposive way. In comparing the position of the UK relative to its EU partners in this field, the article will also discuss the provisions of the *Employment Relations Act 1999* which introduces the right to parental leave and proposes simplification of the legislation via Regulations. It concludes by assessing the extent to which the problems described may be unique to the UK and the potential of the proposed legislation to remedy them.

Historical development

One of the principal features of employment legislation in the UK in the 1970s was its focus on providing individual rights for employees. In 1971, for example, the *Industrial Relations Act* introduced unfair dismissal rights, and although the Act was repealed by the incoming Labour Government in 1974, the right not to be unfairly dismissed was re-enacted by the *Trade Union and Labour Relations Act 1974*. At this time the right was made dependent on a period of six months' continuous employment, although this period was subsequently lengthened on two occasions. The following year

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a whole raft of individual rights were given statutory force by the *Employment Protection Act 1975*: generally referred to as a 'floor' of rights, the intention was that they could be built on by collective bargaining or by individual negotiation, but they could not be reduced or excluded. Statutory maternity leave, for a period of up to eleven weeks before the birth and 29 weeks after, was one of the rights introduced by the legislation, although the right to reinstatement following leave and protection from unfair dismissal did not become operative until June 1976, and maternity pay regulations which provided for a statutory pay period of six weeks operated from April 1977. As in the case of unfair dismissal, the right to leave was conditional upon a requirement of continuous service – in this case, two years by the eleventh week before the week the baby was due. Women who worked fewer than 16 hours per week but more than eight could also qualify provided they had at least five years' service.

From the time the legislation was first suggested it had aroused controversy (noted in Daniel, 1980a). Employer groups criticised the provisions alleging that the need to hold open a woman's job for up to 40 weeks was a major source of inconvenience, disruption and, hence, cost. Furthermore it was claimed that the legislation had an even greater impact upon small firms and represented an obstacle to their expansion. There was also the predictable argument put forward that the legislation acted contrary to women's interests by making employers less likely to take on women who might subsequently leave to have children. Not surprisingly, women's groups took a different view; they compared the rights unfavourably with those of other EU countries, some of which had longer periods of paid leave and/or parental leave without a period of continuous employment in order to qualify for leave or the right to reinstate (Paoli, 1982), although it was not uncommon for there to be a qualifying period in order to be entitled to maternity pay. It was also felt that the introduction of maternity rights would not in itself promote women's employment and career prospects unless it was accompanied by improved child-care facilities and more flexible working arrangements.

The 1980 amendments

When the Conservative Government was returned to power in 1979 it was of the firmly held view that the law had swung too far in favour of employees' (and trade unions') rights, and that it should be amended to 'strike a balance' between the rights of employers and the rights of employees. In furtherance of its aims, its first measure was to increase the qualify-

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ing period for unfair dismissal by Order in Council from six months to one year, but it also proposed to amend the law in other respects giving particular attention to the needs of small businesses which it saw as crucial to the growth of the economy.

In consequence, the *Employment Act 1980* further increased the unfair dismissal qualifying period to two years for those employed by 'small' employers (20 or fewer employees), and exempted employers with six or fewer employees from the obligation to reinstate women at the end of their maternity leave if it could be shown that it was not reasonably practicable to offer the woman her original job or a suitable alternative. In addition, the Government demonstrated that it had taken on board more generally the grumbles of employers in relation to maternity rights by providing that an alternative job could be offered if it was not reasonably practicable to reinstate the woman in her old job, and by entitling employers to seek additional written confirmation (not earlier than 49 days after the birth) of a woman's intention to return to work at the end of her leave.

Interestingly, research carried out at the Policy Studies Institute shortly before the 1980 Act cast considerable doubt on the need for the changes proposed at that time. The first part of the research programme consisted of a random survey of women who had had babies in February or March 1979 (Daniel, 1980a). It showed that substantially more women reported that they had had the right to reinstatement (65 per cent) than satisfied the statutory requirements (54 per cent), that the median period of return was 15 weeks after the birth and that of all those who stopped work to have babies only 17 per cent gave notice of return but failed to do so. These results suggested that despite their grumbles employers were in fact allowing women to return to work who did not qualify for the right and that it would be unusual to have to keep a woman's job open for a period of 40 weeks. The research also brought into question the need for re-confirmation by a woman of her intention to return because only rarely would an employer be misled about this matter. Furthermore, concern for the 'plight' of small firms appeared to be misplaced because the survey showed that they were least likely to employ women who qualified for maternity rights, least likely to be subject to formal notice of return and least likely to have been subject to an unfulfilled notification.

