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LAW'S RESPONSE TO PREGNANCY/WORKPLACE CONFLICTS: A CRITIQUE

ABSTRACT. This paper considers law's engagement with pregnancy/workplace conflicts. Drawing on recent research, including original empirical research conducted by the author, I consider how law's response is ineffective. The nature of this 'ineffective response' is explored and in particular I consider the gap between, on the one hand, legal prescriptions and policy ambitions and, on the other hand, the reality of pregnancy/workplace conflicts. In essence, law fails to capture the experiences of pregnant women and new mothers at work and this is reflected in the high number of women experiencing pregnancy discrimination, the low number of women invoking the law in order to gain redress when they do experience pregnancy/workplace conflicts and the low success rate amongst the few women that do bring claims against employers in such circumstances.

KEY WORDS: discrimination, employment, family, pregnancy, tribunals

Introduction: The Nature and Consequences of Pregnancy/Workplace Conflicts

Research conducted by the Equal Opportunities Commission (E.O.C.) suggests that in the U.K. over 30,000 women experience some form of pregnancy-related discrimination at work (E.O.C., 2005a) and original Nuffield Foundation funded research conducted by the author (hereafter, 'the tribunal study' – discussed below) shows that annually 1,000 women bring claims to an employment tribunal when they feel they have been dismissed for a reason relating to pregnancy or childbirth. Examples of the type of conflict that can occur include being selected for redundancy or dismissed on the basis of a fabricated issue relating to capability or conduct. Some are given a 'cold shoulder' or verbally abused once pregnant as in *S.L. Bower v. Eldersteels Limited t./a. G.M.E. Steels*,[1] where Ms Bower's supervisor told her that they did not want "a pregnant split arsed cow" working in their office. Others witness an unwanted increase or unwanted

[1] 2802792/97 Sheffield, 9 February 1998.

decrease in their hours, or experience an alteration in other working conditions as a result of their pregnancies. For example, in *N. Peplow v. Cooper Nimmo (A Firm)*,[2] the claimant was, upon returning from maternity leave, offered an alternative and less well paid position (see also *New Southern Railways Ltd v. Quinn*),[3] and in *J.W. Beswick v. R. Awan & A. Mistra*[4] and *S.C. Wilson v. C. Turner*,[5] the claimants' hours were drastically reduced following the announcements of their pregnancies. In the latter case the claimant's hours were dropped from over 40 to between 13 and 17 hours per week. Some women are treated so badly they feel they have no option but to leave their jobs, are signed off sick against their will or 'encouraged' to start their maternity leave early, are denied paid time off to attend antenatal classes, denied promotion opportunities or pressured to resign (see James, forthcoming; Dunstan, 2001; Adams et al., 2005). Indeed, the E.O.C. report that 5% of women in employment when pregnant are put under such pressure (E.O.C., 2005b).

This detrimental treatment of pregnant women and new mothers occurs despite policies, at both a national and an E.U. level, that promote work/family reconciliation (see for example D.T.I., 1998, 2000, 2005; European Commission, 2005). Having come to power in 1997 with a manifesto promising "a flexible labour market that serves employers and employees alike" (Labour Party, 1997), New Labour soon introduced policies designed to help "create a society where being a good parent and a good employee are not in conflict" (D.T.I., 2000; and see also D.T.I., 2005). Such policies are increasingly viewed as central to providing informal care, domestic labour and socialising children (McKie et al., 2005, p. 11). Reforms have included the introduction of longer maternity leave entitlement, the right to request flexible working conditions, the right to paid paternity and adoptive leave, a National Child Care Strategy and Working Families Tax Credit. The most recent reforms include a further extension of maternity leave to twelve months for all employees (D.T.I., 2006a) and paid leave of nine months with the promise of an increase in payment to twelve months by the end of Parliament (for comment see James, 2006).

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[2] 2406839/97 Manchester, 1 June 1998.

[3] 0313/05 E.A.T., 28 November 2005.

[4] 2406856/97 Manchester, 12 February 1998.

[5] 4561/96 Norwich, 17 April 1996.

