



Response to Department for Business Enterprise & Regulatory Reform's consultation on European Commission proposals to amend the Pregnant Workers Directive

June 2009

Introduction

1. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. The Equality Commission welcomes the opportunity to respond to the Department for Business Enterprise & Regulatory Reform's ('the Department') consultation on European Commission proposals to amend the Pregnant Workers Directive.
3. In general, the Equality Commission welcomes the European Commission's proposals to increase the standard of protection across all Member States for pregnant workers and workers who have given birth or are breastfeeding. It welcomes, for example, the extension of compulsory maternity leave and maternity leave, as well as the additional safeguards for women in employment when returning from maternity leave.
4. Although the Department has raised a number of questions in the consultation document, the Equality Commission has

concentrated on those questions relevant to its own remit and experience. In particular, the Equality Commission wishes to raise the following points in relation to the European Commission's proposals.

Comments in relation to draft Pregnant Workers Directive

Right to request flexible working

5. Although, in general, the Equality Commission welcomes the proposed inclusion of a right for workers, during maternity leave or when returning from maternity leave to request flexible working, employers are only obliged to consider such requests, taking employers' and workers' needs into account. An employer is not required to set out the reasons for a refusal to permit flexible working, nor does the Pregnant Workers Directive require an employer's decision to be objectively justifiable.
6. The Department will be aware that an employer can comply with his /her obligations under the Employment Rights Act 1996, provided that s/he considers a request for flexible working and the reason for the refusal falls within the eight grounds set out in the legislation. However, the EAT has made it clear in the case of *Commotion Ltd v Ruddy*¹, that tribunals can only decide on the factual correctness of the ground for refusing a flexible working request but not its fairness and reasonableness.
7. In contrast, where an employee who is refused a flexible working request alleges indirect sex discrimination, a tribunal will consider whether such a refusal could be justified by the employer. As evidenced by the case of *Webster v Soft Drinks*², an employee's case relating to a refusal to work flexibly, can fail under the Employment Rights Act 1996, but succeed under the Sex Discrimination Act 1975. The difference in tests and standards applied under the two different pieces of legislation has resulted in confusion and uncertainty both for employers and employees.
8. In summary, in light of the proven benefits of flexible working and in order to provide clarity for both employers and

¹ [2006] IRLR 171

² 2005, ET/1803942/2004

employees, it is recommended that the flexible working requirements and tests are consistent with those applied under the Sex Discrimination Act 1975 in relation to indirect discrimination complaints.

9. The Equality Commission therefore recommends that the Pregnant Workers Directive provides that an employer can only refuse a request for flexible working where justifiable.
10. In addition, under the Flexible Working Regulations, employers are required to provide written reasons for a refusal of an application for flexible working by an employee. The Equality Commission recommends that the Pregnant Workers Directive states that employers are required to set out the *reasons* for a refusal to permit flexible working.

Consistency with recast Equal Treatment Directive

11. The Equality Commission notes that the draft Pregnant Workers Directive aims to reflect certain protections already provided for by the Equal Treatment Directive³; in particular, in relation to the transference of the burden of proof; protection from victimisation; a requirement that no upper limit can be placed on penalties for breach of the Pregnant Workers Directive's provisions; and provisions specifying that existing equality bodies will be given responsibility for covering the equal treatment aspects of Pregnant Workers Directive.
12. The Equality Commission recommends, in order to ensure consistency and clarity, that the following provisions outlined in the recast Equal Treatment Directive⁴ are also included in the draft Pregnant Workers Directive.
 - Dissemination of information
13. The Equality Commission recommends a provision stating that Member States shall ensure that measures taken pursuant to the Pregnant Workers Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

³ Directive 2002/73/EC

⁴ Directive 2006/54/EC

14. This will place an obligation on Member States to proactively ensure that changes introduced as a result of implementing the Pregnant Workers Directive are brought to the attention of employers, employees, and others affected by the provisions of the Directive. This proposed provision reflects Article 30 of the recast Equal Treatment Directive.