The researchers' conclusion that it was not easy to see how maternity rights could have created much difficulty for employers was borne out by the results of the second survey, which sought the views of employers themselves (Daniel, 1980b). They found that only 18 per cent of employers reported having experienced problems in relation to maternity rights. Where

concerns were voiced there was hardly a mention of any administrative difficulties over maternity pay and issues surrounding reinstatement appeared to be general irritants as opposed to serious problems.

Part-timers' rights

Detrimental treatment of part-time workers by, for example, excluding them from pension schemes or selecting them for redundancy prior to full-timers, led increasingly to a focus on the issue of indirect sex discrimination, in that such treatment adversely impacted on female workers. In 1991 the UK Equal Opportunities Commission (EOC) took the unusual step of bringing a case in the High Court alleging that the longer qualifying period for unfair dismissal for part-time workers was contrary to Article 119 of the Treaty of Rome[1] (that is, 'equal pay for equal work', in that unfair dismissal compensation constituted 'pay') and the Equal Treatment Directive (16/207). The ultimate upholding of the claim by the House of Lords and the rejection of the Secretary of State's defence of 'justification' was regarded as a stunning victory in the UK and led to the complete removal of the hours qualification for all statutory individual rights, including the right to maternity leave (*R v Secretary of State for Employment, ex parte EOC* [1994] Industrial Relations Law Reports [IRLR] 493).

The 'Pregnant Workers Directive' and its implementation by the *Trade Union Reform and Employment Rights Act 1993*

In 1992 a directive on pregnant workers was adopted by the EU.[2] Throughout the 1980s the UK had consistently been able to block proposed directives such as those on atypical workers, the burden of proof in discrimination cases and parental leave because since they related to terms and conditions of employment they required unanimous voting by the Council of Ministers. However, as this Directive was regarded as a health and safety measure it required only qualified majority voting and ultimately the UK was faced with complying with its demands of a minimum of 14 weeks' leave, protection from dismissal, maternity pay at least at the level of statutory sick pay and protection from health and safety risks.

As noted earlier, the combination of hours of work and service requirements in the UK had meant that in 1979 only 54 per cent of women leaving to have a baby qualified for statutory maternity rights. Moreover, whilst the hours requirement was under threat by the time the Directive was adopted,

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the qualifying period for unfair dismissal had in 1986 been raised to two years even for those working for 'large' employers. Although dismissal on grounds of pregnancy was automatically unfair, employers could evade this if the woman's pregnancy made her unable to carry out her job and there was no suitable alternative available. Hence, substantial changes to the UK legislation were required in order to comply with the Directive.

Although the *Trade Union Reform and Employment Rights Act 1993* gave effect to the demands of the Directive by removing the qualifying period for unfair dismissal claims relating to pregnancy and disallowing a 'defence' that the woman was incapable of doing her job, it did not create a right to maternity leave and reinstatement applicable to all women. Instead it left intact the original scheme for those with two years' service and introduced a new 14-week period for those with under two years' service. Understandably this has given rise to a complicated system which was made even more confusing by the fact that the statutory maternity pay period by then lasted 18 weeks.[3] Thus, whilst maternity pay covered the entire 14-week period, those women entitled to the longer period of 11 weeks before the birth and 29 weeks after would be entitled to maternity pay for only 18 weeks of the 40-week leave period.