The fact that pregnancy/workplace conflicts occur on such an extensive scale despite this clear commitment to helping parents (and mothers in particular) balance their work and family responsibilities is disappointing. That such conflicts occur despite ample specific laws protecting women who participate in the labour market from detrimental treatment because of their pregnancies or childbirth is surprising. The right not to be discriminated against at work on the grounds of sex.[6] has been part of U.K. law since 1976, and pregnancy-related discrimination has, since 1990, been classified by the European Court of Justice (E.C.J.) as direct sex discrimination contrary to the Equal Treatment Directive.[7] Recent amendments to the legislation now explicitly prohibit discrimination on the grounds of pregnancy and maternity.[8] More specific maternity rights also exist, which include a right to paid time off work to attend antenatal appointments and, importantly, an automatic right to claim unfair dismissal in the event of a pregnancy-related dismissal from employment.[9] This right exists regardless of hours worked or longevity of employment.

Despite fairly clear legislation pregnancy/workplace conflicts, described by the E.O.C. as "one of the most hidden and damaging forms of workplace injustice" (E.O.C., 2005b), continue to marginalise many pregnant women and new mothers at work. The law is ineffective in this context, failing to support either women's right to work or society's need for women to give birth (on the social function of pregnancy see Fredman, 1994, 1997) and to participate in a globally competitive labour market. Women are already particularly susceptible to financial disadvantage when they leave the workforce for any substantial period of time. It has been suggested that a mid-skilled mother of two is likely to lose up to £140,000 across her lifetime (Rake, 2000; see also McRae, 1993; Houston and Marks, 2003). Financial loss is especially difficult for women who have a number of children and loss of work due to pregnancy-related discrimination can only aggravate this further, especially given that women who suffer unfair treatment at work when pregnant are six

[6] Sex Discrimination Act 1975 (S.D.A.).

[7] *Dekker v. Stichting Vormingscentrum voor Jong Volwassen Plus*, Case C-177/88 [1990] E.C.R. I-3941; [1991] I.R.L.R. 27 (E.C.J.).

[8] See the new s. 3 following the implementation of the Employment Equality (Sex Discrimination) Regulations 2005, S.I. 2005 No. 2467.

[9] Employment Rights Act 1996 as amended, s. 99.

times more likely to consider never going back to paid work at all (E.O.C., 2005a, p. vii). Pregnancy/workplace conflicts can also affect women in less tangible ways. Earlier studies have shown that negative attitudes towards pregnancy can make women feel that they have to work even harder than their colleagues when pregnant in order to counter stereotypes that exist (Rodmell & Smart, 1982; O'Grady & Wakefield, 1989) and expectant workers may be reluctant to admit to experiencing difficulties (Tabor, 1983). In extreme cases, such problems can have a devastating impact on the health of a woman and her unborn child as evidence suggests that miscarriages are often linked to stress – a study of over 800 women who had suffered a miscarriage found stress impacted profoundly on pregnancy maintenance (Coghlan, 2004).

Pregnancy-related discrimination also has consequences at a wider level. The promotion of women's participation in the labour market is also viewed as crucial to the promotion of the country's economic prosperity. Hence, employers and the economy as a whole can experience financial loss as a result of pregnancy/workplace conflicts. Women comprised 45% of all those in employment in the U.K. in the Spring of 2002 (Duffield, 2002) – a rise mirrored in other E.U. Member States (pre-May 2004) where an estimated six of the 10 million jobs created between 1997 and 2001 were occupied by women (European Commission, 2001) – and the greatest leap in the figures is amongst women of childbearing age (Desai et al., 1999). Hence, pregnancy/workplace problems, if left unregulated or poorly regulated, can alienate a growing percentage of the working population. Moreover, given the growth of the traditionally female-dominated service industry (Wilson, 1994), this gap between the legislation and everyday experiences of pregnant workers has wider ongoing ramifications. Family and home responsibilities are cited by a pool of 2.2 million women as the reason they are not engaged in employment (Weir, 2002). Not only does this run contrary to New Labour's broad Welfare to Work policies but over time, given our ageing population, women of childbearing age will become even more crucial to employers. If women are not encouraged into and provided with the incentive to remain in employment, and adequately protected against pregnancy-related discrimination when they do, alternative sources of labour supplies will have to be developed in the U.K. (Weir, 2002).

