

PREGNANT PAUSE

What rights do pregnant partners have under discrimination law? **Charis Damiano and Clare Murray** report

extreme situations, why should it not also protect individuals from intrusions by politicians or other guardians of specific rights or liberties?

The absence of an established transparent protocol for resolving tensions arising from time to time between parliament, courts and other constitutional bodies, seems to be an increasing problem, especially concerning EU law applications; most prominent, recently, in connection with the information held by lawyers advising News International.

Necessary price

And finally, is the solicitor-client relationship of such unique importance that it must be upheld as a fortress from all attacks and intrusions, save where criminality is present or parliament-made statutory exclusions to that principle apply? Or is that an anachronistic approach in a world where nobody is entitled to special or elite status?

The rationale given by the judge for confining his disclosure order only to the target defendant's contact details provides an answer to most of these questions, and the case is an important demonstration of why lawyers have to be treated as especially protected, if not immune, from erosions of the confidentiality of their client relationship: to have justice at all, citizens need confidential access to legal advisers and representatives who do not themselves hold a stake in the interests they are engaged to protect. That is because, to impose on them the same obligations of compliance with court directions as their clients, for example in the selection of what information is or is not disclosable in litigation, would create an impossible situation not only for their client but also for them.

Principled reluctance by the courts to meddle with client/lawyer confidentiality, with attendant opportunities both for abuse by the clients and distorted commercial advantage for the lawyers built on the exclusive privilege rights attaching to their advice, are shown accordingly to be a necessary price of preserving access to justice.



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Only employees have a statutory right to maternity leave, or paternity, adoption or parental leave, and to receive statutory maternity or paternity pay. However, discrimination law does give some protection to partners who are pregnant or have recently given birth, because discrimination on grounds of pregnancy or childbirth is a protected characteristic under the Equality Act 2010.

European law has some relevance as the Equality Act is underpinned by the Equal Treatment of Self-Employed Workers Directive (to be replaced by the Equal Treatment of Self-Employed Workers Directive (2010/41/EC) on 5 August 2012).

Protected period

It is discriminatory to treat a partner less favourably during a 'protected period' on the grounds of her pregnancy or pregnancy-related illness. The protected period for non-employees, which includes partners, runs from conception until two weeks after birth (whereas employees are protected until the end of statutory maternity leave). ECJ case law has also covered less favourable treatment occurring after the protected period, if the cause of the discriminatory treatment is pregnancy or pregnancy-related absence during the protected period. Although some less favourable treatment is obvious, such as de-equitisation or expulsion, some actions are more subtle. For example, reallocation of key clients (with whom the female partner has a strong and profitable relationship) may also constitute discriminatory treatment.

Female equity partners have specific protection against discrimination on the grounds of pregnancy if the firm treats them less favourably during their protected period in relation to their share of profits. If the firm reduces normal profit share during that protected period, it is likely to be regarded as direct pregnancy discrimination. While suspension of normal pay during employee maternity leave is lawful for employees, that exemption does not apply to partners. However, given that the protected period lasts for only a further two weeks after birth, and most women will wish to take a longer period of paid leave than this, a female partner will need to rely on direct and indirect sex discrimination protections if they feel that they have been treated less favourably.

Profits during leave

Surprisingly, a number of partnership and LLP agreements do not include provisions relating to female partners' entitlements during maternity leave. However, in the

absence of specific provisions, the extent to which a partner may be entitled under discrimination law to receive profits while absent on maternity leave (beyond the two-week protected period) is unclear.

Under European and UK law, employees are not entitled to full pay when absent on pregnancy or maternity grounds where there is an 'adequate allowance' provided. This is defined as an amount not less than statutory sick pay (in the UK, statutory maternity pay is given). Although yet untested, it is likely that it would be lawful for firms not to provide full profit share during a period of absence and to reduce a female partners' profit share pro rata to reflect any period of maternity leave.

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In addition, the new Equal Treatment of Self-Employed Workers Directive will give the self employed a similar right to an adequate allowance from the state during maternity-related absence. Self-employed women in the UK are already entitled to maternity allowance for up to 39 weeks as long as they have fulfilled certain criteria such as registering with the HMRC as self employed and paying class 2 NICs.

On this basis, it appears that a female partner will have no strict legal entitlement to full profit share during any period of maternity-related absence. However, if a firm is committed to retaining high-performing female partners, it should seriously consider offering a reasonable period of paid maternity leave. This will demonstrate it recognises the value of working mothers and their long-term contribution to the firm.

In any event, firms should ensure their partnership agreements make clear what a partner can expect in the event of pregnancy and childbirth. Simply leaving it to be discussed as and when the situation arises is arguably more likely to lead to disagreements and undermine many firms' stated aim of attracting and retaining female partners.



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