The current statutory provisions

The current provisions on maternity rights are contained in the *Employment Rights Act 1996* which consolidated earlier pieces of legislation including the 1993 Act. Section 73 of the Act describes the new 14-week leave, termed the 'maternity leave period' (MLP). In order to avail herself of the right to this leave a woman must notify her employer in writing of her pregnancy and the date the baby is due at least 21 days before her leave commences (or as soon as is reasonably practicable). The intended commencement date of the leave must also be communicated to the employer by this time, but need not be in writing. Although in general the start date lies in the hands of the employee, it may not commence earlier than the eleventh week before the week the baby is due,[4] and there is a compulsory period of two weeks following the birth during which the woman is prohibited from working.[5] Breach of the prohibition is a criminal offence on the part of the employer. During the MLP the woman's terms and conditions, with the exception of her remuneration,[6] are expressly maintained (so that, for example, holiday rights continue to accrue) and unless she proposes to return earlier than the end of the MLP she is not required to give notice to her employer. No mention is made in the legislation of the job to which the woman will return, although this is unsurprising given that her terms and conditions remain

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unaltered: she merely returns to her old job as would an employee absent through sickness.

Women with two years' service by the eleventh week before the baby is due are described by the legislation as having the 'right to return' up to 29 weeks after the birth as opposed to having the 'right' to a longer period of leave. Prior to going on leave, such women must not only comply with the notice requirements already described but must specifically tell their employer that they intend to return following their leave. As already indicated, the *Employment Act 1980* permitted the employer subsequently to seek written confirmation of the woman's intention to return, and currently this may be sought no earlier than 21 days before the end of the MLP. When seeking such confirmation, the employer must tell the woman that if she fails to respond in writing within 14 days she will lose the right to return. The final notification requirement, again introduced by the 1980 Act, is that the woman must give 21 days' notice of when she intends to return to work (the 'notified date of return').

Since much of the recent case law has concerned women unable to return on the due date by reason of sickness, it is also relevant to note what postponement of the return date is permitted. Section 82 of the Act provides that return from the longer leave may be postponed once, for a period of 28 days, by certification of sickness prior to the notified date of return. Curiously, there is no parallel provision in relation to the MLP, but section 99(3) provides that it is automatically unfair for an employer to dismiss a woman within the period of 28 days following the end of the MLP if she is absent through certified sickness and it is for reasons connected with her having given birth to a child.

The 1992 Directive did not prohibit a requirement of continuous service for the purposes of maternity pay and as noted earlier the UK is not alone amongst EU countries in having such a requirement. The current situation is that a woman will qualify for Statutory Maternity Pay only if she has six months' service by the *fifteenth* (not the eleventh!) week before the week the baby is due. Although Statutory Maternity Pay is paid by employers, most of it is recouped through national insurance contributions[7] and currently stands at 90 per cent of earnings for six weeks followed by a flat-rate of £59.95[8] per week (equal to the rate for Statutory Sick Pay) for 12 weeks. Those who do not qualify for Statutory Maternity Pay may be entitled to a flat-rate Maternity Allowance, paid for 18 weeks through the social security system, but even so, entitlement is dependent on the woman having paid at least 26 standard rate National Insurance contributions in the 66 weeks before the baby is born. Thus, whilst the UK's maternity entitlement may

at first glance seem generous in allowing up to 40 weeks' leave, it becomes less attractive compared to other EU countries when the length of *paid* leave and the level of entitlement is taken into account. Table 1 sets out paid maternity rights across the EU following implementation of the Directive.[9]

Table 1. Maternity Rights in the EU in 1994

Country	Maternity Leave (paid)	Cash Benefits[1]	Source
Austria	8 weeks before and 8 weeks after	100%	Social Security
Belgium	7 weeks before and 8 weeks after	82% for 30 days, 75% thereafter	Social Security
Denmark	4 weeks before and 4 weeks after	100% up to a ceiling	Social Security
Finland	105 days	80%	Social Security
France	6–8 weeks before and 10–18 weeks after	84% up to a ceiling	Social Security
Germany	6 weeks before and 8 weeks after	100%	Social Security: up to a ceiling employer pays difference
Greece	16 weeks	75%	Social Security
Ireland	14 weeks	70% up to a ceiling or fixed weekly rate	Social Security
Italy	2 months before and 3 months after	80%	Social Security
Luxembourg	16 weeks	100% up to a ceiling	Social Security
Netherlands	6 weeks before and 10 weeks after	100%	Social Security
Portugal	90 days	100%	Social Security
Spain	16 weeks	75%	Social Security
Sweden	6 weeks before and 6 weeks after	Flat-rate daily allowance	Social Security
UK	14–18 weeks	90% for 6 weeks and flat daily rate thereafter	Social Security