When the number of women experiencing pregnancy/workplace conflict in the U.K. is juxtaposed with the comparatively small

number who commence legal action, it suggests that current laws are neither adequately protecting women nor providing an effective opportunity for legal redress in the event of such conflict. It is within this context that this article considers law's response to pregnancy/workplace conflicts. At its core it explores the gap between what law and policies emphasise and pregnant workers' experiences. I consider the nature of this gap and demonstrate that it is wider and the experiences it contains are more diverse than one might anticipate. I also explore important manifestations of this gap between law and practice – namely that it is, in part at least, created by the fact that so few women who experience pregnancy/workplace conflicts choose to litigate and so few of those who do litigate are successful when their cases reach a tribunal hearing. Although drawing on wider research and discussions, this article considers what original research of tribunal decisions can add to this exploration (for a fuller account of this study and its findings see James, forthcoming). Hence, the following section briefly outlines the scope of this study.

The Tribunal Study

The overall aim of the Nuffield Foundation funded tribunal study was to investigate the extent, nature and legal treatment of pregnancy/workplace problems through an analysis of employment tribunal decisions registered in England and Wales. Employment tribunal decisions are unreported and, hence, often ignored by academics who naturally tend to base their interpretations and doctrinal analysis of the law on those (relatively few) cases that reach the higher courts or the E.C.J. (for example see Conaghan, 1998; Wynn, 1999; Caracciollo di Torella & Masselot, 2002). In this study though I was keen to look beyond the surface of reported case law at a legal institution that provides women's first (and in the majority of cases their last) opportunity to engage with the relevant law in a formal sense. In doing so, I uncovered a mass of legal activity hitherto hidden from the public domain. The decisions are housed in Bury St Edmunds, England and whilst some basic information is available on the public register the decisions themselves are in paper format and needed to be located by hand and photocopied on the premises. The process was costly, time consuming and hampered by administrative difficulties such as decisions missing from the files or pages missing from the decisions. In addition, analysis was unaided by the fact that

the information available in the decisions varied considerably. For example, some are in summary form only and they lack consistency in terms of what information they include. This lack of consistency with the reporting of decisions was noted in studies conducted in the 1980s (see Leonard, 1986, 1987a, 1987b) and, when coupled with the difficulties associated with locating these decisions, reflects a lost opportunity to facilitate the monitoring of the general application of law at tribunals.

The study involved the collation and analysis of all pregnancy related unfair dismissal claims registered at employment tribunals in England and Wales between January 1996 and April 2002. In total 6,726 claims were registered during this time. Most claims (68%) were settled or withdrawn prior to full merit hearings but a total of 1,368 did go on to be considered by a tribunal panel and these provide the majority of the descriptive statistical information drawn upon in this article. Whilst excavation of the decisions has provided a large and useful dataset it is important to acknowledge the boundaries of the study. First, the focus is on pregnancy-related unfair dismissal actions and although the majority of the decisions naturally include a claim for sex discrimination it was not possible to search all the decisions registered under the S.D.A. to see if they were pregnancy related.[10] Hence, there may be some claims that were 'missed' as a result of this methodology. Second, the study focuses on England and Wales. The employment tribunal decisions for Scotland and Northern Ireland are housed elsewhere and investigation of these areas was beyond the scope of the present study so the research is geographically contained.

Third, whereas this research of tribunal decisions undoubtedly widens the area of academic attention it is still limited to a study of litigation. It does not engage with the many positive pregnancy/workplace relationships that exist – in one qualitative study of women working during pregnancy, 61% felt that their employers were supportive (Adams et al., 2005). Neither does it engage with the section of society experiencing pregnancy/workplace relationship problems but, for various reasons, not litigating – in the tribunal study the individuals have already 'named, blamed and claimed' (Felstiner et al., 1980–1981). Research conducted by the E.O.C. does fill this 'gap' to some degree but further research is needed to help us

[10] For example there were 17,726 claims registered under the S.D.A. between April 2004 and April 2005 (and 17,722 in 2003–2004; 11,001 in 2002–2003). See Employment Tribunals Service (2005).

better understand what influences decision making within this context. Despite these boundaries, this study and other relevant research provides an opportunity to further our understanding of how pregnancy/workplace relationships are regulated. Overall, this methodology, by locating women at its centre, challenges legal assumptions producing, in Conaghan's term "a picture with very different contours and shades" (Conaghan, 1999, p. 21) and highlights tensions between women's lived experiences and the inherent assumptions of the legal framework.

