

XpertHR Weekly Podcast

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Susan Dennehy:

Hello and welcome to this week's XpertHR Weekly with me, Susan Dennehy. This week we look at a survey by the government and the Equality and Human Rights Commission on pregnancy and discrimination at work.

With me this week to discuss the findings of the survey is employment law editor, Felicity Alexander. Thank you very much for joining me this week, Felicity.

It's been 40 years since the introduction of the sex discrimination legislation. According to the survey, 28% of employers thought protections in place for pregnancy or maternity leave employees were unreasonable. One of the headline findings from the survey was that around one in nine of mothers surveyed reported that they were either dismissed or made compulsorily redundant where others in their workplace were not.

The survey said that if scaled up, it would mean that 54,000 mothers a year could be treated in this way. The report highlighted lack of awareness by some employers. The law in this area is notoriously complicated. Can we start, Felicity, by looking at what special protections are in place for pregnant employees or employees on maternity leave against dismissal and redundancy? [0:01:05.9]

Felicity Alexander:

Pregnant employees and employees on maternity leave, including employees now absent on the shared parental leave, do have protection against dismissal and redundancy for reasons related to pregnancy and paternity. Under the Equality Act 2010, there is a right not to be discriminated against because of pregnancy or maternity leave and discrimination on these grounds could also be unlawful sex discrimination under the Equality Act.

A dismissal is automatically unfair where the reason or principle reason for the dismissal is pregnancy, childbirth or maternity, including absence on shared parental leave. For automatically unfair dismissals, there is no minimum service requirement.

Susan Dennehy:

Well clearly an employer can dismiss a pregnant employee or an employee on maternity leave or make that employee redundant. So how does an employer go about dismissing an employee with these protections? [0:01:51.9]

Felicity Alexander:

The reason for the dismissal must be one of the potentially fair reasons and unconnected with the pregnancy. The potentially fair reasons include reasons relating to the capability or qualifications

of the employee for performing her job, her conduct or redundancy. The employer must follow a fair procedure.

Susan Dennehy: And are there any other considerations that the employer needs to be aware of? [0:02:13:4.]

Felicity Alexander: If the employer is taking disciplinary action against an employee that may lead to dismissal, the employer will need to arrange a venue and a time that the employee can attend, taking into account any issues related to the pregnancy or care of the new baby. If the employer does not take these considerations into account, the employee could have a claim for unlawful discrimination.

A disciplinary hearing, if it has not been held before the employee goes on maternity leave, cannot be held during the compulsory maternity period, that is within the first two weeks after birth or first four weeks in the case of a factory worker.

If the employee is dismissed while pregnant or on maternity leave, the employer must automatically provide her with a written statement explaining the reasons of her dismissal, irrespective of her length of service.

Susan Dennehy: Yes, normally you need to have two years' service where the employment began after 6th April 2012 and make a request for the reasons for dismissal, but not in that case.

It can cause some real problems for the employer, whether or not to wait for the pregnant employee to return before disciplining her, but there can be problems if the employer delays, can't there? [0:03:13.7]

Felicity Alexander: Yes, ideally it's best for the employer not to delay. It may weaken the employer's case and the employer should really get on with it and progress the disciplinary procedure. The employer must consider the health of the mother and her baby and must also make sure that the mother can make arrangements for the care of her baby.

Susan Dennehy: And what about dismissing for a redundancy? What does an employer have to do in that situation? [0:03:35.8]

Felicity Alexander: A pregnant employee or an employee on maternity leave must not be selected for redundancy because of pregnancy or maternity. This would be unlawful under the Equality Act and would also be an automatically unfair dismissal.

Susan Dennehy: So what should the employer do if there is a genuine redundancy situation? What sort of things are employers getting wrong? [0:03:53.9]

Felicity Alexander: Well the employer should follow the prescribed steps as for any redundancy process but with two key differences. Firstly the employer should ensure that the consultation and selection

process does not disadvantage or discriminate against the employee because of her pregnancy or absence on maternity leave.