Note: 1. Cash benefits as a percentage or proportion of wages or insured earnings.
Source: International Labour Office (1994)

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So far as protection from dismissal is concerned, section 99 of the 1996 Act provides a comprehensive set of circumstances under which dismissal will be automatically unfair whether during pregnancy or maternity leave, or even following leave but for reasons in connection with having taken leave. Moreover, employers are now unable to dismiss fairly a pregnant woman because the job poses risks to her health and safety or because she is no longer capable of doing the job. Amendments to the *Management of Health and Safety at Work Regulations 1992* mean that employers must now carry out risk assessments in relation to pregnant workers or those who have just given birth or who are breastfeeding and case law has recently established that the duty to do so arises whenever an employer has female employees of child-bearing age (*Day v T Pickles Farms Ltd* [1999] IRLR 217). Once an employer is notified by a female employee that she is pregnant, there is an obligation on the employer to alter her working conditions so as to avoid any risk which exists. Should the employer be unable to remove the risk, the woman must be suspended on full pay, although she is entitled to be offered suitable alternative employment before being suspended.

Effects of recent case law

Whilst it is apparent from the above description of the statutory provisions that the system of maternity rights is extremely complex, recent case law will undoubtedly have made the picture less easy for employers and employees alike to comprehend. The problems which have arisen in the cases have tended to centre round three interconnecting issues: the status of the contract of employment of a woman who has the 'right to return' once the 14-week MLP has come to an end; whether a woman who is prevented by sickness from returning at the end of her leave period may claim unfair dismissal if her employer subsequently refuses to take her back; and the extent to which the *Sex Discrimination Act* may provide her with complementary or alternative rights (Earnshaw, 1998a).

As indicated earlier, the *Employment Rights Act* makes it clear that during the 14-week MLP a woman's contract of employment subsists. However, there is no statutory provision covering the remainder of the leave period for those employees who have the right to return up to 29 weeks after the birth. The significance of this point is that by virtue of section 96 of the Act, a woman who complies with the statutory notice requirements but is prevented by her employer from returning is 'deemed' to have been dismissed on her notified date of return. Should she fail to comply, for example

by omitting to notify her employer of her intention to return, or to confirm such intention when requested to do so, she loses the right to return and cannot rely on section 96. Suppose, however, that rather than wait until the end of the leave, her employer writes to her whilst she is on leave to tell her that as a result of her non-compliance with the statutory provisions she has no right to return and her employment has therefore terminated. Had her contract of employment subsisted up to that point, could she not argue that the letter was a letter of dismissal and that she could therefore claim unfair dismissal under the 'ordinary' unfair dismissal provisions rather than under section 96? Or to take another scenario, suppose the woman is prevented by sickness from returning at the end of her leave, postpones her return for a period of 28 days and subsequently writes to her employer stating that it will be at least another 28 days before she can return. Her employer replies that she can only postpone her return once and that regretfully it will not be possible for her to have her job back. If her contract had not only subsisted during the period of leave, but continued after the end of the leave, could she not similarly argue that her employer's letter was a letter of dismissal entitling her to make a tribunal claim?

Over the years, similar scenarios have in fact arisen for consideration by employment tribunals with varying degrees of acceptance of the employee's arguments depending on the particular facts, although the approach as to whether or not the contract should be presumed to exist has recently changed. Early cases appeared to favour a presumption that the contract of employment would continue even where a woman had failed to comply with the notice requirements at the outset. More recently however the Employment Appeal Tribunal (EAT) denied the existence of such a presumption, but ruled that the contract would continue if there was an express or implied agreement that it should do so. Consideration of three cases illustrates the circumstances in which such agreement may (or may not) implicitly arise.

In *Kelly v Liverpool Maritime Terminals Ltd* ([1988] IRLR 310) the employee's pregnancy exacerbated a pre-existing back condition. At the end of her leave period she submitted a series of medical certificates the first of which was accompanied by a letter stating 'I am unable to return to work' and 'it will be several months or more before I can consider my return'. Mrs Kelly received no response to the first three sick notes, but ten days after receiving the fourth, her manager wrote to her to 'regretfully inform you that you will not be able to resume your employment with us'. It was argued by the applicant that by her letter she was in effect requesting sick leave and that her employer's failure to respond to the continued

sending in of sick notes constituted an implied agreement that her employment continued after the period of maternity leave expired. In the view of the Court of Appeal however, such an agreement could not be constituted by the failure to respond.

