important, extending and strengthening the employment rights of women workers in the area of maternity must be a priority for the labour movement and all governments.

See below for contact information, including Free Call numbers, for all the Centres. Contact the Centre in your State to find out more about, or to assist with, its work.

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WWC CONTACT DETAILS

NSW
tel (02) 9689 2233
free call 1800 062 166

QUEENSLAND
tel (07) 3224 6115
free call 1800 621 458

ADELAIDE
tel (08) 8267 4000
free call 1800 652 697

TASMANIA
tel (002) 34 7007
free call 1800 644 589

NORTHERN TERRITORY
tel (08) 8981 0655
free call 1800 817 056

Failing to deliver

CAMILLA PALMER examines the impact of European law on maternity rights in Britain.

Good maternity rights, high quality childcare and a flexible working environment which enables women to combine work with family responsibilities are the key to women's equal participation in the labour market. The UK has failed on all scores. The prediction that by the next century 20% of women will choose to remain childless, in order to pursue a career, is a damning indictment. Despite the increasing number of women entering and staying in the labour market, there is still a glass ceiling, which few women break through, and full-time women employees receive only 72% of men's gross weekly earnings.

Maternity leave and pay

Prior to 1994 women who had worked for their employer for less than two years were not entitled to maternity leave. The evidence shows that many were simply dismissed. The European 'Pregnant Workers Directive' forced a reluctant UK Government to introduce 14 weeks maternity leave for all women, whether permanent or temporary employees, irrespective of the number of hours they work or how long they have worked for the employer.[1] In addition, women who have worked for their employer for two years are entitled to 'extended maternity absence' — that is, they can return to work up to 29 weeks after the birth of a baby.[2]

The reality is that many women cannot afford to take the longer period. Statutory maternity pay (SMP), which is payable to employees earning more than $122 a week, is payable for 18 weeks @ 90% of pay for the first six weeks and a flat rate of $109 a week for the following 12 weeks. (This is paid by the employer, but 90% is refunded by the Government.) Thus, women who are only entitled to 14 weeks leave must return to work and will lose four weeks SMP. This is just one of the anomalies in the system. Another is the different treatment of women during their 14-week maternity *leave* period and the extended maternity *absence*.

During maternity leave women are entitled to the benefit of the terms and conditions of their contract *except* for 'remuneration'. Remuneration is the woman's basic pay. All other benefits, such as mortgage subsidy, insurance, employer pension contributions, and holiday leave continue to be received or accrue during the 14 weeks.

What happens at the end of the 14 weeks, during the extended 'maternity absence' period? The Employment Appeal Tribunal (EAT) clearly does not know. Two EAT decisions say that the contract continues, but are not clear about whether the *terms and conditions* of the contract continue.[3] The third decision suggests that the contract comes to an end — unless and until the woman exercises her right to return to work.[4]

Dismissal and discrimination

It is now *automatically unfair* to dismiss a woman for any reason connected with her pregnancy, childbirth or maternity leave. The employer has no defence.[5] This protection was introduced in 1994 at the same time as Carole Webb was arguing before the European Court of Justice (ECJ) that it was *discrimination* to dismiss her because she was pregnant.[6]

It took eight years for Carole Webb to win her case. All the British courts were against her. The ECJ, to which the case was referred by the House of Lords, held that it *was* unlawful to treat a woman less favourably because she was pregnant. It was not necessary to compare her to a man in a similar situation (the sick man comparator). Nor was it possible to argue that the discrimination was *not* because the woman was pregnant but because of the *consequences* of her pregnancy — that is, she was not available to work.

Webb established that any less favourable treatment of a woman because she is pregnant, has had a baby or has taken maternity leave is unlawful discrimination. This would include a failure to recruit, promote or train a woman, denial of any benefit or dismissal. A discrimination claim should always be brought (as well as an unfair dismissal claim) because, unlike unfair dismissal, compensation can be awarded for injury to feelings and there is no limit to the amount of compensation.

Other maternity rights

All employees are entitled to *paid* time off for ante-natal care, which includes relaxation classes. In addition, pregnant women, new and breastfeeding mothers are entitled to protection from health and safety risks. Employers must carry out an assessment of the risks and where there is a risk, the employer must either alter the working conditions to remove the risk, give the woman available suitable alternative work, or if there is no such work, suspend her on full pay.

A 'right' to return to work part time or as a job share?

Many women want to return to work part-time. Refusal to allow a woman to work part-time may be indirect discrimination. Indirect discrimination is where there is a 'requirement' or 'condition' (for example, to work full-time), which a considerably smaller proportion of women than men can comply with (90% of part-timers are women), which the employer cannot justify and which is to the woman's disadvantage because she cannot comply with it. Women with children find it harder to work full-time and it is not enough to say they *could* do so by employing a childminder.

