

Tip of the iceberg

Interim report of the EOC's investigation
into discrimination against new and
expectant mothers in the workplace

September 2004

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About the investigation

This investigation is a statutory investigation under the Sex Discrimination Act 1975. These powers allow the Equal Opportunities Commission to undertake general formal investigations where the EOC investigates deep-seated issues of gender inequality or discrimination and makes recommendations to those who can take action, including Government. For the full terms of reference of this investigation, see annex 3.

What do we mean by pregnancy discrimination? Our investigation is using a wide definition of pregnancy discrimination to encompass all the issues that a woman can face around childbirth. We have taken that term to mean any disadvantage at work caused wholly or partly by pregnancy, or by taking maternity leave.

Acknowledgements

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The support and expertise of the external Advisory Board has been invaluable. A list of the members is given at Annex 2.

Executive summary

Every year, in England and Wales alone, around 1,000 women take legal action against their employer claiming they were sacked because of their pregnancy. This is likely to be the tip of the iceberg. Thousands of women contact the Equal Opportunities Commission (EOC) and other organisations every year about their maternity or pregnancy rights at work. Over 500 women have been in touch with us since we launched the investigation to tell us their experiences.

These are the sorts of problems they face:

- **during pregnancy** – being refused a job, dismissed, selected for redundancy, demoted, losing out on pay, bonuses or other benefits, being exposed to health and safety risks or subjected to unpleasant or hostile treatment
- **during maternity leave** – being made redundant, not consulted on changes to the organisation, passed over for promotion, or deprived of the benefit of pay rises or bonuses
- **on return to work** – being denied flexible hours or forced to return to a lower-status job.

Whilst only 350,000 women are pregnant in any one year in Great Britain, out of almost 10 million working women of childbearing age, many women will experience pregnancy at work at least once. Pregnancy discrimination can hit the income and health of their families very hard and the effects can be long-lasting. Because so few women are pregnant at any one time, pregnancy is an unfamiliar experience for most employers and does present challenges. When discrimination occurs, the economy and businesses lose out on talent as well as facing the costs of replacing staff and, sometimes, legal costs. Some women fear the effect of pregnancy on their careers and there is evidence that women are having fewer children than they would ideally choose (OECD, 2003). This is happening at a time when the birthrates in England, Scotland and Wales are declining.

The EOC was so concerned about this that we launched a formal investigation in September 2003 to find out the extent of pregnancy discrimination and the reasons for it.

This report presents the findings so far. We have more research to do but there is already strong evidence of the need for change. Based on this evidence, we are putting forward some initial recommendations, together with some other possible solutions which are included in the separate formal consultation currently underway with employers and others, in order to stimulate further discussion on the best way forward.

We published in July a consultation document aimed primarily at employers and employer associations. Views are sought by 30 September and the document is available on and can be downloaded from our website at www.eoc.org.uk/pregnantandproductive.

The final report from the investigation will include comprehensive recommendations and will be published in March 2005.

Shared benefits, responsibilities and costs

It's not just families – mothers, fathers and children – who benefit when pregnancy at work is a successful experience and who lose out if it is not. It's in everyone's interests for pregnancy at work to be productive.

Women make up nearly half of the workforce, a figure that is growing, with the vast majority of pregnant women and the majority of mothers of young children now working. Families depend upon their income. Employers depend upon their labour and women make a major contribution to our economic prosperity. We all need the next generation to be born and to thrive. We rely on the workforce of the future for our prosperity and welfare, including our pensions.

That's why laws are in place to protect pregnant women at work. They sum up the way in which people expect to live their lives and the values that underpin them. Most people want pregnancy at work to be positive and accept that there are responsibilities and costs to achieve this as well as benefits. The law provides for these costs to be shared between the state, employers and families:

- the state provides legal protection and reimburses employers for 92% of statutory maternity pay (SMP), 105% if they are small employers
- employers are responsible for the safety of the mother and her unborn child and face costs, for example finding cover during maternity leave, as well as benefits if they are able to retain valued employees
- families often forgo income as well as meeting the costs of having children. When things go wrong, the burden falls on them to enforce the legislation which protects mothers.

A summary of the law on pregnancy and maternity rights is given at Annex 4.

Only around 15% of women and 20% of men take the once widespread view that men should go out to work while women stay at home (Jowell et al, 2000). The debate for most people is not about whether pregnant women should work but whether the sharing of costs and benefits is fully understood and whether the balance is right.

The sharing of costs is fully accepted by many employers. 89% of employers, of those who were aware of maternity entitlements, said they were totally or fairly reasonable (Young and Morrell, 2004). Many good employers top up maternity entitlements.

However, understanding of the law and the thinking behind it is patchy, partly because the law is complex. For example, over a quarter of employers could not, without prompting, name a single statutory entitlement for pregnant women. Some employers take issue with the costs they have to bear. More than a third felt that pregnancy was an “undue cost burden on the organisation” (Young and Morrell, 2004). Some employers, especially small businesses, are unaware of their right to reclaim SMP from the Government (EOC Wales, 2004). This can lead to resentment and a feeling that pregnant women are a burden. A proportion of employers don't agree that they should have any role in supporting pregnant women, failing to see the benefits for them. “Society needs children, not small firms” as one employer put it.

Some pregnant women are unaware of the help they could receive and see it as a personal issue they and their families have to face alone. Others are aware of their rights but find it difficult to enforce them. When they seek to return to work, the support may not be in place to help them return to work easily: reliable childcare, access to flexible working and a framework which allows fathers to look after their children too.

Better communication, with greater support for families and employers

This report highlights two key areas for change:

- first, the law needs to be better understood and the benefits of supporting pregnant women at work need to be more effectively communicated. It needs to be clear that employers do not, as some think, bear the lion's share of the costs. Pregnant women need to know about their existing rights
- second, both families and employers need more support. The balance of responsibilities and costs between the state, employers and individuals, although broadly right, needs some adjustment. This report indicates where there is a case for the state giving more support to employers. It also flags up where pregnant women and mothers might benefit from more protection and help. It further highlights that this is not just an issue for women and the health of their children. Fathers have an increasingly important role. 30 years ago, fathers of young children spent 15 minutes a day looking after their children. Now it is 2 hours a day (O'Brien and Shemilt, 2003). Fathers increasingly want to share caring responsibilities but the law largely assumes that it is mothers who will take on the childcare role. When mothers lose their job because of discrimination, choice is reduced still further.

Our specific recommendations to achieve this are set out below.

Recommendations for change

The evidence suggests that there are five main areas of concern. Our proposals for change address each of these in turn.

1. People are not aware of their rights and responsibilities, partly because the law is difficult to understand

This can cause women to see unfair treatment during pregnancy as their own personal problem rather than as part of a wider pattern of unlawful discrimination.

Pregnancy and maternity law is enshrined in the Employment Rights Act 1996 (ERA), the Sex Discrimination Act 1975 (SDA), the Management of Health And Safety at Work Regulations 1999 and decisions in innumerable domestic and European legal cases.

It is an incredibly complicated jigsaw of rights and responsibilities and it is operating in a vacuum. There is little support, or guidance for those who are expected to work within its framework and this is creating problems for employees and employers alike. Small businesses, with no human resource specialists to turn to, may find it particularly difficult to find out what is expected of them.

While most employers expressed a willingness to comply with the law, we have found a lack of knowledge and understanding can hinder their ability to do so in practice. For many, especially in a small workplace, pregnancy is a rarity and getting to grips with the legislation can be a very low priority. This increases the risk of non-compliance when pregnancy does occur, as well as the disruption and costs to the business. We also found that some employers, particularly in small workplaces, have unjustified confidence in the ability of their line managers to comply with the law. Virtually all agreed that 'line managers always comply with legislation relating to pregnant women at work' but only 19% of small workplaces had developed guidelines for line managers. Furthermore, 30% of respondents in small workplaces could not, without prompting, name a single statutory entitlement for new and expectant mothers (Young and Morrell, 2004).

Both employers and employees find the law confusing and unclear. There is no one place they can go to find out what their rights and responsibilities are. The various legal provisions under the ERA and the SDA

are sometimes inconsistent. In addition, many terms and concepts are ill-defined and unspecific. This leaves enormous scope for conflict. Disputes between employers and employees over what is just or reasonable can lead to mutual resentment and, if left unresolved, the breakdown of the employment relationship.

There is an urgent need to ensure employers, line managers and individual women receive clear information on their rights and responsibilities at the time they need it: when pregnancy occurs.

We recommend a written statement of rights and responsibilities to be provided to every family and the woman's employer.

We believe some of the disputes can also be overcome by providing one-stop, practical guidance on what the law says.