Pregnancy/Workplace Conflicts: Testing the Legal Framework

Pregnancy/workplace conflicts test the current employment law framework's ability to adequately protect pregnant workers, reflecting a gap between what the law provides in terms of employee rights and employer responsibilities and what happens in reality. This is, firstly, evident in the persistence of discrimination against pregnant women. Second, it is manifested in the limited invocation of relevant legal avenues by pregnant women and new mothers who experience detrimental treatment and, thirdly, in the low success rate when women do invoke law to seek redress.

The Persistence of Pregnancy/Workplace Conflicts

As stated earlier, the tribunal study found that an average 1,000 women annually register pregnancy-related unfair dismissal claims at employment tribunals in England and Wales. Further research has found that over 30,000 women actually experience pregnancy-related discrimination at work every year (E.O.C., 2005a). In addition, the tribunal study suggests that this widespread discrimination is not geographically contained and that it occurs across all industries where women are employed. However, although the discrimination is persistent in the sense that it continues despite laws prohibiting its occurrence, it is not, it seems, equally dispersed amongst all cohorts of pregnant workers. In fact, some pregnant women may be more likely than others to experience workplace conflicts. In the tribunal study, the claimants' length of employment at the time of the alleged dismissals was calculated where possible (in 1,140 decisions) and the findings suggest that female workers who become pregnant are more likely to experience conflict at work if they have been in employment for less than a year: 58% had less than one year's employment history

at the time of the alleged dismissal and 79% had under two year's history. Length of service may therefore influence whether or not the employment relationship, once the pregnancy is announced, is strained to the point of conflict and litigation (see also McRae, 1991; Gregory, 2004). Or, put another way, it shows how employment relationships can become increasingly stable and mutually committed over time and hence more capable of withstanding the inevitable challenges to the workplace equilibrium and the metamorphosis from 'unencumbered' to 'encumbered' worker (see discussion below) caused by pregnancy and childbirth. In terms of law's engagement it underlines the importance of legal protection remaining available to all employees regardless of length of employment.

The tribunal study also shows that women are more vulnerable to dismissal prior to maternity leave. In the majority of the decisions that went to a full merit hearing it was possible to determine the timing of the dismissal in relation to the claimants' pregnancies (1,208 in total). The study found that 78% were dismissed prior to maternity leave – many (33%) within days of announcing their pregnancies to their employers. Other research, however, seems to suggest that problems can surface at any time. For example, whilst relatively few of the women in the tribunal study experienced problems when returning to work, Adams et al. found that employer inflexibility at this time caused problems for 23% of 'returning' mothers (Adams et al., 2005). Of course, it may be that the problems they experienced at this stage were not resolved through legal action and hence would not be uncovered by a study focusing on litigation. If so – it indicates that either these conflicts are resolved without the need for litigation or that new mothers are less likely than pregnant workers to legally challenge conflicts that arise (see below). Again, in specific terms, this may suggest a need to focus on strengthening legal protection during the early stages of pregnancy.

The study also found that pregnancy-related illness was mentioned in over a third of the decisions. This finding gives rise to two initial questions – whether pregnancy-related illness provokes or causes tensions to escalate (hence adding to the likelihood of conflict), and the degree to which illness prevents women from commencing legal proceedings in the event of unlawful treatment, or results in them settling rather than continuing to a full tribunal hearing? These issues require further qualitative research on the transformation from 'naming' to 'blaming' to 'claiming' (Felstiner et al., 1980–1981) in this

context, but for the purpose of this article, the fact that a third of women mention pregnancy-related illness highlights the plurality of experiences amongst pregnant workers.

Other cohorts also experience pregnancy/workplace relationships and conflicts in different ways. The E.O.C. research tentatively (given the small samples involved) suggested that younger women, those from ethnic minorities, disabled women, lesbian mothers and atypical workers might be more vulnerable to conflicts (E.O.C., 2005a) as well as those working for small employers (ten or fewer staff) – who reported particular difficulties in relation to managing pregnancy in the workplace (Leighton & Evans, 2004; Young & Morrell, 2005). Even if not more vulnerable, these cohorts can certainly experience pregnancy/workplace conflicts in different ways. For example, lesbian mothers can experience "intrusive questioning about how they became pregnant, who the father was and why they wanted to be pregnant" (E.O.C., 2005a, p. 19; see also Salmon, 2006), and Asian women experience assumptions that they "would have lots of babies or that they would choose to stay at home with their child rather than return to work" (E.O.C., 2005a, p. 19).