In the case of *Kwik Save Stores v Greaves* ([1997] IRLR 268) the argument was less clear-cut. Once again the applicant was unable to return on the due date (14 August 1994) and submitted a series of sick notes covering the period up to 7 November 1994. She also attended a meeting at the store with her manager on 3 November to discuss her medical condition, during which it was agreed she would attend a medical examination. Later the same day she was contacted by her manager once again and told that there was no point in going ahead with the examination because, having failed to exercise the right to return, her contract had terminated. In this instance, the EAT did not reject the applicant's argument but remitted the case to the tribunal to determine whether in the circumstances, particularly the meeting with the area manager, the tribunal could infer that Mrs Greaves' contract continued until she was informed that it was being terminated.

Finally, in the case of *Lewis Woolf Griptight v Corfield* (Case No 1073/96, EAT 23.5.97), the applicant not only submitted a sick note when she was unable to return (on 18 August 1995) but also enquired in the accompanying letter whether she was entitled to Statutory Sick Pay. Subsequently, there was correspondence between Ms Corfield and her employers about this and on 25 August 1995 the Chief Executive wrote to her outlining the details of the job Ms Corfield would have 'at the end of [her] current sickness'. However, on 18 September, when Ms Corfield notified her employers that she would be off for a further six weeks, she was told that she could postpone her return to work only once, for a period of four weeks, and having been absent for longer than that, her employment had come to an end. In these circumstances the EAT was prepared to find that Ms Corfield's letter amounted to notification that she was taking sick leave, that this was implicitly agreed to by her employers and that therefore her contract was subsisting on 18 September.

Whilst the search for the subsistence of the contract of employment is unobjectionable in principle and may provide a woman with a remedy which would otherwise be unavailable to her, these three cases show quite clearly that such an approach leads to the undesirable outcome that slight shifts in factual situations, or the content of correspondence or conversations, can serve to provide or deny the right to claim unfair dismissal. They also suggest that employers should behave in a way which would not

normally be regarded as conducive to the furtherance of harmonious working relationships because presumably they should refrain from having conversations with employees absent on maternity leave and should in no circumstances reply to letters enclosing medical certificates or requesting information about sick pay. Fortunately, the need to search for implicit agreement as to the existence of the contract in such cases should not in future be necessary following a recent decision of the Court of Appeal on the question of what is meant by 'exercising' the right to return.

Until the Court of Appeal's ruling, case law had established that the 'right to return' could be exercised by nothing less than a bodily return to actual working. For example, in the *Kelly* case already discussed, the Court of Appeal felt unable to construe the applicant's letter and submission of sick notes as some sort of 'notional' return to work, and its approach was followed in the case of *Crees v Royal London Mutual Insurance Society Ltd* ([1997] IRLR 85) which, on similar facts, rejected the argument that a woman 'legally' returned to work when she gave notice of her intention to return. It had also been held insufficient to attend on the due date merely to hand in a sick note.[10] Such decisions prompted speculation as to whether it would be sufficient if the individual in question were to work for an hour and then return home, or to sit at her desk but do very little in the way of productive work (Earnshaw, 1998b).

It has now become unnecessary to answer such questions as a result of the combined judgment given by the Court of Appeal following an appeal from the EAT in the *Crees* and the *Kwik Save* case ([1998] IRLR 245). In upholding the applicants' appeal the Court of Appeal pointed out that section 82 of the *Employment Rights Act* provides that a woman 'shall exercise the right [to return to work] by giving written notice to her employer' of her notified date of return. In other words, the right to return is exercised not by a return to work, but by the giving of the requisite notice.