We recommend that a statutory Code of Practice for employers be prepared jointly by the EOC, ACAS and the Health and Safety Commission.

We also recommend that the Government should review existing equality and employment protection legislation to make it more user-friendly. As the new Commission for Equality and Human Rights is established, existing legislation across the different equality strands should be modernised and made consistent.

We are consulting on what specifically might need to be done to harmonise the legislation and simplify the process for reclaiming SMP.

Employers have told us of significant practical obstacles to managing pregnancy efficiently. For example, many are unsure if they can legitimately ask a woman about her plans for the future during pregnancy and maternity leave and this uncertainty can create problems for the business. Employees, on the other hand, can feel sidelined while pregnant, and isolated during maternity leave.

We recommend a toolkit for employers to improve planning for and management of pregnancy, including a framework for planning and communication

2. Health and safety requirements are not being enforced

Despite the requirements in the Management of Health and Safety at Work Regulations 1999, we have found risk assessments are not being undertaken for many pregnant employees, exposing them to possible harm to themselves and their unborn babies. Awareness of the law is low: employers do not always know what they have to do and many employees do not realise they have a right to a risk assessment. This is compounded by limited action by the Health and Safety Executive (HSE) and local authorities to enforce the law.

We are therefore making recommendations aimed at increasing knowledge of and compliance with health and safety duties.

For example, the role of the HSE and local authorities should be better publicised and levels of enforcement increased. Employers' compliance with the legislation should be monitored during routine health and safety inspections.

3. The system for resolving disputes or enforcing the law isn't working

It's up to women themselves to take action after the law has been broken. There is no agency on the ground to ensure day to day compliance except in relation to health and safety. Women who suffer pregnancy discrimination often decide not to challenge their treatment through the employment tribunal.

There are a number of reasons for this:

- the three month time limit for filing a claim can discourage women who cannot face the stress and expense of litigation while still pregnant or caring for a new baby
- they do not want to lose their job
- the burden of proof falls on them and it can be difficult to prove this form of discrimination
- there is no legal aid for representation at tribunal in England and Wales with few exceptions, although it is available in Scotland for the most complex cases.

It is estimated that half of the women who pursue a complaint to the tribunal lose their case, often because they cannot prove their pregnancy or maternity leave was reason behind their treatment. Even if they do win, they invariably have already lost or lose their job and can find it difficult to find equivalent work. Half of applicants report lower status, lower paid employment or even unemployment afterwards.

Employers often find litigation unsatisfactory too. Many who lose feel that the employment tribunal process is imbalanced, with applicants being unduly favoured. Even many of those who win their case count the cost not only in legal fees and management time but also in damage to morale and reputation.

Whilst ACAS conciliates the majority of ongoing cases, there is very little access to ways of resolving pregnancy-related disputes without taking a claim.

We need to find ways to make the system work better for everybody.

We recommend an extension of the three-month time limit for filing a pregnancy-related claim to give more women access to justice.

But it may be necessary to do more, such as shifting the burden of proof onto the employer to show that her treatment was for a reason other than pregnancy.

One option on which we are consulting employers and others is on the provision of free mediation services and the greater use of the existing conciliation services provided by ACAS. This might help employers and employees resolve their disputes before their relationship breaks down. We are also consulting on how other agencies could assist in ensuring greater compliance with the law, thus relieving individuals from the full burden of enforcement. Greater investment in building up the expertise of those who give advice on these rights and responsibilities could also make a significant difference.

4. Some employers do not comply with the law

We are carrying out research to show the incidence of pregnancy discrimination but existing evidence suggests that a proportion of employers try to duck the consequences of a pregnancy in their workplace either by avoiding taking on women of childbearing age or by dismissing or forcing out employees who become pregnant. No one knows how many women actually lose their jobs for being pregnant because the majority of these dismissals are settled confidentially, often before any legal proceedings are issued, and many women take no action at all.

A possible solution which we will explore further during the investigation is a system to collect data on all dismissals during pregnancy and maternity leave.

An organisational culture of long working hours and a negative attitude towards working mothers were the most common reasons, suggested by employers in our survey, for why other employers may discriminate against pregnant women. This was cited by 39% in our survey. Other possible reasons are that employers:

- do not see a need for the special protection afforded to pregnant women

- believe the law is unfair
- fear the costs of managing pregnancy
- may not be aware of the help with costs
- are concerned about the unreliability of childcare.

We believe many of employers' fears about managing pregnancy could be overcome by providing them with better information and advice. For example, we have found that attitudes are more likely to be positive where there has been a recent pregnancy and managers better understand how to deal with the practical difficulties. Two thirds of employers in workplaces where there had not been a recent pregnancy agreed that "some women abuse their rights" compared to one third with recent experience of managing a pregnant employee (Young and Morrell, 2004).

But it is an inescapable fact that there are costs in managing pregnancy and maternity leave. These include recruiting and training staff cover, the business costs of lost experience and knowledge and possibly paying the salary of someone suspended on health and safety grounds. These can have a disproportionate impact on small employers.

There may be a case for asking the state to provide financial support for small businesses to spread the costs of pregnancy more equitably and remove some of this fear. We are consulting on this before making firm recommendations.

The scope for employers to dismiss or make pregnant women redundant is currently wider than in many other European countries. Further details are at Annex 5. It may be necessary to restrict further the circumstances in which employers may dismiss pregnant women or those on maternity leave. Other options for filling gaps in the legislation include strengthening the individual's right to her job back after additional maternity leave and extending her special protection for three months after her return to work.

5. Lack of support for working parents – mothers and fathers

Within the family, having children is not just a mother's responsibility. In most families, including where the parents are separated, both parents now take an active parenting role and children are benefiting. Yet the framework in place to support parents is almost entirely directed at mothers and this is one of the reasons why employers may discriminate against women.

Parents need the right back-up in order to return to work successfully after childbirth: reliable and affordable childcare, opportunities for flexible working and greater access to leave for fathers so that they can take their share of caring. Without these conditions, everyone stands to lose: women who are concerned about childcare may find it hard to reintegrate into working life; fathers may be unable to take on a fuller role looking after children; employers may get returners who are understandably stressed, tired, distracted or even absent.

There is also a need to look at the financial support to parents. Maternity leave entitlement in the UK is relatively generous but maternity pay is lower than in most other EU countries (James, 2004).

We therefore recommend a new "National Family Strategy" to deliver a coherent framework of parental employment rights and services. This would include improved statutory paid maternity and paternity leave, with flexibility which allows parents to choose who will take up any leave over the second six months, new measures to make childcare services more affordable and accessible and an extension of the right to ask for flexible working to all parents, not just those with very young children.

Working parents would also receive greater support if there were a deeper understanding of the reasons for the law and how it works in practice.

The Government should communicate to employers and to wider society the benefits of supporting pregnant women and make sure that all employers know about the financial support available to them.

The case for change

Key facts

- **Women make up nearly half the labour force. Eight out of every 10 new entrants to the labour market are now women.**
- **350,000 working women in Great Britain are pregnant each year. Businesses with fewer than 10 employees are likely to have a pregnant employee only one year in ten and those with fewer than 25 employees, one year in five.**
- **80% of women return to work within 17 months of childbirth but only 47% return to the same job at the same employer. Some employers achieve rates of return of over 90%.**
- **In Sweden, only 2% of women are economically inactive because of family and responsibilities compared with 14% in the UK.**
- **38% of mothers and more than one in ten fathers have given up or turned down a job because of their caring responsibilities.**
- **30 years ago, fathers of young children spent around 15 minutes a day looking after them. Now they spend 2 hours on average.**

The reasons for getting it right

Nowadays, many pregnant women work and a high proportion return to work soon after the birth. Everyone benefits when this is a positive experience and loses out when it is not.

Declining birthrates in England, Scotland and Wales, in common with that of many developed countries, present a threat to our future prosperity and welfare. It's in everyone's interests, including those who do not have children themselves, to create an environment in which people want to have children and in which those children can thrive. They are the workforce of the future and it is they who will provide the wealth to finance our pensions and the care to support us in our later years. Women who feel forced to sacrifice their careers in order to have a family may choose to remain childless. There is evidence that women are now having fewer children that they would ideally choose (OECD, 2003).

Women in the workforce today are also vital to the economy. Women currently make up 45% of the UK labour force and will account for 80% of the growth in the employment rate between 1995 and 2006 (James, 2004). In an economy where a lack of essential skills is threatening productivity and profits in many sectors, it is vital to ensure that every woman who wants to continue to work after childbirth can do so.

