Brexit and Mrs Webb: Return of the sick man *versus* pregnant woman?

The EU widened the scope of protection against gender discrimination considerably. Advancements have included protection relating to equal pay, paid time off for antenatal appointments, pregnancy discrimination, parental leave and urgent time off for family reasons, paid maternity leave and the right to equal treatment for part-time, fixed-term and agency workers.

In this article, we focus on the benefits for women under EU law which make it easier to obtain protection against workplace discrimination when pregnant and on the extent to which these advances might be reversed following Brexit.

No comparison with men

A key example of how a progressive Court of Justice (CJEU) secured important rights for women, is the well-known case of *Webb v EMO* [1995] ICR 1021. Following *Webb*, women could bring pregnancy discrimination claims far more easily because they did not need to rely upon a male comparator any more.

Mrs Webb was employed by EMO to replace a pregnant employee during the latter's maternity leave. Mrs Webb was supposed to continue to work after that leave ended. Soon after she started, she discovered she was pregnant. On hearing this news EMO dismissed her. She alleged that she had been directly discriminated against on grounds of her sex under the Sex Discrimination Act 1975 (since repeated and replaced by the Equality Act 2010). EMO said they would have dismissed a man employed for the same purpose who was going to need leave of absence at the same time (e.g. for medical or other reasons).

Before the case was referred to the CJEU, the House of Lords ruled that the key point was availability for work and not the reason for unavailability. If an employer would treat men or women who were unavailable in the same way – and the reason for absence did not matter – there was no sex discrimination.

The CJEU in *Webb* ruled that pregnancy was a condition unique to women, and sex discrimination could be proved because it was not necessary to compare the pregnant woman with a sick man. Women had special protection against any detrimental treatment because of pregnancy or pregnancy-related absence during a "protected period" (from the start of pregnancy and throughout maternity leave).

Webb led to many additional protections for pregnant women across the EU.

After *Thibault* (decided by the CJEU in 1998), women gained the right to object to being denied the benefit of terms and conditions during maternity leave (except with regard to actual pay). In *Gillespie* (in 1996), the CJEU had decided that although there was no entitlement to full pay when on maternity leave, maternity pay had to take into account relevant pay rises.

Section 18 Equality Act 2010 now protects against "unfavourable" treatment in pregnancy and childbirth cases. The general direct discrimination provision in the Act (section 13) requires proof of "less favourable" treatment but section 18 does not.

Burdens on business post Brexit?

Implementing such decisions imposes financial burdens on business. It would be naïve to assume that a Government, seeking deregulation and cutting red tape (see e.g. the 2011 Employment Law Review), would not consider amending the provisions protecting against pregnancy and childbirth discrimination, perhaps reverting to a law requiring proof of less favourable treatment.

Some businesses did not like *Webb.* So protection of pregnant women might, assuming Brexit, become a target. The 1972 EC Act gave supremacy to EU law and so forced the UK to accept *Webb.* If we are divorced from EU law the Government could simply enact legislation to overturn such decisions.

"You don't know what you've got till it's gone"

Currently, there are clear arguments which prevent regressive legislation in respect of rights to equal treatment. Such legislation would:

1. fail to comply with Article 2(2)(c) of the Equal Treatment Directive,
2. prevent an effective remedy for such a breach, now a general requirement of EU law specifically enshrined in Article 17(1) of that Directive as well as Article 19 Treaty of the EU and Article 47 of the EU Charter,
3. prevent a purposive interpretative obligation, enshrined in decisions like *Marleasing* [1990] ECR I-4135,
4. deny the interpretation that had been gained from a reference to the CJEU.

Post-Brexit such arguments are meaningless. Disentangled from EU law obligations, Directives relating to social rights would be domestically irrelevant. You could look at them, but could not require anyone to interpret national law using them.

The useful duty to read words into domestic laws to comply with European law in cases like *Coleman v Attridge Law* [2008] I.C.R. 1128 will go. This gave associative discrimination rights to parents of disabled children.

Equality lawyers would revert to the pure domestic aim of statutory interpretation, which is to determine Parliament's intention expressed in the legislation's language. Courts would be less willing to "distort" the linguistic meaning of legislation in favour of achieving a social objective.

The concept of "equal pay for work of equal value" would never have developed without the interpretation provided by the CJEU. Thousands of female manual workers would still be paid less for cleaning offices than their male colleagues receive for collecting rubbish.

You will read this two days before the Referendum, but all this is not scare-mongering. Now, as in 1995, it is essential to ensure effective protection against pregnancy discrimination. So there must be effective access to justice and remedies. Government-commissioned research on pregnancy discrimination bears this out:
https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings.)

There are no irreversible tides

Would the UK really want to go back on 20-year-old established legal principles for establishing pregnancy discrimination? Remember how arduous outlawing part-time status discrimination was? For years, the UK vetoed Directives protecting atypical workers. The Part Time Workers Directive was only implemented in the UK, via the 2000 Part Time Workers Regulations, after the 1997 Labour government signed the Social Charter which then went on to form part of the Treaty on EU. EU law alone gave around 400,000 part-time workers, mostly female, better pay and conditions.

Conclusion

Most commentators have focused on reductions post-Brexit in working time or agency workers' rights. But a post-Brexit UK could also kerb social developments such as ensuring fathers have equal rights to properly paid parental leave and the potential protection of carers. There is also concern that ill pregnant women, or women whose maternity leave is a cost their employers would rather avoid, or indeed fathers who want to share in early years childcare, will be the definite losers in a post-Brexit world. A very different set of tactics will be needed by campaigning organisations to retain rights post-Brexit, than are currently required.