Although such a purposive construction of the statute was a welcome step forward in providing greater protection for women who are prevented by illness from returning on the due date, it does raise a number of issues. First, whilst it assists those women who have the requisite service to have the 'right to return', the decision has no application to women with less than two years' service because they merely have a right to a 14-week period of leave as opposed to a right to return and hence there is no comparable statutory mechanism for 'exercising' their return. Second, it appears to make the right to postpone the date of return for 28 days unnecessary: a woman who gives notice of her intention to return gains nothing by availing herself of the four-week extension because, as the Court of Appeal sees it,

she has already exercised her statutory right. The decision also leaves employers in something of a quandary as to how to deal with the situation at a practical level in that it is unclear at present whether they will be required to keep the employee on the books indefinitely or whether they will be able to dismiss her fairly by treating her like any other employee who is absent through sickness.

Until a body of case-law develops around the decision there are some aspects which will remain the subject of speculation. There has now, however, been one case in which the Court of Appeal has followed its previous ruling and which must send a warning shot to employers faced with a similar situation. The Court held that the employers' reason for 'dismissal', namely that they believed they were not obliged to hold the woman's job open for her, was wrong, and that such a wrong reason for dismissal could not be other than unfair. Whilst it is difficult to argue with this reasoning, it seems likely to be the case that a substantial number of employers will fall into the same trap until the ramifications of the case become more widely known. An additional consequence of the contract having revived by the giving of notice was that the applicant was also found to have been wrongfully[11] dismissed because she had not exhausted her contractual entitlement to sick pay when her employment was terminated.

Whilst the approach of the Court of Appeal has relieved employment tribunals from the burden of having to construct implied agreement as to the continuation/revival of the contract of employment in cases where a woman with the right to return has given the requisite notice, its existence or otherwise may still have to be determined in other situations such as failure to return to work at the end of the 14-week MLP. For example, the EAT found in a recent case that the woman's contract had remained in existence until she had been 'dismissed' because her employers had continued to pay her *wages* (as opposed to Statutory Maternity Pay) beyond the 14-week period. More alarmingly from the employer's point of view, the EAT was of the opinion that because the applicant was suffering from a pregnancy-related illness, her dismissal was 'on grounds of pregnancy or for a reason connected with pregnancy' within section 99(1)(a) of the *Employment Rights Act* and hence automatically unfair. Because such dismissal is unfair regardless of 'reasonableness', the logical conclusion is that an employer in this situation will be unable to terminate the woman's contract fairly, however long she may be indisposed.

The continuance or otherwise of the contract has also been critical to claims of sex discrimination in these circumstances, since the UK *Sex Discrimination Act* has been held to apply to job applicants and to individu-

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als who are employed, but not to ex-employees.[12] Even so, however, there has been some inconsistency in approach in respect of discrimination claims. Thus, in the case discussed above, the applicant was held by the EAT to have been discriminated against on grounds of sex without regard to the treatment of a comparable man, in that she was suffering from a pregnancy-related illness from which a man could not suffer. The more generally accepted approach, however, is that once maternity leave has ended, the treatment of the woman in question must be compared with that of a similarly-placed man. On this basis a claim of sex discrimination has succeeded where before 'dismissing' the employee, the employers made no attempt to obtain medical evidence as to the likelihood of her returning to work and refused to allow her paid sick leave to which she was contractually entitled.

Amendments made by the *Employment Relations Act*

Changes to existing maternity rights

Whilst the full extent of the changes will not be known until the draft Regulations accompanying the *Employment Relations Act* are implemented, some can be predicted with a degree of certainty. Most significantly, and following on from the reduction of the qualifying period for unfair dismissal from two years to one (for dismissals on or after 1 June 1999), the Act provides that the right to return up to 29 weeks after the birth will henceforth be open to women with one year's service by the eleventh week before the baby is due (this longer period to be known in future as 'additional leave'). It is expressly provided that the contract of employment will continue during the additional leave period. Parliament has also taken the sensible step of extending the MLP (henceforth to be referred to as 'ordinary leave') so as to coincide with the 18-week period during which Statutory Maternity Pay is available.

The Act has also given power to the Secretary of State to make amendments to the notice requirements by way of the Regulations already referred to. It seems likely that not only will the notice requirements be simplified, but that failure to comply with them will result in a less draconian situation than loss of the right to take leave or return after it. The draft Regulations also suggest that during additional maternity leave, the only contractual terms and conditions which will be maintained will be the implied duty of good faith and the duty of mutual trust and confidence.