In practice, this means that the employer may need to make special arrangements for notifying the employee and including her in the consultation process.

In addition, factors that arise specifically because of the pregnancy or maternity leave, such as the employee's absence for these reasons, must not be taken into account where one of the selection criteria for redundancy is an employee's absence record.

The employer may take into account other absence, as not to do so could effectively discriminate against male employees on the grounds of sex.

Susan Dennehy:

Yes, employers can get themselves into hot water, can't they, trying not to discriminate against a pregnant woman and end up discriminating against the man instead.

You said there are two key differences. What's the second key difference? [0:04:50.8]

Felicity Alexander:

Where an employee is made redundant during either her ordinary maternity leave or her additional maternity leave, the employer must identify and offer her suitable alternative employment under a new contract that begins on the day immediately following the day on which her previous contract came to an end. The new contract must be both suitable in relation to the employee and appropriate for her to do in the circumstances.

Susan Dennehy:

And when you say 'suitable' and 'appropriate', what does that actually mean, Felicity? [0:05:17.0]

Felicity Alexander:

The terms and conditions as to the capacity and place in which she is to be employed and the other terms and conditions of the employment must not be substantially less favourable to her than if she had continued to be employed under her previous contract.

Susan Dennehy:

So that's quite a lot to think about.

Felicity Alexander:

Yes. And also the employer must not require the employee to apply for or be interviewed for the vacancy. She must just be offered the vacancy.

Susan Dennehy:

So this is giving priority to employees on ordinary maternity leave or additional maternity leave to be offered vacancies before other employees who are not on maternity leave. What about an employee taking shared parental leave? Is that the same? [0:05:52.9]

Felicity Alexander:

The same priority and rules apply to an employee taking shared parental leave, which can be the mother or father, where the mother curtails her statutory maternity leave.

- Susan Dennehy: Okay, well moving on then, two further key findings from the government survey is that one in five mothers said they had experienced harassment or negative comments related to pregnancy or flexible working from their employer and even from their work colleagues. One in ten mothers, 10% of mothers, said that employers discouraged them from attending antenatal appointments. Can you remind us, what special rights are given to pregnant employees and mothers returning from maternity leave that could give rise to these kinds of issues? [0:06:27.1]
- Felicity Alexander: Pregnant employees are entitled to paid time off for antenatal care. Except for the first appointment during a pregnancy, attendance at the appointment must be recommended by a registered medical practitioner, midwife or nurse, so the employee does not have unlimited time off.
- Susan Dennehy: And last year the government introduced new rights in this area. It's not just mothers now, is it that enjoy the right to time off for antenatal care? [0:06:47.9]
- Felicity Alexander: That's right. From the 1st October 2014, the partner of the pregnant woman may have unpaid time off on two occasions to accompany her to an antenatal appointment. But an employment tribunal will not uphold an employee's complaint against the employer for refusing to permit an employee to have time off if the employer's refusal is reasonable.
- Susan Dennehy: So these rights are not unlimited. Shall we look next at flexible working? Realistically employers should expect a request from returning mothers to work flexibly. Sometimes it's just a small adjustment but sometimes it can be quite a big reduction in hours or working from home. The survey found that nearly six in ten, 58%, of employers with a pregnancy in the last three years in their workplace had received requests for flexible working from pregnant employees or those returning from maternity leave. The majority of employers in the survey said they granted all the requests they received. Nearly seven in ten, 68%, of mothers said that they had made a request for one or more type of flexible in working. In most cases requests were approved straight away or were approved after some discussion with their employer. What should employers be aware of, Felicity, when looking at flexible working requests? [0:07:48.9]
- Felicity Alexander: Well since June 2014, the right to request flexible working applies to all employees with 26 weeks' qualifying service. Employers must deal with all requests to work flexibly in a reasonable manner and can only reject a request on one of the specified grounds. These grounds include the burden of additional cost for the employer, the employer's inability to reorganise work among existing staff or recruit additional staff. So the employer's given quite wide reasons for refusing a request.
- Susan Dennehy: What's the situation if the employer really doesn't feel they can accommodate the request, for instance if the employee would

want a job share but they need client contact and it's a crucial element of their job? Have you got any practical tips for employers? [0:08:29.7]