The laws that protect pregnant women and their unborn children are designed to make pregnancy at work productive for all concerned. These laws express the way in which society has chosen that pregnancy at work should be managed. They recognize that the benefits are shared by the state, employers and families and for this reason they share out the costs. Annex 4 sets the effect of these laws in more detail. Broadly, the sharing of responsibilities and costs is as follows:

- the state provides legal protection and reimburses employers for 92% of SMP, 105% if they are small employers

- employers are responsible for the safety of the mother and her unborn child, and face costs, for example finding cover during maternity leave, as well as benefits if they are able to retain valued employees. Pregnant women are protected from dismissal on grounds of pregnancy. All pregnant women have access to up to maternity leave of at least 26 weeks, with SMP available for most who also have an entitlement to unpaid additional maternity leave over a further 26 weeks. They have a right of return and to paid off time for antenatal classes
- families often forgo income as well as meeting the costs of having children. When things go wrong, the burden falls on them to enforce the legislation that protects mothers.

If this were working well:

- the health of pregnant women and their unborn babies would be a paramount consideration in every workplace
- mothers-to-be could feel confident about telling their employer – or even a prospective employer – about their pregnancy without fear of discrimination
- every woman who wished to remain working during and after their pregnancy could do so
- employers could comply with the law without difficulty and would not see pregnancy and maternity leave as a burden
- employers would retain the skills, experience and commitment of almost all their female employees
- women could choose to have a child without jeopardising their career aspirations
- having and looking after children would be seen as an issue for both mothers and fathers, not just for women.

The mounting evidence from our investigation is that much more work is needed to turn this into reality. Mothers are still bearing too much of the responsibility and cost of combining work and pregnancy. Employers face challenges too. Whilst many women will experience pregnancy at work and consider this to be a part of ordinary life, the employment of pregnant women can be rare for many employers. Out of a workforce of nearly 10 million women of childbearing age in Great Britain, only 350,000 are pregnant in any one year. Businesses with fewer than 10 employees are likely to have a pregnant employee only one year in ten and those with fewer than 25 employees, one year in five (www.dti.co.uk).

The law is complex and difficult for both employers and individuals to understand. Whilst employers are reimbursed for SMP, employers carry the administrative burden of implementing the law in Britain and often vulnerable individuals carry the burden of enforcing it. In other EU countries there is stronger protection for employees and more onus upon the employer to show that dismissals are not due to pregnancy or maternity (Heron, 2004). Although Britain has relatively generous levels of maternity leave, maternity pay is lower than in most other EU countries (James, 2004).

In Britain today, pregnancy is still seen as an issue for women. The role of fathers in supporting partners during pregnancy and in looking after their own children once they are born is hardly recognised. EOC research shows that, 30 years ago, fathers spent around 15 minutes a day looking after their children. They now spend around two hours a day, a major social change (O'Brien and Shemilt, 2003).

The position in Sweden provides a good contrast. There the policy focus is on parents rather than mothers. Both parents can split 480 days' leave up to the child's eighth birthday, and claim a high level of state parental benefit while they are off work. What we term pregnancy discrimination is seen there not as sex discrimination, but as a broader, non-gender-specific discrimination. In Sweden only 2% of women are economically inactive because of family responsibilities, compared with 14% in the UK (James, 2004). The flexible provisions in Sweden are grounded upon a policy which seeks to advance the well-being of the child, to promote women's economic independence and encourage fathers' involvement in childcare and family life (Hass et al, 1999).

What are the costs of getting it wrong?

For women and their families

Losing her job as a result of getting pregnant can have serious effects not only on a woman's long-term well-being but also on that of her family. There are particular implications for women on low incomes and lone parents, who may be especially affected by pregnancy discrimination. People on low incomes suffer worse working conditions, more job insecurity and poorer relationships with their employers than the better off; they are also less likely to understand their legal rights and to take legal action than those on higher incomes (Maternity Alliance, 2004a). If a woman loses her job and income, it also places ever more of the burden of breadwinning on fathers, who work the longest hours in Europe, and makes it even harder for them to help with childcare.

Families tend not to experience just one isolated social justice issue. A single 'trigger problem' may set off a disastrous chain of events. Loss of employment during or after pregnancy could be such a trigger, leading on to other forms of deprivation such as debt, housing problems, family breakdown and so to poverty and social exclusion (Plesence et al, 2004).

Though most working women go on to have perfectly healthy pregnancies, the stress caused by losing one's job unfairly or working in unpleasant or unsafe surroundings can damage the health of mothers-to-be and their babies. The childbirth charity Tommy's has found, for example, that women are at higher risk of giving birth prematurely if their work is psychologically demanding and they don't like their working environment and that this could have long-term implications for their babies (Levete, 2004).

There is also evidence that women who would like to be employed but are not are more likely to suffer from depression (James, 2004). This is a serious concern given that women who have just given birth are at higher risk of mental health problems anyway.

It is every citizen's basic human right that she should be able to enforce her legal rights and have the right to a fair hearing when those rights are infringed. Though over 1,000 pregnant women in England and Wales go to tribunal each year on the grounds of pregnancy discrimination, the odds are stacked against them doing so at a time when they need to protect their own and their baby's health, their career and their income. Our research with ethnic minority women suggests that women from some communities would not even contemplate taking enforcement action against their employers (Connect, 2004).

For business

The best-performing businesses, large and small, now see present and future competitiveness as being dependent on their ability to attract and develop the best talent, and hold on to it. Managing pregnancy well and providing family-friendly policies can enhance their productivity, through the best use of skills and experience, as well as heightened commitment and morale thereby reducing their costs (Bevan et al, 1999; IDS, 2003).

80% of women return to work within 17 months of childbirth but only 47% return to the same job at the same employer (Hudson et al, 2004). Yet employers who manage pregnancy well and offer a range of family friendly working practices can achieve rates of return of over 90% (IDS, 2003). HSBC has almost trebled the number of women returning from maternity leave, saving millions of pounds. Happy Computers, a small IT training company, is twice as good as its competitors at keeping staff because of flexible working. 38% of mothers have given up or turned down a job because of their caring responsibilities and more than one in ten fathers (www.eoc.org.uk).

“I went from being the top salesperson in the company to being a liability. They weren't prepared to put in the time and effort that is needed to help the comeback. If they had, I'd have gone back to being the top salesperson.”

Former sales executive for a major national IT company.

Becoming an ‘employer of choice’, one that promotes itself as investing in its workforce and being a positive, inclusive place to work, has become a top business priority in sectors suffering severe skills shortages. Many businesses see reputation as a matter of competitive advantage.

Employers may also be missing out on unexpected benefits by failing to manage pregnancy positively. Contributors to our Equality Exchange events, for example, have told us how planning for maternity leave has enabled them to harness real business advantages: for example, temporary replacements bringing fresh ideas into the organisation and the transfer of employees giving them personal and career development opportunities.

“In 2000 our organisation had few women returning to work after their maternity leave. The loss to the organisation was not just the costs of replacing these individuals, but also the less visible costs of severed client contacts and loss of skilled organisational knowledge. We therefore set about implementing maternity and family-friendly policies and introducing an open, positive culture so that employees would feel comfortable discussing their pregnancy with us from an early stage. The picture is very different in 2004: 90% of pregnant employees have returned to us after their maternity leave. For the 10% (actually one person) that did not return, this was a positive choice.”

Diabetes UK

Where matters are mismanaged and a tribunal case is lost, a company's image can be tarnished. Tribunal cases are also expensive in terms of legal costs, lost management time and even low staff morale.

For our economy and society

The birthrate in England, Scotland and Wales is declining.

When pregnancy at work goes wrong on a wide scale, it makes Britain less productive, our economy less efficient. Dismissing or treating women unfairly as a result of pregnancy and maternity could also affect their long-term attachment to the labour market and we will be exploring this in our research (James, 2004).

The gender pay gap remains a shaming problem for our society, with women working full time earning on average 18% less per hour than their male counterparts and those working part time earning around 40% less per hour than men working full-time (EOC, 2004a). Helping women keep their jobs and seniority during and after pregnancy will undoubtedly contribute to greater pay equality.

This is also an important public health issue. Medical problems arise for pregnant women and their children that could be prevented by protecting them from risks, including stress and anxiety, and better enforcing health and safety protection in the workplace.

What have we found out about the problems for individuals?

Key facts

- **Pregnancy discrimination can range from dismissal, redundancy and forced resignation to unpleasant comments, unwarranted criticism and being denied promotion or training.**
- **Nearly one quarter of women who made an employment tribunal claim of pregnancy discrimination were dismissed within hours or days of telling their employer they were pregnant.**
- **Less than one in three pregnant women received a health and safety risk assessment from their employer.**
- **Over 1,000 women in England and Wales each year make an application to the employment tribunal related to pregnancy discrimination.**
- **One in five women who returned to work for the same employer after maternity leave returned to a lower grade or level of job.**

Since the launch of our investigation in September 2003, over 500 women have been in touch to tell us how they have been affected by their treatment at work whilst pregnant. Their poignant and sometimes harrowing stories bring to life the many types of disadvantage women face simply because they are pregnant, on maternity leave, or when they return to work. Pregnancy discrimination permeates every part of the employment relationship from beginning to end. The next phase of our investigation will tell us more about the extent of these problems.