Table 2. Parental Leave Provisions in EU Countries, 1994-95

Country	Duration		Transferability	Benefits		Conditions
	Maximum	Boundaries		Rate	Period	
a) paid leave						
Austria	24 months	Until child is 4 years	Family	Flat-rate[a]	104 weeks	No
Belgium[b]	None	None	Individual	Flat-rate with higher payment for 2 and 3	260 weeks	12 months of service
Denmark[c]	10 wks + 3-9 mths[d]	Until child is 9 years	Family Individual	Flat-rate: 80% of unemployment benefits	10 weeks 20 weeks	No
Italy	6 months	Following maternity leave	Family	Income-related: 30% of earnings	26 weeks	No
Germany	36 months	Until child is 3 years	Family	Income related	Until child is 3	4 weeks of service
France	36 months	Until child is 3 years	Family	Flat-rate, 2nd child income-related: 66% Flat-rate: income related: 80% (10 mths) and 90% (2 mths); Flat-rate (3 mths)	Until child is 3	12 months of service
Finland[e]	6 months until child is 3 years	Following maternity leave Until child is 3 years	Family	[Figures unavailable]	20 weeks	No
Sweden	18 months	Until child is 3 years	Family	[Figures unavailable]	65 weeks	6 months of service[f]
b) unpaid leave						
Netherlands[g]	6 months part-time	Until child is 4 years	Individual	Unpaid		12 months of service
Spain	36 months		Family	Unpaid		No
Portugal	6 months Max: 24 months[h]	Following maternity	Family	Unpaid		12 months of service
Greece	3 months	Until child is 2½ years	Individual	Unpaid		12 months of service
c) none						
Luxembourg	None					
UK	None					
Ireland	None					

Notes:
a. Higher for single parents of low income families.
b. No parental leave, but 'career break'.
c. Leave can also be used for other reasons, such as training; workers taking leave are not guaranteed their jobs.
d. Only with employer's agreement.
e. Basic parental leave and extended child-care leave.
f. Or 12 months in past 2 years.
g. Part-time only
h. Maximum of 24 months to be taken in special circumstances.

Source: Rubery and Fagan (1998)

Implementation of the Parental Leave Directive

The previous Conservative Government made no secret of its opposition to the social legislation proposed by the EU during the 1980s and at Maastricht in 1992 it obtained an opt-out to the Social Protocol of the Treaty. Subsequently, the Parental Leave Directive was adopted by the other Member States but by reason of the opt-out there was no obligation for it to be implemented in the UK. However, when the Labour Government took office in 1996, it stated its intention to sign up to the Social Protocol, and the provisions of the *Employment Relations Act* on parental leave and time off for domestic incidents are a manifestation of its commitment. The principal requirement of the Directive is for a period of three months' leave to enable a parent to care for a child; the leave may be paid or unpaid and the entitlement may be conditional upon a service qualification. As can be seen from Table 2, when the Directive was adopted in 1995 it had little impact on most European countries: only Luxembourg, Ireland and the UK did not meet its requirements.

Whilst the Government is committed to fulfilling its EU obligation by means of Regulations, its present intention is to offer no more than the minimum requirement of three months' leave and not to provide for the leave to be paid. There is to be a service qualification of 12 months' continuous employment and the Regulations propose that the maximum age of a child in respect of whom parental leave may be taken should be five years (that is, below the upper limit of eight years specified in the Directive). The UK will therefore offer significantly less generous provisions than other EU countries, many of which (as can be seen from Table 2) provide for a period of leave substantially longer than three months, a majority of which provide for paid leave, and some of which have no requirement of continuous service.

Assessment

There is no doubt that the UK is moving in the right direction so far as the problem of reconciling work and family life is concerned. Whether it is going far enough and whether its current system together with proposals for the future are satisfactory is another question.