- Prevention of discrimination

15. The Equality Commission recommends a provision placing an obligation on Member States to encourage, in accordance with national law, collective agreements or practice, employers to take effective measures to prevent all forms of discrimination against pregnant workers and workers who have given birth or are breastfeeding.

16. This proposed provision reflects Article 26 of the recast Equal Treatment Directive.

- Social dialogue

17. The Equality Commission recommends a provision requiring Member States to take adequate measures to promote social dialogue between the social partners with a view to ensuring effective measures to prevent discrimination against pregnant workers and workers who have given birth or are breastfeeding, and to promoting flexible working arrangements with the aim of facilitating the reconciliation of work and private life.

18. This proposed provision reflects Article 21 of the recast Equal Treatment Directive.

- Dialogue with non-governmental organisations

19. The Equality Commission recommends a provision requiring Member States to encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination in relation to pregnant workers and workers who have given birth or are breastfeeding, with a view to promoting the principle of equal treatment.

20. This proposed provision reflects Article 32 of the recast Equal Treatment Directive.

- Gender Mainstreaming

21. The Equality Commission recommends a provision requiring Member States to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in the Pregnant Workers Directive.

22. This proposed provision reflects Article 29 of the recast Equal Treatment Directive.

- Defence of Rights

23. The Equality Commission further recommends that Article 12 of the draft Pregnant Workers Directive is amended to ensure that Member States ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the Pregnant Workers Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Pregnant Workers Directive.

24. This proposed provision reflects Article 17 of the recast Equal Treatment Directive.

General comments

Sharing of responsibilities and child care provision

25. The Department will be aware that the CEDAW Committee⁵ recommended that the Government “continue its efforts to assist women and men to reconcile family and professional responsibilities and to promote equal sharing of domestic and

⁵ Concluding observations of the Committee on the elimination of discrimination against women, UK, July 2008

family tasks by providing, *inter alia*, more and improved childcare facilities.”

26. The Committee further recommended that the Government “encourage men to share responsibility for childcare, including through awareness-raising activities and by taking parental leave”. The Equality Commission notes that the Pregnant Workers Directive is solely aimed at securing additional rights for pregnant women and women who have given birth or are breastfeeding. It also recognises that at EU level, social partners have started negotiations on family-related leave other than maternity leave. In line with the CEDAW Committee’s recommendations, and those of the European Commission⁶, the Equality Commission recommends the urgent adoption across Member States of measures aimed at encouraging men to share responsibility for childcare, and designed to encourage Member States to provide affordable accessible and quality child care facilities.

27. The Equality Commission in its report on the Convention⁷, made it clear that the reconciliation of work and family life was critical to the achievement of gender equality in Northern Ireland and highlighted the importance of good quality accessible childcare in ensuring the ability of women to remain in employment or to improve their labour market position as regards pay and promotional opportunities. We note with concern that the European Commission in its report⁸ on the development of childcare facilities in Member States has concluded that most Member States will not meet the Barcelona targets by 2010. We support the European Commission’s recommendation for further action by Member States in relation to the provision of affordable accessible and quality child care facilities.⁹

Self-employed workers

28. The Equality Commission recognises the limited scope of the draft Pregnant Workers Directive, in that it applies solely to employees and not self-employed workers. The Equality

⁶ Report of the European Commission , equality between women and men-2009, February 2009

⁷ CEDAW report, UN Convention on the elimination of all forms of discrimination against women, March 2008, ECNI

⁸ COM(2008) 638, Report of the European Commission , implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children, October 2008

⁹ Report of the European Commission , equality between women and men-2009, February 2009

Commission supports the proposals of the European Commission to repeal Directive 86/613/EEC¹⁰, so that female self-employed workers and assisting spouses or life partners should be entitled, at their request, to the same maternity leave entitlement as that provided for employees under the Pregnant Workers Directive.

¹⁰ Council Directive of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood