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King's Bench Walk

WOMEN & EMPLOYMENT LAW: Equal Pay and Secrecy clauses, Pregnancy, Maternity and Family Leave Claims

**Hollie Patterson, Laura Robinson and
Martina Murphy**

www.12kbw.co.uk

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Equal Pay and Secrecy Clauses

▶ **Hollie Patterson**

Equal Pay

- ▶ Equal pay law is covered by the Equality Act 2010 and the Equality and Human Rights Commission (EHRC) statutory code of practice on equal pay.
- ▶ It is well established and understood that by law, men and women must get equal pay for doing 'equal work'.
- ▶ Equal pay law applies to pay and terms and conditions of employment, including: basic salary, pension, working hours, annual leave allowance, holiday pay, overtime pay, redundancy pay, sick pay, performance-related pay.

Secrecy Clauses

- ▶ There is nothing in principle to prevent an employer from including in the contract of employment (or worker's contract) a 'pay **secrecy clause**'.
- ▶ Secrecy clauses purport to prevent disclosure by a worker of their own pay arrangements to someone else, and/or prevent the worker from seeking information from a colleague about that colleague's pay.
- ▶ Lack of pay transparency is one of the key obstacles to enforcing the right to equal pay. It potentially stops workers from knowing how their pay, on average, compares to that of their colleagues of the other sex doing equal work or work of equal value.

Statistics

- ▶ A TUC/GQR poll published in January 2020 found that:
 - Nearly a fifth (18%) of workers have been told they're not allowed to discuss their pay with co-workers.
 - Half (50%) of workers don't know what senior managers in their organisations are paid.
 - More than half (53%) of workers are not given information about other people's pay in their organisation.
 - Fewer than one in five (18%) report that their workplace has a transparent pay policy, where salary details are available to everyone through an official source.
- ▶ TUC General Secretary **Frances O'Grady** said: “[Pay secrecy clauses] stop workers from challenging unfair pay, allow top executives to hoard profits and encourage discrimination against women and disabled people.”

The Equality Act 2010

- ▶ The Equality Act 2010 (EqA 2010) recognises that the operation of pay **secrecy clauses** may mask prohibited conduct by the employer, which contravenes the Act.
- ▶ It also recognises that workers may wish to have discussions about pay in order to find out whether any pay disparities between them infringe their equality rights under the Act, potentially allowing them to bring a claim to remedy the situation.
- ▶ Section 77 is the provision within the Act which addresses discussions about pay.

Section 77 of the EqA 2010

s77 Discussions about pay

(1) A term of a person's work that purports to prevent or restrict the person (P) from disclosing or seeking to disclose information about the terms of P's work is unenforceable against P in so far as P makes or seeks to make a relevant pay disclosure.

(2) A term of a person's work that purports to prevent or restrict the person (P) from seeking disclosure of information from a colleague about the terms of the colleague's work is unenforceable against P in so far as P seeks a relevant pay disclosure from the colleague; and "colleague" includes a former colleague in relation to the work in question.

(3) A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic.

(4) The following are to be treated as protected acts for the purposes of the relevant victimisation provision—

- (a) seeking a disclosure that would be a relevant pay disclosure;
- (b) making or seeking to make a relevant pay disclosure;
- (c) receiving information disclosed in a relevant pay disclosure.

(5) The relevant victimisation provision is, in relation to a description of work specified in the first column of the table, section 27 so far as it applies for the purposes of a provision mentioned in the second column.

EqA 2010 Protection

- ▶ Essentially, the EqA 2010 protects the right for workers to conduct discussions about pay, if the purpose of the discussion is to find out whether (or to what extent) there is a connection between pay and having (or not having) a particular protected characteristic.
- ▶ And it provides protection for workers against an employer subsequently subjecting them to a detriment because they had such a discussion, by allowing such workers to bring victimisation claims under s27 of the Act.
- ▶ The EqA 2010 does not provide any right to conduct pay discussions that do not have that purpose or allow victimisation claims to be brought where a worker is subjected to a detriment because he had a pay discussion which did not have that purpose.

Problems

- ▶ Although the EqA seeks to protect the right for workers to hold discussions about pay, the very presence of secrecy clauses can make individuals reticent to speak about such matters.
- ▶ Even where an individual is bold enough to discuss pay with colleagues, it can often be difficult to discern their motivation when doing so. For example, whether the conversation was a break room boast or a conversation borne out of concern about discrimination.
- ▶ The presence of secrecy clauses results in a lack of pay transparency which creates a grey zone favouring the perpetuation of gender bias in the setting of salaries.

Next Steps

- ▶ Increasing pay transparency is a key part of the fight against unfair pay, helping to expose the many different forms of pay discrimination and inequality workers face.
- ▶ The following steps would assist in achieving greater transparency:
 - Banning pay secrecy clauses outright so that everyone can talk about their pay and other work benefits to anyone and for any reason.
 - Delivering stronger union rights so that trade unions can ensure transparent and fair processes for setting pay rates.
 - Committing to the introduction of cutting-edge pay transparency measures such as those being considered by the European Commission.