As far back as 1983 the Court of Appeal was moved to comment that:

> [The judge in the EAT] described the statutory provisions with which we are concerned as being of 'inordinate complexity exceeding the worst excesses of a taxing statute' and observed that this was especially regrettable bearing in mind that they are regulating the everyday rights

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> of ordinary employers and employees. We agree with these observations. ([1983] ICR 534)

It should be remembered also that these comments were made before there were two sets of maternity leave provisions and before the body of case law discussed in this article. One suspects that the way in which the complex statutory rules have become increasingly interwoven with common law contractual principles means that not only will the majority of women who wish to exercise their right to maternity leave and maternity pay be unlikely to understand how the system operates, but also that neither will many employers. In the absence of research one can only speculate as to the numbers of women who fail to qualify for maternity leave or lose the right to return through ignorance of, or confusion over their rights. What seems indisputable is that in many instances they will face great difficulty in arguing their cases in an employment tribunal without legal representation or, at the very least, legal advice. Although the EOC can in theory provide this sort of assistance, it operates on a very limited budget, and since legal aid is not available in employment tribunals, there will inevitably be many claims in which the women themselves will bear the cost of any legal representation.

It is very much the norm in the UK for statutory provisions to be fleshed out by case law and there is little that can be done to prevent common law principles from creeping in. It should also be remembered that, as discussed earlier, the application of the common law of contract has provided some women with a remedy which the statutory scheme would have denied them. Nevertheless, the present system is clearly unsatisfactory, and there are aspects of it which could be remedied. The notice requirements are a prime example of unnecessary complication and it is to be hoped that they will be dramatically simplified in the promised Regulations. Evidence that the system need not require such formality as the UK demands is demonstrated by looking to Denmark, France, Greece and Italy – in which countries a woman automatically gains protection of maternity leave provisions simply by becoming pregnant, regardless of how and when the employer learns of it. In Finland, a woman is required to notify her employer only if she wishes to take leave more than 30 days before the baby is expected (ILO, 1998).

Given the problems caused by uncertainty as to the status of the contract of employment during the longer period of leave it is encouraging that the Government proposes maintenance of the contract of employment throughout the leave. However, since it is proposed that only terms relating to the duty of good faith, and to mutual trust and confidence will be maintained during additional leave, it remains possible to envisage the scenario

whereby a woman who has the right to return up to 29 weeks after the birth is entitled to keep her company car for the first 14 weeks of her leave, but must return it to her employer for the remainder of the period. Nevertheless, maintenance of the contract does make way for the laudable suggestion that in future, a woman unable to return at the end of her leave becasue of illness should be treated like any other employee absent for ill-health reasons.

Without doubt, the most significant aspect of the proposals is the extension of statutory rights: the lengthening of the shorter period of leave to 18 weeks, the shortening of the qualifying period for entitlement to the longer leave and the introduction of parental leave are clearly moves which are to be welcomed and should have a substantial impact. Nevertheless, it is perhaps regrettable that the Government has failed to grasp the opportunity to harmonise the two sets of maternity leave provisions so as to produce one system applicable to all. It is also predictable that the present intention not to provide paid parental leave will signficantly affect take-up rates: statistics show that the highest take-up rates in the EU are to be found in the Nordic countries in which an allowance is payable which substantially compensates for loss of wages (OECD, 1995, cited in ILO, 1997). There may indeed be light at the end of the tunnel but the UK is still emerging only slowly from the shadows.

Notes

1 Since the Treaty of Amsterdam, Article 119 has become Article 141.
2 Directive 92/85 on the 'introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding'.
3 Increased from the original six week period.
4 If the woman is absent from work with a pregnancy-related illness within six weeks of the birth, the employer can choose to trigger the commencement of the MLP.
5 This may entail extension of the leave period if the woman's baby is born later than expected.
6 The term 'remuneration' was chosen specifically to limit it to monetary aspects, the work 'pay' having been incrementally widened by EU case law to include, for example, travel concessions.
7 Employers recover 92 per cent of Statutory Maternity Pay, although 'small' employers who pay £20,000 or less in gross National Insurance Contributions recover 106.5 per cent.
8 Equivalent to around $150 Australian.
9 In some EU countries maternity leave is only one part of paid parental leave – see Table 2.

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10 Note that by so doing the applicant could not avail herself of the right to postpone her date of return for four weeks, because this right is contingent upon the submission of a medical certificate *prior* to the notified date of return.

11 That is, in breach of contract.

12 This construction of the *Sex Discrimination Act* has now been held to be in breach of EU law, following a case in which an ex-employee claimed to have been victimised contrary to the Act when her employer refused to provide her with a reference.

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