Having established that pregnancy/workplace conflicts are a widespread phenomenon but may be experienced more by certain cohorts of pregnant workers than others and that a plurality of experiences exists, it is still unclear why this persists in an age of family/workplace reconciliation. The tribunal study can only recount the reasons given in defence by employers for the dismissals of the pregnant women and they include capability and conduct, redundancy and health and safety. These are to be explored further in a future publication (James, forthcoming). On the whole though, there is a paucity of attitudinal research to help explain the occurrence of pregnancy/workplace conflicts but they are likely to be driven by a number of inter-related factors: The limited research available suggests that employers sometimes perceive pregnant workers, partly because their condition is associated with medical treatment and partly because they are assumed to become irrational, emotional and passive, as a burden and expensive to employ, less hardworking, less committed to the job and hence unworthy of promotion or training (Bistine, 1985; Collinson et al., 1990; Halpert et al., 1993; Pattison & Gross, 1996). Employers may fear how pregnancy and childbirth might impact upon their business with many reporting experience of a number of problems with working parents, including their inability to

work late and/or extra hours when needed, absenteeism due to childcare difficulties and leaving work early or arriving late (M.O.R.I. 2002). Such concerns are especially prominent in small businesses (Leighton & Evans, 2004; Young & Morrell, 2005) and may help account for the level of discrimination evident in U.K. workplaces.

Viewed from an alternative perspective, pregnancy/workplace conflicts might reflect the inability of workplace structures and the 'new economy' to adapt to the needs and desires of (mostly female) atypical workers and families in general. This is a time of profound changes, brought about by the demands of workplace feminisation, globalisation and technical advances, in how the labour market operates. Such changes have driven a move away from the Fordist model of employment relations towards alternative (more profitable and less secure) relationships. As a result, workers – especially female workers – are increasingly engaged in precarious work, which includes part-time work, home working, fixed term and temporary contracts (see Fudge & Owens, 2006). This type of employment, especially as it is conducted largely by women who also continue to bear the majority of domestic responsibilities (I.L.O., 2004, p. 10, cited in Fudge & Owens, 2006, p. 15), challenges legal norms and forces us to reconsider how we structure and regulate the labour market. In relation to women, as Fudge and Owens comment, because of this transition, ''conventional understandings of the standard life course, on the one hand, and standard working hours, on the other, do not fit with women's employment histories or patterns'' (Fudge & Owens, 2006, p. 21).

Pregnancy/workplace conflicts and the notion that working parents are 'problematic' might be a symptom of this wider transition. Pregnant workers and new mothers at work challenge the normative model of the standard employment relationship and highlight the need for a reconsideration of how law regulates these situations. This is part of the challenge facing traditional law in protecting women at work per se (see Fredman, 2006). Such conflicts remind us of the interdependence of the public and the private spheres (Thornton, 1995; Boyd, 1997). Family-friendly policies are an attempt to reconcile these two spheres but these policies are not focused on preventing pregnancy/workplace conflicts and fail to provide an adequate mechanism for individuals to challenge employers when such conflicts occur.

The conflicts that materialise when an employee becomes pregnant might also reflect a preference amongst employers for the

'unencumbered worker' who has arguably replaced the traditional 'male breadwinner' as an ideal worker in the 21st century (see Williams, 2000; Berns, 2002; see also McGlynn, 2005). The unencumbered worker is one facet of the unencumbered citizen who, as Berns explains, ''has a wife, or behaves as if she does'' and ''if she has a family, she relies upon others for care work and all of the other services that facilitate single minded concentration upon the tasks in hand'' (Berns, 2002, p. 43). The unencumbered worker is, it seems, flexible and devoid of personal dependants or caring responsibilities. Whilst very few workers are truly unencumbered for the whole of their working lives, the pregnant worker (as she is soon to become a mother) is arguably the furthest removed of all citizens from this 'ideal'. Moreover, if this is her first pregnancy during this employment relationship she may have previously personified this ideal 'unencumbered worker' and her metamorphosis from (what might be perceived as) committed to uncommitted, flexible to restricted, focused to distracted, could provoke tensions in the workplace and upset the workplace equilibrium that existed prior to the revelation of imminent motherhood. Overnight the pregnant worker becomes the antithesis of the normatively given model of the 'unencumbered citizen'. For our purposes, this could provoke fear amongst employers, which results in unfair dismissal or sex discrimination and may help explain why such conflict exists. Such perceptions and fears about how parents (and mothers in particular) can cause 'problems' for employers need to be explored and challenged so as to help us better understand employers' motivation to act unlawfully when pregnancies occur and this in turn might help explain the gap between law and the lived experiences of pregnant workers.