During recruitment: job offers can be withdrawn when women inform their prospective employers of their pregnancy, though this can be hard to prove.

D was offered a job following an interview at an estate agency. She did not disclose that she was pregnant during the interview but when she informed her employers subsequently they withdrew the job offer, claiming that she should have informed them at the interview.¹

Dismissal or constructive dismissal (being forced to resign): the evidence suggests that those with less than a year's service and on a low income are most likely to be dismissed (Gregory, 2004). Women are more vulnerable to dismissal during pregnancy than during maternity leave or their return to work. In one study of employment tribunal cases involving pregnancy discrimination, 22% of applicants were dismissed within days or hours of informing their employer they were pregnant (James, 2004). Disciplinary procedures can be used by managers as a smokescreen for pregnancy-related dismissal.

¹ Dando v Gareth L. Edwards t/a Gareth L. Edwards Estate Agent/Valuer (2003). Employment tribunal case number 1600672/03.

When H became pregnant, allegations of gross misconduct were made against her. She became ill with pre-eclampsia and lost her baby. The tribunal found there had been no gross misconduct - this had been a sham and the real reason for dismissal was pregnancy.²

A receptionist who needed extra antenatal care because of renal problems was dismissed because of her pregnancy. She said she was so traumatised she considered terminating her pregnancy, or asking to be sterilised once she had had her baby. Her confidence was adversely affected and her relationship with her husband suffered.³

A trainee nursery nurse was sacked by her employers in June 2003, just weeks after informing her employers she was pregnant. When she asked why she was being dismissed she was told it was because of her pregnancy.⁴

The employer, who had encouraged her to sign up for training, responded to news of Elisabeth's pregnancy with: "You're not a lot of use to us now, are you? Let's call it a day." Elisabeth said "I felt absolutely worthless."

Former trainee nail assistant

Redundancy: women have been selected for redundancy because they are pregnant, on maternity leave, or absent with pregnancy-related sickness.⁵ Our research will tell us whether women are more likely to be made redundant during maternity than at other times.

Changes to terms and conditions: this can include changes to employment status or a cut in hours, so the employer can avoid paying SMP, or cuts in salary, bonuses or benefits (Maternity Alliance, 2004b).

"I was working 25 hours per week, once they knew of my pregnancy I got put down to 12 hours a week and was never offered more hours like the other staff."

Supermarket worker (quoted in Maternity Alliance, 2004b)

An Accounts Assistant was asked to write a letter of resignation as soon as she told her employer of her pregnancy. She was taken off the payroll and told she was now casual, should arrange her own tax and National Insurance and that she would not receive SMP. She has continued to work for her employer full-time on this basis (Maternity Alliance, 2004b).

2 Davies-Taheri v Proddow Mackay (2003). Employment tribunal case number 2801787/02.

3 Johnston v MCA Direct Ltd t/a Best Advice (2002). Employment tribunal case number 2500495/2002.

4 Mountford v Jack and Jill Nursery (2004). Employment tribunal case number 1306875/2003.

5 For example, the cases of Taylor v Lidl UK GmbH (2003) employment tribunal case number 1101586/2002 and Amoah v Morgan Elliott (2003) employment tribunal case number 2306156/2002.

Denial of promotion or training: Women can be denied opportunities for career development because their employers do not think it is worth investing in them as they might not return (Young and Morrell, 2004).

Following a company merger, C applied for the new post of Group Facilities Manager. Initially she was told she was the only internal candidate under consideration but a month after a traumatic birth, she was interviewed and informed she had not been successful. The tribunal said the employer did little more than “go through the motions” of interviewing her.⁶

Unpleasant treatment or remarks: Many women find that, with the announcement of their pregnancy, their status as a valued, respected, even cherished employee can disappear into thin air.

“Clients may have worked for many years and have been highly thought of until, that is, they announced their pregnancy. First-class employees are then seen to become second-class, as though all (their) acquired skills are lost entirely to the pregnancy.” CAB adviser

Women have told us that unpleasant remarks from their manager can begin as soon as they announce their pregnancy.

“You silly girl!...I had you marked down as a career woman...”

“Have you considered an abortion? You aren’t seriously thinking of keeping it, surely not! But, you’re not married!”

“Well at least we know you opened your legs at some point.” Feedback to the investigation

Women have told us how they have been accused of being uncommitted, selfish or lazy; sidelined or ignored; or unjustly criticized, sometimes in front of colleagues. This type of treatment, which can be designed to force a pregnant woman to leave, is hard to prove or pin down and women can be unaware that it constitutes unlawful discrimination.

A centre manager was told to stay out of meetings as her pregnant appearance was “inappropriate”. When she raised these issues she was told, “You’re hormonal and delusional.”

When a lecturer in politics at a university became pregnant her boss said “I assume that’s a mistake?” When she assured him it was not, he said “Well, you need to think very seriously about your future here.” Feedback to the investigation

⁶ Campbell v Royal Mutual Insurance Society Ltd (2004).

Exposure to health and safety risks: this includes being expected to move heavy loads, work in potentially violent situations or deal with high levels of stress. A recent survey found that less than one in three staff in the retail sector who worked while they were pregnant received a risk assessment (USDAAW, 2004). Women may not be aware of this right and so do not push for it. Managers may not realise that this is something that should be done. Where it is carried out, the risk assessment may not be adequate or followed up properly. As enforcement by the Health and Safety Executive and local authorities is limited, women may have no choice but to resign rather than work in hazardous surroundings. Women can also be denied their right to time off for antenatal appointments, which are vital to monitor their pregnancies (Maternity Alliance, 2004b).⁷

*A dental clerk resigned from her work after her employer failed to protect her from risks. Her risk assessment did not cover hazardous substances such as mercury (used in fillings) and she was told to stand by the door when x-rays were being taken.*⁸

Being isolated or overlooked while on maternity leave: women can be denied the opportunity to apply for jobs or promotion, fail to receive bonuses or pay rises they are entitled to and not consulted about redundancy or offered alternative work (Maternity Alliance, 2004b; James, 2004).

Problems on return to work: even though a woman has the right to return to the same job after ordinary maternity leave, this does not always happen. Women returning after additional maternity leave, who do not have an absolute right to their job back, can be given lower-status work or told they are redundant.⁹ The Maternity Rights Survey found that 20% of women who returned to the same employer after their maternity leave moved to a lower grade or level of job (Hudson et al, 2004). Women have told us that there can be problems after requesting a change in hours.

“Before I was pregnant, I had a clear definitive career path in a recognised job with a recognised function. My new role is ill-defined, I now do a lot of the donkey-work for other people to make the decisions that I would have made in my old job and without any recognition.”

Marketing Manager in the container shipping industry.

In one case, after having a baby, Elizabeth Jones asked her employer if she could return to work part-time on a temporary basis to her post of Production Controller. Instead she was offered a part-time receptionist post on 40% less hourly pay than in her previous job. She said that her manager also assumed she would want fewer responsibilities than before and expressed surprise that she was interested in responsibility and status now.

7 For example, the case of Goates v ESA Market Research Ltd (2004). Employment tribunal case number 3302234/2203.

8 Matheson v IA Dental Practice (2003). Employment tribunal case number 2500495/2002.

9 For example, the case of Bond v Lidl UK GmbH (2003). Employment tribunal case number 1400967/03.

The effects of stress

We know from hundreds of employment tribunal decisions that the stress of pregnancy discrimination can result in a loss of self-esteem, sleepless nights, depression and other mental health problems and damage to relationships. Some applicants claim it has led to pregnancy complications, even miscarriage. Dismissal can also result in financial worries due to the loss of income as well as feelings of rejection and loss of confidence about getting another job.

Are some women more at risk?

Black and ethnic minority women have told us they face additional stereotyped assumptions from some managers that they “have lots of babies” or will start a family at a younger age and therefore be less committed to their career (EOC Wales, 2004).

Disabled women have informed us that some people, including work colleagues, also make assumptions about disabled people, such as that they should not have children or will not be able to manage (EOC Wales, 2004).

Atypical workers: it is possible that homeworkers, agency temps and those on fixed term contracts may be at higher risk of pregnancy discrimination (Maternity Alliance, 2004a).