Felicity Alexander:

For some jobs it can be difficult for the employer to accommodate a request to work flexibly. The employer needs to be able to justify a refusal, so employers should keep a good record and make sure that they could justify the reasons for their refusal if the employee brings a claim to an employment tribunal.

An employment tribunal could ask an employer, if the tribunal considers the employee's request to be unreasonable, to reconsider the request and to award compensation of up to £3,800. But more importantly, the employer risks a sex discrimination claim as well as a constructive dismissal claim.

Susan Dennehy:

Under the flexible working provisions, the compensation is capped, as you say, at eight weeks at the statutory maximum of a weeks' pay, which would be a maximum of £3,800, but it can be a lot more, as you say Felicity, if the claim were for discrimination or a constructive dismissal claim.

One area employers can be concerned about is what to do with competing requests. So have you got any practical guidance, Felicity, that you can offer employers in that situation? [0:09:29.6]

Felicity Alexander:

Yes, requests should be dealt with in time order. Also an employer could, where there is a difficult, speak to employees already with flexible arrangements to see if they can vary their arrangements. Their children may be older, for example, and they could perhaps accommodate some flexibility.

Susan Dennehy:

And would it help employers to have a flexible working policy in place? [0:09:49.1]

Felicity Alexander:

Yes, definitely. If the employer has a flexible working policy in place, this should help ensure that all employees are treated fairly and consistently in respect of flexible working requests.

Susan Dennehy:

Another topic investigated by the survey was communication between employers and employees on maternity leave. The most common problem cited by one in four mothers was too little contact with their employers. This can be a tricky area for employers, knowing how much contact to have with the employee. How could an employer manage this so as not to either overburden an employee or make her feel that she is not kept in touch with her workplace? Mothers often feel forgotten, don't they, and sometimes employers do forget to notify them of promotions or training opportunities, or even redundancies that have taken place while they've been away, they can come back to a whole new office in some circumstances. What things do you think employers should be doing? [0:10:33.5]

Felicity Alexander:

It's a really good idea for the employee's line manager to discuss before the employee goes on maternity leave how much contact

she would like from the employer and what form it should take. For example, the employee may wish to be included on certain email distribution lists that relate to news updates and be invited to social events. Both the employer and employee can agree that while she is on maternity leave she can come back to work for up to 10 days for the whole or part of a day to undertake training or work. The employer can agree to pay the employee for attending work in line with any contractual arrangement, and at the very least at the statutory maternity pay rate that the employee is entitled to receive for that pay week. These days are known as 'keeping in touch' or 'KIT' days.

Susan Dennehy:

And what about employees taking shared parental leave? Do they enjoy the same rights? [0:11:21.2]

Felicity Alexander:

There is similar provision for an employee on shared parental leave, to carry out up to 20 days' work for his or her employer without bringing shared parental leave to an end. These days, which are known as 'shared parental leave in touch' or 'SPLIT' days are in addition to the 10 'keeping in touch' or 'KIT' days available to an employee during maternity leave. SPLIT days worked by an employee do not extend the total duration of any period of shared parental leave.

Susan Dennehy:

One of the positive findings of the survey was that mothers found 80% of employers supportive, so that's an overwhelming majority of employers, isn't it? Thanks very much, Felicity. That wraps up our discussion on the survey for this week. There are more resources on our website, including model redundancy letters in our 'policies and documents' section, including for employees on shared parental leave, and there's a model flexible working policy that Felicity mentioned earlier.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then it's goodbye from us.