Limited Invocation of Law

It is curious why so few of the tens of thousands of women who annually experience pregnancy/workplace conflicts commence legal proceedings against their employers. To a degree this is a manifestation of a more widely recognised problem of individuals not initiating legal action even when they have a valid claim (see generally Felstiner et al., 1980–1981; Genn, 1999; Pleasence et al., 2004). For the purpose of this article, the gap between those who experience pregnancy discrimination at work and those who litigate as a result is further evidence of how pregnancy/workplace conflicts test the employment law framework. Relevant laws and policies are failing to

capture the messy realities of pregnancy/workplace relationships, and as a result they can hamper women's access to justice.

The legal framework, based on a mixture of the concepts of equality and difference (for a discussion of the equality/difference debate see Sohrab, 1993) reflecting attempts to accommodate pregnancy in the workplace, is flawed because it fails to engage with the pregnant women and new mothers who experience conflict at work. They remain invisible and their needs are assumed to be catered for along with the mass of claimants who annually initiate legal proceedings at employment tribunals. Their invisibility is reflected in tribunal procedures which ignore their potential needs: The majority of claimants in the tribunal study were dismissed prior to maternity leave (78%) and the study reveals that 65% of registered claims were heard within four to five months. Given that claims for unfair dismissal or sex discrimination must be registered within three months of any dismissal many claimants are likely to be heavily pregnant or will have recently given birth at the allocated time of the tribunal hearing. The assumed importance of a speedy conclusion to tribunal applications, which is set as a performance indicator and is supported by a generally strict approach to out of time applications,[11] may be misplaced in this context.

In the context of claims which involve pregnancy/workplace conflicts, we do not (yet) know what claimants need, but to assume that they are catered for by the generic procedures in existence may prove to be detrimental to pregnant women who wish to pursue a claim if they experience workplace conflicts. Indeed, such procedural requirements may place a pregnant woman in a uniquely difficult position – forcing her to choose between the need to litigate if the behaviour is to be challenged and the demands of pregnancy and/or motherhood. This 'choice' is likely to be particularly stark given that she is unemployed – unless she has found new employment –, the relevant law is complex and legal aid funding is not available to cover legal representation at employment tribunals. In addition, this 'choice' may also be detrimentally influenced by her particular experience of pregnancy (for example, whether she is suffering a pregnancy-related illness, her age and support network or lack of it). Moreover, the procedure, given its implications at a time of competing priorities, may force her to confront (and reject – if she wishes

[11] See *Noel v. London Underground* [1999] I.R.L.R. 621 (E.A.T.); *Schultz v. Esso Petroleum Company* [1999] I.R.L.R. 488 (C.A.).

to litigate) powerful societal conceptions of what is required of 'a good mother/parent' or 'mother/parent-to-be' (see generally Smart, 1995, p. 195). Such conceptions may place expectations on her, which require priority to be given to the needs of unborn/newborn babies over any material gains that litigation can bring.

The law is deaf to the needs of pregnant women and new mothers who wish to claim redress when subjected to poor treatment at work and this may prevent them from accessing justice. The system is predicated upon, to use Berns' phrase once more, the normative model of the 'unencumbered citizen'. The pregnant worker's distance from this ideal makes it particularly difficult for her to engage with the system. The relevant laws and the infrastructure that accommodates them should challenge such normative assumptions and provide mechanisms that allow these women to gain legal redress where needed. Its failure to do so reflects a wider defect in the employment law framework – it remains unresponsive to the mixed needs of its user community. This, in turn, reflects employment law's wider flaw – "to focus only on those relationships which law acknowledges as economic and labour-related" and "to allow the legal form to shape the normative agenda rather than the normative agenda to (re)shape the legal form" (Conaghan, 2005, p. 42). In the pregnancy/workplace context it ensures that pregnant workers remain marginalised and the process of marginalisation takes place at an early stage in the 'naming, blaming and claiming' transformation, making it less visible and hard to detect.