The next stage of our investigation will tell us more about how different groups of women experience their pregnancy in the workplace and whether additional protection is needed.

What have employers told us about managing pregnancy?

Key facts

- **89% of employers, of those who were aware of entitlements, said they were totally or fairly reasonable.**
- **Employers felt confident about managing pregnancy but more than a quarter could not cite, without prompting, a single statutory entitlement for pregnant women.**
- **Almost half of employers felt some women abuse their rights during pregnancy, maternity leave and on return to work.**
- **Uncertainty over whether and when the women will return to work and difficulties in covering the maternity absence were the main problems in managing pregnancy.**
- **More than one third of employers felt that pregnancy was ‘an undue cost burden on the organisation’.**
- **Some employers are unaware of their right to reclaim Statutory Maternity Pay.**

Employers we surveyed (Young and Morrell, 2004) fall into roughly three groups:

- employers who fully support the law, and the reasoning behind it, and who comply with the responsibilities placed upon them. Some of these employers extend maternity entitlements. The vast majority of employers who were aware of entitlements said they were totally or fairly reasonable
- employers who accept their responsibilities but struggle to implement it. While many employers say that they treat pregnancy positively, many are not fully aware of their obligations or do not know how to put them into practice due to the complexity of the law and a lack of one-stop, practical, accessible guidance. Some are concerned about cost burdens. Some employers have real practical and financial difficulties accommodating pregnancy and maternity and some do not know about the financial support available to them
- employers who do not accept the law and ignore it.

Employers are more likely to have positive views of managing pregnancy if they:

- are part of a large workplace
- have a predominantly female workforce
- have recent experience of managing a pregnancy
- are in the public sector.

Those employers who had managed a pregnant employee in the previous three years tended to have more pregnancy-friendly attitudes and beliefs than those who had not. This suggests perceptions are not always borne out by experience. They may either be unjustified or may be outweighed by the benefits of positively managing the employee. With experience and commitment, genuine challenges can be overcome. However, businesses with fewer than 10 employees are likely to have a pregnant employee only one year in ten and those with fewer than 25 employees, one year in five (www.dti.co.uk) and lack of familiarity, coupled with lack of access to human resources expertise, may make the experience more difficult.

Patchy awareness and knowledge

Virtually all employers told us they were confident that line managers ‘always complied’ with legislation (Young and Morrell, 2004). However:

- more than a quarter of employers we surveyed could not cite a statutory entitlement for pregnant women or those on maternity leave without being prompted. Small workplaces, male-dominated ones, and those that had not had a pregnancy in the previous three years found this particularly difficult
- 73% that knew one or more statutory entitlements were most likely to mention maternity leave (46%) and maternity pay (45%)
- only a quarter mentioned paid time off to attend antenatal appointments
- awareness of health and safety duties seemed particularly low: only 7% of those who could name an entitlement cited risk assessments
- small businesses have a particularly low awareness of employment regulations and see complying with them as a very low priority. For many, pregnancy is a rarity and getting to grips with the many legal requirements can only be done when it becomes a necessity. These employers say they require access to clear, simple advice on a need-to-know basis (Opinion Leader Research, 2004)
- some employers, small businesses especially, are unaware of their right to reclaim SMP from the Government (EOC Wales, 2004).

Difficulties in understanding and applying the law

Rights and responsibilities during pregnancy and maternity are not all located in one piece of legislation. They are contained in the Employment Rights Act 1996 (ERA), the Sex Discrimination Act 1975 (SDA), the Management of Health and Safety at Work Regulations 1999 as well as a huge amount of both domestic and European Court of Justice case law.

The main statutes, the ERA (which gives women employment protection) and the SDA (which protects them from discrimination) frame rights very differently and are inconsistent in several respects. Advice on rights and responsibilities can differ according to which statute has been referred to.

The law can also be vague about exactly what practical steps employers must take. This leaves scope for conflict and misunderstanding between managers and employees which, if left unresolved, can lead to resentment and the breakdown of the employment relationship. For some issues on which the law is particularly unclear, such as accrual of holiday entitlement and bonuses during maternity leave, even legal advisors are unable to provide definitive answers.

Employers have told us of many common situations where disagreement on what is reasonable or fair may lead to dispute:

- antenatal appointments: what is ‘reasonable time off’?
- health and safety: what activities can safely be undertaken by a pregnant woman?
- breastfeeding: what kind of ‘facilities’ are suitable?
- returning to the same job: what if there have been structural changes and the job no longer exists in the same form? What is a suitable alternative?

Practical difficulties in managing maternity

Businesses have two main difficulties in managing pregnancy and maternity:

- uncertainty over whether and when a woman on maternity leave will return to work
- financial and practical difficulties in covering the maternity absence (Young and Morrell, 2004).

Uncertainty over return: almost 30% of employers told us this caused severe difficulties. Small workplaces were more likely to find this a big problem, though fewer employers that had experienced a pregnancy in the past three years cited it as an obstacle. Many employers did not know they had the right to contact a woman on maternity leave. Often communication during this period was sporadic or non-existent (Young and Morrell, 2004; EOC Wales, 2004).

Small businesses told us it would make life considerably easier if they could contact the woman at the six-month point to see if she wanted to return (Young and Morrell, 2004).

Research shows women who make plans with their employer about their return to work before they go on leave are much more likely to return than those who do not (Houston and Marks, 2003). This is borne out by best-practice employers who have shared their experiences through our Equality Exchange events. A building services contractor, for example, explained how establishing procedures for communicating and planning with staff throughout the pregnancy made it far easier to maintain contact during maternity leave and to discuss openly the options for returning to work.

Difficulties in covering maternity absence: the uncertainty of whether a woman would return to work after maternity leave was the biggest problem, followed by managing increased workloads and training new staff to cover the work (Young and Morrell, 2004). Recruiting suitable cover for those with specialised or pivotal roles in the business was particularly difficult. Problems can be particularly serious if they have to suspend pregnant employees on full pay for health and safety reasons (EOC Wales, 2004).

Small workplaces are more likely to have problems in managing these issues. In-depth research with small employers in Wales, where small businesses are the main employer, found very few small businesses brought in temporary staff to cover for maternity leave. They gave several reasons for this:

- temporary staff took too long to train and often made mistakes
- potential employees were not attracted by temporary work
- they were reluctant to pay agency fees.

“With a company like mine, it’s all about client knowledge, product knowledge, media knowledge. You can’t fit somebody temporarily to cover maternity leave for a job like that. Just as you get them (trained) the other person comes back.”

Small employer (Young and Morrell, 2004)

Some firms were beginning to understand the need to develop a more strategic approach to preparing the business for maternity absences, especially among employees in high-skill or key roles. A food manufacturer had developed a policy of multitasking and teamworking and found the self managing teams were more able to cope with maternity leave absences. A small firm in language and translation services had introduced a more open plan office, training to bring everyone up to date with databases, coupled with a policy to bring in freelance staff to familiarise them with the firm’s processes in case they were called on to cover (EOC Wales, 2004).

Other reasons for non-compliance with the law

Our investigation has identified several other reasons why employers may not comply with the law or choose to ignore it.

1. They fear the costs of managing pregnancy

Employers of all sizes said that they feared the cost of managing pregnancy. More than a third said pregnancy was an ‘undue cost burden on the organisation’ and 13% specifically mentioned costs as a reason why managers discriminate. In Scotland, the figure was 17% (Young and Morrell, 2004).

Some costs of managing pregnancy are not reimbursed to the employer. These include recruiting and training a new employee to cover someone on maternity leave, the time spent administering maternity pay and maternity leave, the salary of a pregnant employee suspended on health and safety grounds and the impact on the business of losing valuable knowledge and experience.

The problems are most acute for small workplaces, especially in terms of covering absences while also managing SMP. One in six employers thought the costs associated with managing SMP were very difficult (Young and Morrell, 2004).

“Lots of small employers are running on such tight margins that they can’t afford the costs associated with a pregnancy.”

Employers’ association representative

Some employers described a stark choice between doing their legal duty and hitting demanding business targets. One employer representative stated:

“There is a perception among some employers that they have a higher duty to the viability of their business – reduce costs, increase income. It’s crude and tough.”

Employers’ association representative

2. They are hostile to pregnancy and maternity law or employment law in general and think it’s not their job to bear the costs

Research among small employers has found that while most non-compliance is down to ignorance of employment regulations “there are also areas where some employers admit to knowingly break the regulations” (Opinion Leader Research, 2004).

Some employers say the law is too heavily weighted in favour of pregnant women.

“As a working mother myself, I would say there would have to be a balance between (employers’) and employees’ rights and responsibilities. I do not think that the right balance has been achieved yet, and that is at the expense of the organisation.”

