

Harmonising maternity rights



Joe Neville provides an update of the recently introduced changes to benefits during maternity leave, putting them into the wider context of maternity laws and pay provisions.

On October 5, 2008 legislation changed some aspects of maternity law. Most significantly, employee benefits and entitlements during 'additional maternity leave' were brought into line with those currently enjoyed during 'ordinary maternity leave'.

The new legislation is the Sex Discrimination Act 1975 (Amendment) Regulations 2008, which are designed to rectify the non-compliance with Directive 2002/73 found by Burton J in *Equal Opportunities Commission v DTI* [2007] IRLR 327 – a challenge to maternity legislation by the Equal Opportunities Commission. The pre-existing regime drew a sharp distinction between the two leave periods, but to see how the relationship has changed, it is helpful to review our maternity laws.

The governing legislation was, and still is, the Maternity and Parental Leave Regulations 1999/3312 (MAPLE 1999).

Leave and benefits on adoption is covered by different legislation, which in most respects has identical provision and is not considered in this article.

A calendar is an essential tool of the trade when dealing with maternity rights

Ordinary maternity leave is available to all pregnant employees, without any qualifying period of service with the employer being necessary. The right is for the pregnant employee to take up to 26 weeks' leave from her employer.

It begins whenever the employee wishes, although she must notify her employer before the end of the 15th week before her expected week of confinement that she is pregnant; the date of her expected week of confinement; and her proposed start date for ordinary maternity leave. It cannot start earlier than the 11th week before the expected week of confinement and will start automatically if she gives birth, or is absent wholly or partly because of her pregnancy at any time from the beginning of the fourth week before the expected week of confinement.

There is a prohibition on the employee performing any work for a period of two weeks after giving birth – four weeks if she works in a factory – and this period is known as 'compulsory maternity leave.' There is absolutely nothing to say that a woman cannot, if she wishes, keep on working right up until her contractions make it impossible.

During ordinary maternity leave a number of rights and benefits come into play. The most important one of these, for many employees, is the right not to suffer a detriment related to pregnancy, childbirth, or taking maternity leave (section

47C, Employment Rights Act 1996), or to be dismissed for one of these reasons (section 99, ERA 1996).

During ordinary maternity leave the employee's contract, and the benefits she derives from it, continue exactly as before, save for any that require her to work or to attend her place of work, or that concern remuneration by the employer.

The latter is defined as wages or salary, which includes payments related to the employee's own performance, such as profit-related pay, commission, or targeted bonuses, but not those which are unrelated.

An annual bonus unrelated to work done and made to all staff would fall outside the definition of remuneration and be payable to an employee on maternity leave; a bonus calculated on each employee's monthly sales would not.

Thus, in *GUS Home Shopping Ltd v Green and McLaughlin* [2001] IRLR 75, the employment appeal tribunal found unlawful the withholding of a bonus payable on a successful transfer from a woman absent on maternity leave for the entire period. The difficulties in distinguishing payments are considered further below.

Other typical non-remunerative contractual terms and conditions which would be preserved during ordinary maternity leave are company cars permitted to be used for personal travel, gym membership, staff discount schemes, accrual of contractual length of service, for example for a company redundancy scheme, and accrual of holiday entitlement.

Additional maternity leave previously required 26 weeks' qualifying service by the 15th week before the expected week of confinement. The right thus gained was to an additional 26 weeks' leave after the end of ordinary maternity leave.

The qualifying period for additional maternity leave was abolished for women with an expected week of confinement on or after the April 1, 2007, with the result that all women now have the right to both forms of leave.

The traditional contractual treatment of additional maternity leave has been that the contract's terms and conditions do not remain in force save, under MAPLE 1999: the benefit of the employer's implied obligation of trust and confidence; and any terms and conditions relating to notice of termination, compensation in the event of redundancy, or disciplinary or grievance procedures; and on the employee's side, any terms relating to notice of termination, disclosure of confidential information, acceptance of gifts or other benefits, competition, and the implied obligation of good faith. The gym membership, accrual of contractual holiday entitlement, company car and so on could thus be withheld during additional maternity leave.

This suspension of contractual terms and conditions has been controversial ever since the European Court of Justice case of *Land Brandenburg v Sass* [2005] IRLR 147, which suggested that any benefits, excluding pay, ought to continue through the entire period of leave. It was this judgment, applied in the domestic arena by the *EOC v DTI* case referenced above, which has prompted the October 2008 changes.

For employees with an expected week of confinement beginning on or after October 5, 2008 additional maternity leave is included with ordinary maternity leave in reg. 9, MAPLE 1999, so that the two are of identical effect in relation to preservation of the contract of employment.

This means that the two periods of leave are on an equal footing and the non-remuneration benefits enjoyed by the employee during ordinary maternity leave continue into additional maternity leave.

The difficulty in distinguishing when a bonus fails to be considered as remuneration persists is now drawn into sharper focus by the effective extension by six months of the period when the problem exists. In the leading case of *Hoyland v Asda Stores Ltd* [2006] IRLR 438 the difficulty of this distinction was made clear. Asda operated an annual bonus scheme based on profits, which was pro-rated to reflect absences of eight consecutive weeks or more during the year.

Maternity leave was treated as absence for the purpose of calculating bonus payments. On the facts, the employment appeal tribunal held that as the bonus was payable in respect of the workforce's performance as a whole, it was remuneration which was capable of lawfully not being paid during maternity leave.

Practitioners should be careful to note that the distinction does not exist during the two-week compulsory maternity leave, which is treated for these purposes as though the employee was still at work.

It would therefore appear that the only two distinctions between ordinary maternity leave and additional maternity leave, following the changes in contractual provision and the removal of qualifying service, are maternity pay and the right to return to work.

It is helpful to set out a reminder as to qualification and calculation of statutory maternity pay. Statutory maternity pay is still subject to qualifying conditions. Chiefly, the employee must have 26 weeks' service with the employer by the time she reaches the 14th week before her expected week of confinement. She must also still be pregnant, or have given birth to a live baby, by the 11th week before her expected week of confinement. A stillbirth after this week confers identical leave and pay entitlements as a live birth; a stillbirth, miscarriage or termination before this week, none.

For eight weeks, up to and including the 15th week before her expected week of confinement, she must have had weekly earnings at least the level of the lower earnings limit for national insurance purposes - £90 in the current tax year, going up to £95 in 2008/2009. She must also have complied with the notification requirements detailed above.

All in all, a calendar is an essential tool of the trade when dealing with maternity rights.

The first six weeks of statutory maternity pay is payable at 90% of the average earnings over the eight weeks up to and including the 15th week before the expected week of confinement. This average includes any other payments made during that period, such as commission payments, as well as an enhancement to reflect any salary increases applied during the first six weeks of maternity leave. The remaining weeks of statutory maternity pay entitlement are paid at the statutory rate, presently £117.18, or the 90% rate if it is less.

Statutory maternity pay used to be payable for six months, a period that linked in with ordinary maternity leave. Indeed, a lay person would have most likely differentiated ordinary maternity leave and additional maternity leave by the feature that the first appeared to be paid, the latter not. In fact, statutory maternity pay is an entirely separate right to leave, and this was made apparent by the extension of statutory maternity pay to 39 weeks' entitlement for women with an expected week of confinement on or after April 1, 2007.

Another innovation brought in at the same time are 'keeping in touch' days - where, by agreement, an employee may perform up to 10 days' work without jeopardising her statutory maternity pay entitlement - which are hugely beneficial for both employer and employee.

An employee returning from ordinary maternity leave is entitled to return to the same job in which she was employed; an employee returning from additional maternity leave has this entitlement unless it is no longer reasonably practicable, in which case she must be given another suitable job.

Presumably, when statutory maternity pay is extended in due course to 52 weeks, the distinction between ordinary maternity leave and additional maternity leave will be consigned to the history books - it will certainly be a complicated regime accomplishing very little. ■

Joe Neville is a barrister specialising in employment at New Walk Chambers in Leicester. <http://www.newwalkchambers.co.uk>



Key points

- The new regulations apply to employees with an expected week of confinement after October 5, 2008.
- Their effect is that all contractual terms and conditions not relating to pay and wages will apply during additional maternity leave.
- Typical examples will be contractual holiday and length of service accrual, and non-monetary staff benefits.
- The regulations clarify that bonuses not payable during ordinary maternity leave and additional maternity leave are nonetheless payable during compulsory maternity leave.