There is, however, a need for sensitivity when attempting to create or amend existing procedures and regulations, which aim to provide access to the legal framework. We still know very little about why so few of the tens of thousands of women who experience pregnancy/workplace conflict actually litigate and whilst the discussion above has pointed out flaws in the procedures, to assume that lack of litigation is due entirely to these flaws is misleading. To use Barlow and Duncan's term, we risk making a 'rationality mistake' (Barlow & Duncan, 2000; see also Barlow et al., 2005). Our normative assumption in this context is that rational women will litigate when faced with pregnancy/workplace conflict that cannot be settled in-house. What then appears as 'mass irrationality' in this context is, we assume, due to poor legal regulation characterised by the inherently gendered nature of employment law procedures. But this may be too simplistic an explanation. There may be many non-law related

reasons influencing a decision not to litigate. Indeed, the usefulness of attempts to regulate pregnancy in the workplace ultimately depends upon actors' perceptions of their relevant situation and we, as yet, know too little about perceptions of and reactions to pregnancy/workplace conflicts. Indeed, although there may be commonalities, to assume that all pregnant women and new mothers experience pregnancy/workplace conflicts (where they do occur) in the same way essentialises their experiences (see Spelman, 1988) and, as the tribunal study shows, the likelihood and nature of their experiences is multifaceted and dependent upon their particular circumstances (see above).

To assume that the preference of pregnant workers who have experienced discrimination is to invoke law, even if law were to recognise women's varied experiences of pregnancy and accommodate their every need, might be an assumption that perpetuates our blindness to the everyday lives of pregnant workers and new mothers in the twenty-first century. MacKinnon's phrase "take your foot off our necks, then we will hear in what tongue women speak" (MacKinnon, 1987, p. 45) is relevant here as pregnant workers have long been silenced by the legal framework in place and we have only just begun to expose the messy realities of their experiences and concerns. We clearly need to research this pregnancy/workplace/law interface more thoroughly and to assess what motivates decision making when conflicts arise. If, for example, we discover that women are swayed by an intrinsic, albeit socially constructed, moral code (to be a 'good mother' (see for example Diduck, 1998)) then any legal framework that relies upon individual litigation to enforce the standards that are set is fundamentally flawed in this context. Equally, if we do not stay alert to the potential limits of employment law's influence on workplace cultures and social behaviour in general, we may fail to respond to the needs of the very cohort we seek to protect.

Limited Success Rate

When, in the event of pregnancy/workplace conflicts, women do, despite the hurdles discussed above, pursue a claim at an employment tribunal they are unlikely to succeed. The tribunal study reveals that only 45% of the pregnancy-related unfair dismissal claims heard at tribunals were successful. It may be that the strongest claims are settled prior to hearing, but A.C.A.S. decisions are not reported and hence details of these cases and settlements are unavailable.

Nonetheless, the fact that over half of those who challenge their employers at a tribunal hearing are unsuccessful is cause for concern and suggests, again, that current legal avenues have a limited use in this context.

It might be that the low success rate is due to lack of legal representation at tribunals. The unavailability of legal aid funding (in England and Wales) to cover legal representation at employment tribunals can pose an additional stress in this context. Women who wish to pursue an action following pregnancy/workplace conflicts are at an immediate disadvantage because of the competing priorities discussed above – which arguably set them apart from most other applicants. Of all the claimants in the tribunal study that went to a full merits hearing, information about representation was reported in 1,182 of the decisions. Half of these (51%) were represented by a lawyer (which includes barristers and solicitors and employment law consultants). This indicates a perceived need to be legally represented at an employment tribunal in these cases. The study suggests that representation may have an impact on the outcome of the claim – those who were legally represented were successful in 50% of cases, whereas those who represented themselves were successful in 42% of cases.[12] In addition, the submissions of those who were legally represented more often included claims under the S.D.A. (81% of the cases where the claimant was legally represented). Those who represented themselves claimed sex discrimination in 66% of claims (for further discussion see James, forthcoming). This is important because women who successfully claim sex discrimination are eligible for compensation which may include an amount for injury to feelings and there is no upper limit on the amount that can be awarded under the S.D.A.