Employer (Young and Morrell, 2004)

Some small firms we consulted recognised the importance of supporting new mothers but saw it as a community issue rather than one for employers. “Society needs children, not small firms” said one employer, who was hostile to the law in principle, but nevertheless strove to work within it (EOC Wales, 2004).

It seems these employers have not taken on board the reasons for pregnant women having special protection, or the role assigned to them in supporting women through pregnancy and maternity. Some were under the mistaken belief that they were bearing all the costs of supporting pregnant women, including paying for SMP. They had not got the message that responsibility is spread between the state, employers and families.

3. They hold negative perceptions of pregnant women and working mothers in general

Nearly 40% of employers in our survey said prevailing workplace culture, for example, one that harboured negative attitudes towards working mothers in general, was the main reason employers discriminated against pregnant women (Young and Morrell, 2004).

17% thought pregnant women tended to be less committed to their jobs and more than one in ten said women returning to work after maternity leave were less committed than before. Almost half of employers (47%) felt some women abused their rights during pregnancy, maternity leave and on return to work. More than a quarter of employers (28%) thought it was not worth training someone who was pregnant, even though it is unlawful to deny training on the grounds of pregnancy.

4. They feel that women with small children will be less reliable

These negative perceptions may also be fed by the problems some women returners face in attempting to combine their work with their new caring responsibilities, principally attributable to a lack of suitable affordable childcare, the inability of their partners to take adequate time off to share care and the limited opportunities to work more flexibly.

Employers can experience a variety of problems due to workers' lack of adequate childcare including: inability to work extra hours or late when needed, absenteeism, late attendance or leaving work early, or staff being tired, irritable and stressed (James, 2004). Employers at one of our Equality Exchange events told us more affordable childcare and 'educating men to take more responsibility for childcare' were important in helping women return to work fully able to commit.

"They are less reliable, as they prioritise family life."

Employer (Young and Morrell, 2004)

A proportion of employers are abdicating their responsibilities towards pregnant women by dismissing or forcing out employees who become pregnant. Some employers also say they do not employ women due to the financial implications of maternity leave. These attitudes were expressed by women as well as men (EOC Wales, 2004; Opinion Leader Research, 2004).

"If you have a list of people with equal merits, I might be more inclined to employ a bloke as he is not going to get pregnant."

"I am subconsciously careful of employing women."

"You just have to try to employ people who are not in the sector to get pregnant."

Employers (EOC Wales, 2004)

No one in our research in Wales said directly that they would dismiss someone if they found out they were pregnant, but we know from the many tribunal cases that it does happen and that small employers are over-represented (Gregory, 2004). One business owner when asked whether he knew people who would sack a pregnant woman replied, "No, but they would make their lives very difficult."

Does the legal system prevent pregnancy discrimination?

Key facts

- It's up to pregnant women to defend themselves, normally without legal aid for representation at the tribunal.
- Going to court is stressful. At such a vulnerable time as pregnancy, many women choose not to exercise their legal rights.
- The three-month time limit for making a claim is a particular obstacle for pregnant women.
- Many employers feel that the tribunal system is stacked against them.
- Half of applicants who have taken an employment tribunal claim report lower status or lower paid employment, or even unemployment, afterwards.

The legal system is meant to protect women from unfair treatment on the grounds of pregnancy and maternity. A woman returning from maternity leave should be able to restore herself as far as possible to the position she was in before the discrimination took place.

However, our investigation shows that, in reality, pursuing a legal claim involves conflict, stress and the potential loss of one's job. Many women choose to stay on in unpleasant and possibly unsafe working conditions or decide to prioritise the health of their baby rather than enter into legal conflict.

From our own experience of advising women, our consultation with the legal community and existing research, we know that individuals seeking to fight unfair treatment face a series of obstacles.

Lack of awareness of rights: individuals tend to see their own experiences of pregnancy discrimination as personal challenges, rather than as treatment which is unlawful. Early indications are that some pregnant employees expect less favourable treatment.

The current system relies entirely on individuals to enforce their own rights: there is no requirement upon employers to demonstrate compliance with the legislation and no system for enforcing compliance outside the tribunal. The only enforcement agency is the EOC but, with around 150 staff and only a tiny budget for supporting individual legal cases, it is not equipped to monitor compliance on the ground. The EOC is able to support around 40 cases each year. The exception is in relation to health and safety requirements, where the Health and Safety Executive and local authorities have such a role although, in practice, their enforcement activity in this area is limited.

In the absence of more systematic enforcement of the law, some employers will continue to discriminate. Pakistani and Bangladeshi women told us they would not contemplate taking action against their employer (Connect Research & Consultancy Ltd, 2004). Some women spoke of accepting certain situations as they believed that complaining would cause more harm than good and that women who complain are labelled 'trouble makers'. One noted that, for many, it is a choice between taking a stand and possibly losing one's job or keeping quiet and remaining in employment.

“[It’s either] fight for your rights or pay your mortgage.”

Pakistani woman

Many women who bring tribunal claims eventually enter into settlements that are sometimes confidential and many will not make a claim in the first place (Equal Opportunities Commission, 2004b). In Great Britain we have no way of knowing how often this is happening, but in some other EU countries all resignations of pregnant women have to be notified to the Government precisely to ensure that they are not involuntary (see annex 5 and Heron, 2004).

Gaps in the protection of the legislation: although existing legislation does outlaw most forms of pregnancy discrimination, there are some gaps in the law, particularly:

- the exception to the right to return to the same job after additional maternity leave¹
- and the fact that the special exception to the legal protection given during pregnancy and maternity leave does not cover the immediate period of return.²

Obstacles to taking an employment tribunal claim: we recognise that employment tribunals are a last resort but, for the few women who do want to take a claim to the employment tribunal, the obstacles include:

- **the 3 month time limit** for bringing a claim, which is particularly short for a pregnant women or new mother. Research with women in Wales (EOC Wales, 2004) who had experienced discrimination found that the most common reason for not taking a case to the employment tribunal was that they did not feel up to bringing a claim at that particular time because of the stress involved. Tribunals have discretion to allow cases to proceed after the time limit if it is equitable, but this is often denied. A pub manageress who was dismissed was denied an extension of time although only two days late in filing her claim. She had had a pregnancy related illness resulting in hospitalisation and needed to find somewhere to live because her accommodation had been linked to her employment.³

“Looking back, I wish I had taken it further but, after all our problems, the baby was so precious and I decided not to. The timescales are so harsh and there’s so much to think about. Plus a lot of things could arise after the three-month deadline.”

Former Family Support Worker

Some women did not realise until it was too late that they could make a claim.

1 One source of conflict between employers and women arises because the provisions currently leave a grey area about what job a woman is entitled to when she returns from Additional Maternity leave, as there is no need for an employer to offer a woman her old job back ‘if it is not reasonably practicable’ to do so. Conversely, once women do return to the workplace and have their ‘feet back under table’ there is generally a feeling on the part of both employer and employee that they had never left.

2 A woman who is treated less favourably after her return from maternity leave for a reason linked to her pregnancy or absence on maternity leave (including post-natal depression), can no longer rely on the special legal protection afforded her during her pregnancy and maternity leave. This special protection makes any dismissal or disadvantage on the grounds of pregnancy automatically sex discrimination. Instead, if she wished to challenge her treatment, she has the more difficult task of showing that she has been treated worse than a man in similar circumstances would be by comparison.

3 O’Herlihy v The Passionate Pub Company Ltd (2003). Employment tribunal case number 1501857/03.

“I think the time limits are far too short. By the time I had a chance to think about my claim after I’d had the baby, it was far too late.”

Feedback to the investigation

- **the lack of legal aid.** There is no public funding for representation at tribunal in England and Wales with few exceptions, though it is available in Scotland for the most complex cases.⁴ The applicant will usually have to pay her own legal costs out of her compensation, unless she has received free representation, for example, from a union, CAB or law centre
- **the adversarial nature of the tribunal.** Eight in ten applicants settle or withdraw their claims without going to a hearing, the stressful nature of the proceedings being the most frequently cited reason (DTI, 2004).

“The vast majority of women will back down because of the potential stress involved. You are very vulnerable when pregnant, worried about having a healthy baby and not wanting to jeopardise the baby’s welfare.”