The main issue is whether the requirement to work full-time is necessary. Employers often argue it is administratively difficult to have part-timers, or they are inconvenient

or the job is one which can only be done by a full-timer. Courts, and particularly the ECJ, are increasingly looking for proof to support such bald assertions.[7] Successful claims can lead to substantial damages — $70,000 in two cases.

Conclusion

European law has led to improved maternity rights in the UK and protection against discrimination (particularly in relation to part-timers).

There is still a long way to go. Maternity leave is too short and the pay too little. Despite evidence that greater maternity rights benefits both employees and employers (because of the reduced turnover of staff), this is unlikely to persuade a government committed to a free market economy.

Enforcing employment rights is difficult; there is no legal aid and the law is complex. As one senior judge said of the maternity provisions, 'they are of inordinate complexity exceeding the worst excesses of a taxing statute' which 'is especially regrettable bearing in mind that they regulate the everyday right of ordinary employers and employees'. He then said that 'even with the skilled assistance of experienced advocates he had no confidence that he correctly understood them'. What hope for us lesser mortals?

Camilla Palmer is a solicitor in London and an expert in discrimination and employment law.

References

1. Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
2. *Employment Protection (Consolidation) Act (EPCA) 1978*, ss.39-44, as amended by the *Trade Union Reform and Employment Rights Act Act 1993*. This was also the position before 1994.
3. *Institute of the Motor Industry v Harvey* 1992 ICR 470 and *Hilton International Hotels (UK) Ltd v Kaissi* 1994 ICR 578 EAT.
4. *Crouch v Kidsons Impey* [1996] IRLR 79.
5. *EPCA* 1978, s.60, as amended.
6. *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482 ECJ and *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] IRLR 645 HL. At the time Carole Webb was dismissed protection from dismissal referred to in ref.5 above did not exist.
7. These principles apply to other requirements to work particular hours, such as anti-social hours, excessively long hours, unplanned overtime.

POLICING

'Clearly this is not a breath freshener'!

CHRIS RICHARDS examines the safety of police use of capsicum spray.

When ex-FBI Special Agent Thomas Ward awaited sentence after pleading guilty to receiving a $57,000 illegal 'gift' from a leading United States capsicum spray manufacturer, the safety of capsicum spray was also standing trial. Ward got two months imprisonment in May 1996. The verdict on the safety of the spray for the hundreds of Victorians who will be sprayed with it, has yet to be delivered.

Ward's late 1980s research on capsicum spray found it to be safe and effective. His research contains the only comprehensive research on human subjects exposed to capsicum spray, and includes the results of spray testing on nearly 900 FBI Academy trainees and police officers.

Ward's acceptance of large monetary gifts from a company which has profited from his findings means that his research conclusions cannot be relied on. At best, they have the taint of bias; at worst, they are fabricated to ensure that his benefactor's product appears in the best light.

However, Ward was only exposed in February 1996. The FBI endorsement of capsicum spray, based on Ward's research before he was discredited, has been widely attributed as critical to the spread of the spray to the armories of law enforcement agencies around the world — including, it seems, the Victoria Police.

On 18 April this year, Sunshine police became the first Australian police officers to carry capsicum spray as an operational weapon. Since then, the spray has also been distributed to Broadmeadows, Dandenong, Springvale, Knox, Geelong, Morwell and Preston police stations.

Assistant Commissioner Ray Schuey says that the addition of capsicum spray as a police weapon is part of the implementation of the recommendations of Project Beacon. Under the umbrella of this project, five independent reviews formulated 219 recommendations. One of the reviews was conducted in mid-1994 by FBI Special Agent Jim Pledger who recommended that capsicum spray be introduced.

And, while Ward may not have been in Australia in person, it seems he was here in spirit. A Ward study was one of only three documents that the Victoria Police sent to North Melbourne Legal Service in answer to its freedom of information request for the information that the police held about capsicum spray in February 1994. Which leaves us to ask — was Ward telling the truth? Is capsicum spray safe?

Its official name is oleoresin capsicum spray. Oleoresin capsicum is a natural oil of red cayenne pepper. In Victoria, it will be sprayed into the faces of violent police suspects who are assessed as likely to injure themselves or others. It will cause an acute burning sensation and inflammation that results in immediate pain and a closing of the eyes. The mucous membranes around the eyes, lips and nose will become inflamed. If the droplets are inhaled, they will inflame the respiratory tract causing choking and gasping for breath. It will also incapacitate co-ordination. While Victoria Police say that the pain and inflammation will last up to 45 minutes, other reports say the effects could last up to two hours.

Two days before capsicum spray became available to Sunshine police, the San Francisco District Attorney's office banned the use of pepper (capsicum) spray by its investigators. The DA's chief investigator was quoted in the *San Francisco Chronicle* as saying 'It's obvious there are some problems with it. There have been numerous deaths across the nation associated with its use.'

Capsicum spray was legalised for use by California law enforcement agencies in October 1992. The Americans call it pepper spray. To date, Californian police officers and sheriffs' deputies have used the spray nearly 23,000 times.