Family Leave

▶ **Laura Robinson**

Parental Leave - MAPLE 1999

- ▶ Right to parental leave applies to both parents
- ▶ Applies to full and part-time employees but must have one year's continuous service at the time seeking to take the leave
- ▶ Maximum leave is 18 weeks per parent per child (no more than 4 weeks in any one year)
- ▶ Must give notice of the leave – at least 21 days notice specifying the date and duration of the leave
- ▶ Employer can postpone the leave on the grounds of undue disruption to its business provided the leave is re-scheduled not later than 6 months after the proposed date
- ▶ Annual leave entitlement continues to accrue

Parental Leave – MAPLE 1999

- ▶ Employee entitled not to be subjected to any detriment by his or her employer by reason of taking or seeking to take parental leave (Regulation 19 MAPLE 1999)
- ▶ Employee has a right not to be dismissed by his or her employer by reason of taking or seeking to take parental leave (Regulation 20 MAPLE 1999). To do so is automatically unfair dismissal (no qualifying service required).
- ▶ Complaint to Tribunal within 3 months. Extensions of time – not reasonably practicable.

Right to time off to care for dependants – s57 ERA 1996

- ▶ The right is to take such time off as is “reasonable” in order to take action that is “necessary”:
 - a) to provide assistance to a dependant who falls ill, gives birth, is injured or assaulted;
 - b) to make arrangements for care of a dependant who is ill or injured;
 - c) on the death of a dependant;
 - d) because of unexpected disruption or termination of arrangements for the care of a dependant;
 - e) to deal with an incident which involves a child of the employee and occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

Right to time off to care for dependants – s57 ERA 1996

- ▶ The right applies to all employees regardless of continuous service.
- ▶ The employee must tell the employer the reason for the absence as soon as is reasonably practicable and also communicate how long they expect to be absent (s57A(2))
- ▶ Right not to be subjected to a detriment or dismissal for having taken leave.
- ▶ Complaint to Tribunal within 3 months. Extensions of time – not reasonably practicable.

Pregnancy and Maternity Leave Claims

Martina Murphy

Pregnancy & Maternity Discrimination

- Frequently arises in the context of redundancies.
- Selection of a woman for redundancy for a reason related to pregnancy or childbirth is prohibited and protected against in 2 ways:
 - Section 99 ERA 1996 Automatic Unfair Dismissal Provisions as read alongside MAPLE 1999 regulation 20 selection for redundancy for a pregnancy or maternity related reason (see also regulation 29 Paternity & Adoption Leave Regulations 2002, Regulation 39 Shared Parental Leave Regulations 2014)
 - Needs to be sole or principal reason for dismissal.
 - NB Note difference rules on Burden of Proof i.e. R has to establish fair reason for dismissal.
 - Section 18 EqA 2010 claim
 - Inferences & Pregnancy & Maternity Discrimination: *Maksymiuk v Bar Roma Partnership* EATS 0017/12

Pregnancy & Maternity Discrimination

- Example of the Operation of the 2 different tests: *Lau v Serco Leisure Operating Ltd ET Case No.2500894/16*
- Right to Written Statement of reasons for dismissal s92(4) ERA 1996 : A woman who is dismissed at any time and for any reason when pregnant or during her statutory maternity leave period is given the right to receive a written statement of reasons for her dismissal. No need for 2 years continuous service requirement.
- Section 92 ERA 1996: 2 years continuous service requirement

Pregnancy & Maternity Discrimination – Discriminatory Selection Criteria

- ▶ Attendance : Pregnancy-related absence should be disregarded
- ▶ Flexibility: those with childcare responsibilities — predominantly women — may be adversely affected. i.e. assumptions about ability to travel and work long hours
- ▶ Furlough: Those with childcare responsibilities —predominantly women - may well have volunteered for furlough.

Pregnancy & Maternity Discrimination

Alternative Employment & Positive Discrimination

- ▶ Reg 10 MAPLE 1999, (see also regulation 23 Paternity & Adoption Leave Regulations 2002, Regulation 39 Shared Parental Leave Regulations 2014)
- ▶ An employee who is made redundant while on maternity leave is **entitled** to be offered suitable alternative employment in **preference** to other employees. The employee does not have to 'apply' for such employment.
- ▶ Care should be taken over discriminatory assumptions about willingness to take up alternative employment i.e. didn't think would relocate because of family or type of role because of pregnancy.
- ▶ Interplay between section 18 EqA 2010 and Regulation 10 MPL: *Sefton Borough Council v Wainright* [2015] ICR 652 EAT
- ▶ Danger areas: *Eversheds Legal Services Ltd v De Belin* [2011] ICR 1137, EAT: sex discrimination claims

Questions?

- ▶ Feel free to drop us a line at Patterson@12kbw.co.uk and Robinson@12kbw.co.uk and Murphy@12kbw.co.uk
- ▶ Alternatively our Director of Clerking, Oliver Parkhouse can be contacted at Parkhouse@12kbw.co.uk and our Assistant Practice Manager, Daniella Evans can be contacted at Evans@12kbw.co.uk T: [020 7583 0811](tel:02075830811)