Feedback to the investigation

- **limited access to employment law advice.** Some areas of Great Britain have been identified as an ‘advice desert’ in respect of employment law advice (Citizens Advice, 2004; Williams et al, 2003)
- **the heavy burden of proving the treatment was due to her pregnancy.** In a recent study, the EOC found that around half of employment tribunal claims of pregnancy related discrimination were successful under the Sex Discrimination Act. A further 13% succeeded on other grounds (Gregory, 2004). It is often difficult for the applicant to demonstrate the reasons for her employer’s treatment. For example a woman who worked for a small building contractor was offered a new contract at a reduced salary the day after announcing her pregnancy, but the tribunal concluded that this was a coincidence⁵
- **the inability of an employment tribunal to restore the employment relationship.** Succeeding at tribunal does not reinstate a woman to her original job, except in very rare cases. Of those who take tribunal claims less than 3% remain employed with the same employer. Half of applicants who have taken an employment tribunal claim report lower status or lower paid employment, or even unemployment, afterwards (DTI, 2004)
- **compensation is unlikely to be received for 12 months** after the loss and may not make up for the full loss. The average compensation award for injury to feelings where women have been dismissed because of their pregnancy is £2,000 lower than the average awards given for non-pregnancy related dismissals (James, 2004). If the company ceases trading before paying the compensation the woman will usually receive nothing
- **compensation can never make up for some loss** such as miscarriage.

The current system is failing to protect women from pregnancy discrimination, much of which is going unchallenged and unmonitored. It relies on individuals, and their families, to gamble their health, income and well being in order to take action against their employers. Individual litigation is not the most effective way to combat systemic discrimination.

4 House of Commons Constitutional Affairs Committee’s Fourth Report: Civil Legal Aid: adequacy of provision (2004): “It is not acceptable that in employment cases employees can be forced to represent themselves in circumstances where private employers are able to employ lawyers to represent them. If proceedings are to be fair, there needs to be equality of arms. Legal aid should not automatically be excluded from such tribunal hearings.”

5 MacLeod v W F Price (Roofing) Ltd (2003). Employment tribunal case number S/102788/02.

How does the legal system operate for employers?

Employers also find the employment tribunal process far from satisfactory, even a win being described as a “hollow victory” (Opinion Leader Research, 2004). When employers lose at the tribunal they commonly feel that the system is unfair and imbalanced (Young and Morrell, 2004).

“My feeling is that they look at businesses as unscrupulous and without integrity and trying to cheat the whole way through; that’s what I feel has been put to them and there’s this innocent girl that’s got pregnant and this nasty businessman who sacked her.”

Small employer

The role for mediation and conciliation

Not surprisingly, both individuals and employers are calling for means of resolving disputes at an early stage. For example, some small businesses are calling for intervention by a third party such as an independent arbitrator or mediator to try to resolve cases before court proceedings (Opinion Leader Research, 2004).

Our proposals for change

Many of the problems highlighted by our investigation so far are shared by employer and employee alike. Some of these problems require urgent solutions and that is why we are already making a number of firm recommendations for change. In reaching recommendations, we have taken into account both the individual's need to be treated fairly, to be able to combine work, pregnancy and motherhood without loss of employment or prospects, and the real difficulties faced by employers.

We have also published a separate consultation document to gather further evidence on what more may need to be done to make pregnancy a positive experience for everyone involved. The consultation period will run until 30 September and the document is available on and can be downloaded from our website at www.eoc.org.uk/pregnantandproductive.

First problem: employers and employees are not aware of their rights and responsibilities, partly because the law is difficult to understand

1.1 Recommendation: a written statement of rights and responsibilities should be provided to every pregnant woman and her employer, to ensure they have accurate information at an early stage. This statement would be given to a woman at her first antenatal visit, with instructions to give her employer a duplicate copy when she gave notice of her pregnancy. The statement will highlight:

- the employer's obligations, such as the duty to carry out a risk assessment, and rights, such as the right to reclaim SMP
- the employee's responsibilities, such as giving notice of pregnancy, and her rights, such as protection from pregnancy-related dismissal
- sources of information and guidance.

We are currently exploring how this information could be delivered by the National Health Service or other means.

1.2 Recommendation: a statutory Code of Practice on pregnancy and maternity law. This Code of Practice, jointly prepared by the EOC, the Advisory, Conciliation and Arbitration Service (ACAS) and the Health and Safety Commission (HSC), will give clear, practical guidance for employers on the implementation of the Employment Rights Act 1996, the Sex Discrimination Act 1975 and the relevant health and safety regulations. Guidance on other issues affecting parents, such as parental leave rights, could also be included.

1.3 Recommendation: a toolkit or good practice guide for employers, with a separate version specifically tailored to the needs of small businesses. Trade associations and employer associations would produce such a toolkit in partnership with the EOC. It would:

- reduce employers' uncertainty about managing pregnancy by giving them strategies for dealing with difficult issues
- provide a framework for employers to plan ahead for pregnancy and minimise the disruption to their business
- provide model policies for improving communication with employees.

1.4 Possible solution: Government should review existing equality and employment protection legislation to make it more user-friendly since a Code of Practice can only give guidance on the law as it stands. As the new Commission for Equality and Human Rights is established, existing legislation across the different equality strands should be modernised and made consistent.

Second problem: limited compliance with and enforcement of the health and safety requirement to carry out risk assessments for pregnant women.

2.1 Recommendation: the Health and Safety Executive should take steps to increase compliance by raising awareness and stepping up enforcement activity. The situation would be improved to some extent by the new statement of rights and responsibilities. However, the HSE needs to put more resources into increasing awareness and enforcement. Action should include:

- **providing clear signposting** for employees of the role of the HSE and local authorities in enforcement activity
- **monitoring employer compliance** as part of routine health and safety inspections
- **co-ordinating and increasing enforcement with** local authorities.

2.2 Possible solutions include:

- a government subsidy for employers who are forced to suspend a pregnant woman on full pay for health and safety reasons
- giving individuals the right to bring a claim at the employment tribunal for any disadvantage as a result of failure to conduct an adequate risk assessment within a specified time (see Annex 4 for the current legal position).

Third problem: the system for resolving disputes or enforcing the law isn't working.

3.1 Recommendation: extend the three-month time limit for registering a pregnancy or maternity-related unfair dismissal or sex discrimination claim. We will explore further the appropriate extension to the time limit and how it will be affected by the new statutory procedures for resolving disputes in the workplace.¹

3.2 Possible solutions include:

- increasing access to free mediation and conciliation for resolving pregnancy-related disputes. There is general agreement that the emphasis should be on resolving problems in the workplace, so that the employment relationship can continue where possible. But we need to consult on how this would be resourced and how all parties can be encouraged to make use of alternative dispute resolution methods

¹ The Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752) comes into effect on October 1 2004.

- shifting the burden of proof in tribunal cases so that it would be for the employer to prove that a disadvantage suffered by a woman was for reasons other than her pregnancy or maternity leave rather than requiring the woman to prove that the treatment was because of this²
- providing support for individuals whose rights have been infringed. The responsibility for ensuring compliance with maternity rights should be taken up by the state, not left to the individual. There are several possibilities for doing this such as:
 - the creation of a specific agency to ensure better compliance with the law
 - increasing the capacity of existing services to offer advice to those individuals who wish to enforce their claim
 - greater investment in the transfer of expertise from bodies such as the EOC to HR advisers, Citizens Advice Bureaux and legal advisers.

Fourth problem: a proportion of employers do not comply with the law

4.1 Possible solution: to reduce the fear factor, we need to consider whether the state needs to provide more financial support for small employers. This could take the form of a national insurance holiday for employers who engage temporary staff to cover for maternity leave or a specific grant to cover the costs of such leave. This proposal requires further testing and debate.

4.2 Possible solution: provide better job security for women who become pregnant.

This could mean:

- **strengthening employment protection for pregnant women and those on maternity leave.** It is important to ask whether the current scope for employers to dismiss or make pregnant women redundant is contributing to the problems they face. Many other EU countries have interpreted the Pregnant Workers Directive as placing greater restrictions on the circumstances in which pregnant workers and those on maternity leave can be dismissed. It is arguable that UK legislation does not comply with the Directive³
- **strengthening the individual's right to be given her job back at the point of return to work.** After additional maternity leave, an employer does not need to do this if it is not reasonably practicable, and this is often a source of conflict
- **extending the special legal protection** during pregnancy and maternity leave to cover a period after a woman's return to work as happens in other EU countries (see Annex 5 and Heron, 2004). A reasonable extension may be three months.

4.3 Possible solution: a national system should be put in place to collect a public record of all dismissals and termination of contracts during pregnancy and maternity leave. Such systems are in place in many other countries.

2 In employment tribunal cases in Great Britain, the burden of proof rests upon the applicant to show that her dismissal or other disadvantage occurred because of her pregnancy or maternity, but such proof can be difficult to obtain. In some other European countries the situation is different and it is up to the employer to show that the reason for the treatment complained of was not due to the employee's pregnancy. Under the ERA female employees have the right not be disadvantaged or dismissed due to pregnancy, but the burden remains on the individual to prove the prima facie case that the whole or principle reason for dismissal or disadvantage is pregnancy related. Such proof is rarely readily available. Unless it is demonstrable that the employer has put forward an untruthful reason for a dismissal, the tribunal is more likely to accept the employer's explanation than that of the individual. As a result women may be advised that they do not have a strong case. Under the SDA, lawyers are in dispute about what an applicant has to establish before the burden of proving that there has been no discrimination passes to the employer.

3 Article 10 of the Pregnant Workers Directive (which is intended to safeguard the health of pregnant women and their unborn children) provides that 'Member States shall take the necessary measures to prohibit the dismissal of workers... during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1) save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent'.

Fifth problem: lack of support for working parents

5.1 Recommendation: promote positive attitudes towards women who are pregnant, on maternity leave and returning to work.

The Government, employers, trade unions and every agency that offers advice to employers should communicate consistent and positive messages about the benefits to employers and wider society of supporting women whilst they are pregnant, on maternity leave and when they return to the workplace. They should also increase understanding of how the state helps employers with the costs.

5.2 Recommendation: a National Family Strategy, supporting fathers as well as mothers, to reduce the difficulties women face when returning to work.

The EOC Parents and Carers Coalition is recommending a step change in the development of services and support for parents which would bring together and extend existing support, with:

- **quality, universal, community-based childcare and extended schools** for children aged 0–14 which would be affordable and accessible for all
- greater choice, with effective financial support and flexibility for families in managing their caring and working roles, including an **improved framework of paid leave** for mothers and fathers similar to that which is provided in Sweden and **better access to flexible working**.

For the short-term, steps towards this goal include:

- **increasing statutory paid maternity leave so that all women can afford to take it.** Options might include raising SMP close to previous earnings and/or extending the period of paid leave from six months to one year
- **increasing statutory paid paternity leave** to give more fathers the opportunity to play a greater part in caring. Options might include raising statutory paternity pay close to previous earnings and/or extending the length of paid paternity leave from two to six weeks on a flexible basis. The second six months of current maternity leave should also be opened up to both parents to take flexibly
- **taking new steps to make childcare affordable**, free for families on low incomes and accessible for parents of disabled children
- **giving all parents the right to request flexible working** so they can combine paid employment with parenting
- **developing advice and information services** to help parents returning to work and to help employers maximise the potential of their workforce.

The next stage of the investigation

Consultation

In late July we published a consultation document which we have distributed to a wide range of key stakeholders, particularly employers and organisations who represent their views. We want to hear views on possible solutions as well as gathering additional evidence, case studies and examples of good practice. The consultation period will run until 30 September and the document is available on and can be downloaded from our website at www.eoc.org.uk/pregnantandproductive.

Further research

Our extensive research into this subject includes:

- research into employers, including small employers
- how many women are affected by pregnancy discrimination and in what ways
- specific issues facing ethnic minority and disabled women and those on a low income
- the costs to the individual, employers and the economy of pregnancy discrimination.

Final report

We will deliver our final report and recommendation to the Secretary of State for Trade and Industry in March 2005.

Annexes

Annex I

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Annex 2

Advisory Board Members

Chair of group: Fiona Cannon, EOC Commissioner, Head of Equality and Diversity at Lloyds TSB.

Members:

- Caroline Waters, Director of People Networks, BT,
- Janet Gaymer, Senior Partner, Simmons & Simmons, Chair of Employment Tribunal System Taskforce,
- Joergen Frederiksen, HR Director, Kelloggs.
- Julie Welch, Employment Brand Manager, Sainsburys.
- Liz Kendal, Director, Maternity Alliance.
- Peter Firth, HR Consultant, Member of Federation of Small Business Employment Affairs Committee.
- Rhian Davies, Chief Executive, Disability Wales.
- Sarah Veale, Head of Equality & Employment Rights Dept, Trade Union Congress.
- Shernaz H Engineer, Verity Appointments.
- Shona Simon, Chair Employment Tribunal Edinburgh.
- Stephen Haddrill, Director General of Fair Markets, Department of Trade and Industry.

Annex 3

Terms of reference of the investigation

1. To establish the incidence of pregnancy-related dismissal in Great Britain and the characteristics of the women who experience it, including their race, disability and income.
2. To investigate awareness of legal rights and responsibilities in respect of pregnancy at work.
3. To investigate the reasons why employers may break the law, including their perceptions of and attitudes towards pregnant women in the workplace.
4. To quantify the cost of pregnancy discrimination in terms of health and safety and in terms of women's attachment to the labour market.
5. To assess the effectiveness of legal protection for pregnant women at work in Great Britain, with respect to both the substantive law and the determination of complaints through the employment tribunal system.
6. To assess the effectiveness of access to advice and support for women facing discrimination, with particular emphasis on the most vulnerable groups, including black and minority ethnic women and those on low incomes
7. To consider any specific issues in relation to race and disability in relation to the above.
8. To make and widely publicise recommendations to help reduce the problem, with follow up work as necessary.

Annex 4

Current rights and responsibilities in relation to pregnancy at work

Under the Sex Discrimination Act 1975

- Women workers, including temporary and fixed-term staff, have the right not to be dismissed or treated less favourably for any reason connected to their pregnancy or maternity leave. It is sex discrimination for an employer to refuse to appoint or promote, refuse sick pay, withdraw training, select for redundancy, worsen terms and conditions or unfairly criticise or harass due to pregnancy or maternity.
- A worker who issues legal proceedings under the SDA is protected from victimisation.
- A worker also has the right not to be dismissed or treated less favourably for sickness absence which is pregnancy-related.

Under the Employment Rights Act 1996

- Every employee, regardless of length of service, has the right not to be dismissed for any reason connected with her pregnancy, childbirth or maternity leave.
- Maternity rights include 26 weeks ordinary maternity leave for all employees.
- 26 weeks additional maternity leave for employees with 26 weeks service by their sixth month of pregnancy.
- Right to SMP for employees who have worked for their employer throughout their pregnancy and have earnings above the lower earnings limit. Employers are entitled to be reimbursed 92% of SMP by the Inland Revenue. Small employers receive 105%.
- Right to return to the same job after ordinary maternity leave and to the same or, if not practicable, an equivalent job after additional maternity leave.
- Right to paid time off for antenatal classes.
- Right to suitable alternative work if made redundant while on maternity leave.

Under the Management of Health and Safety At Work Regulations 1999

If a risk assessment highlights a health and safety risk, the employer must take the following steps:

- adjust working conditions to avoid the risk and, if this is not possible
- change the employee's work to avoid the risk and, if this is not possible
- redeploy the employee to suitable alternative work, and if this does not exist
- suspend the woman on full pay.

Breach of the regulations in respect of risk assessments does not give rise to any liability under the ERA, but can amount to unlawful sex discrimination if a disadvantage is thereby caused.

Annex 5

Some international comparisons

Maternity rights in other EU countries can be quite different from those in the UK (Heron, 2004). This annex provides some examples. Note that the legal rights referred to here refer only to new and expectant mothers rather than all employees unless this is stated explicitly.

Protection from dismissal related to pregnancy and maternity

- The burden of proof rests with the employer to show that a dismissal is not related to pregnancy in Norway and Finland.
- Dismissals do not come into effect until maternity or parental leave end in Norway.
- Employers in Finland may only make a redundancy during maternity leave if their operations completely cease.
- Dismissals during pregnancy and maternity leave are prohibited in Austria, France, Germany, Italy and the Netherlands except in special circumstances, such as gross misconduct, which differ slightly from country to country.
- Protection is extended beyond maternity leave in Austria, Germany, the Netherlands.

Approval of dismissals and resignations by an external body

- Dismissals of pregnant women in the Netherlands, Germany and Austria must be authorised by an external body.
- Italy and Germany resignations of pregnant employees must be notified to government.
- An employee in Norway who is dismissed must be kept in their job until the fairness of the dismissal has been determined by a court.

Health and Safety at Work

- Pregnant and breast-feeding workers in the Netherlands can take extra paid breaks.
- Paid breaks for breast-feeding are available in Germany and Italy.
- Employers in Finland who do not have adequate expertise to carry out a risk assessment must engage an external expert.
- Employers in Finland, Italy and the Netherlands can obtain reimbursement of the pay for women suspended on health and safety grounds.

Recruitment

- In Finland, all unsuccessful job applicants are entitled to a report from the employer setting out details of the person who was appointed.

Time limits for filing a legal claim

- There is no time limit in France and a limit of one year in Finland.
- In Norway the court may disregard the time limit when requested by the employee and when it is considered reasonable to do so.

Information for employees

- In Germany, employers must visibly display the legislation.

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