Hence, lack of legal representation may help explain the low success rate of claimants in this context but a restrictive application of the law may also play a part. An assessment of the decisions (discussed further in James, forthcoming) suggests that in some instances panels are too willing to accept employers' submissions at face value and this may also have an impact on the outcome of the claim. For example, an action for pregnancy-related unfair dismissal

[12] The importance of legal representation to outcome at tribunal has been identified in earlier studies. Leonard, for example, found that where both parties were legally represented in sex discrimination and equal pay claims, the claimant was successful in 46% of cases, but this fell to 23% when the employer was represented but the claimant was not (Leonard, 1986; see also Genn, 1999).

can be thwarted if an employer successfully claims that s/he was unaware of the pregnancy at the time the decision to dismiss was made. This was established in *Del Monte Foods v. Mundon*,[13] where the employer successfully argued that he was unaware of the pregnancy until the day after it was decided that the applicant was to be dismissed. To a degree the reasoning behind this is understandable. Of course if an employer really did not know that an employee was pregnant then the pregnancy could not have been the motivation for the dismissal. The crux of the issue though depends upon what a claimant has to do in order to prove her employer was in fact aware of the pregnancy at the crucial time. In *F. Wright v. Amorium* (*U.K.*) *Ltd.* (*t./a. Wicanders*),[14] the claimant was dismissed within seven days of informing her employer (by letter) of her pregnancy. Her employer denied knowledge of her condition, but fortunately she had sent the letter via recorded delivery and on this occasion was able to prove knowledge, but what if the letter had been hand delivered or she had, as most do, verbally communicated the fact of pregnancy to her employer?

Clearly, if interpreted in an unquestioning way, 'unawareness' is capable of providing employers with an excellent opportunity to evade the law. In *A.S. Barton v. Bass Taverns Ltd.*,[15] the tribunal found for the employers because, they claimed, the actual member of staff responsible for the dismissal was unaware of the situation. This was despite the fact that this person's wife and three managers knew of the pregnancy. It appears as though in some cases the unawareness argument is unquestionably accepted even when there is evidence to suggest that the applicant was a valued employee (e.g. *R.L. Lister v. Mr R. Morgan t./a. 'Oasis'*),[16] or when the dismissals took place within days (sometimes hours) of the pregnancy allegedly being announced either to colleagues or to the employer. For example in *M.P. v. V.J.W.*,[17] the claimant was dismissed the day after announcing her pregnancy to her employer, who, in turn, argued that the decision to dismiss had been made two months earlier. In *L.V. Reckless v. The Salvation Army Social Services*,[18] the claimant's

[13] [1980] I.R.L.R. 224 (E.A.T.).

[14] 2302259/97 London South, 3 November 1998.

[15] 1600256/97 Cardiff, 17 June 1997.

[16] 1801179/97 Leeds, 27 May 1997.

[17] 21682/96 Bristol, 20 May 1996.

[18] 17680/96 Manchester, 30 October 1996.

supervisor became aware of her pregnancy at 8.30 a.m. and she was dismissed at 12.45 p.m. the same day. They argued that the decision had been taken at a prior meeting. Neither the urgency of the dismissal nor the fact that the claimant received no formal warning was capable of swaying the tribunal. It even viewed the lack of consistency in the employer's submission as evidence that they were not "conspiring to deceive". It held that if that were the case, "one would have thought it more likely that the witnesses would have ensured that their evidence was consistent".[19]

Where employment tribunals are unwilling to infer knowledge of the pregnancy without strong evidence the effectiveness of the legislation is compromised and where this restrictive approach is applied the likelihood of success is limited. A significant consequence of the majority of claimants in the tribunal study (58%) having less than a year's service is that their claims for unfair dismissal depend entirely on them proving that the dismissal was pregnancy-related, as they are unable to tie-in a claim for general unfair dismissal. In the unsuccessful claims tribunal panels frequently comment on the poor procedural treatment of the pregnant workers (e.g. when they were dismissed without any warning, despite a clean conduct record) and state that if the claimant had had a year's employment history they would not have hesitated in finding against the employer. In effect, where these cases are revealing poor dismissal management, tribunal panels are powerless unless the claimant has over a year's employment history.

Limited success rate may therefore relate to lack of legal advice or representation and may be affected when tribunals apply the law in a restrictive manner. The women's lot is unaided by the limited powers of tribunals when poor management of the dismissal (albeit not pregnancy-related) is unearthed. This characteristic of the gap between law and practice reflects a further distancing of legal norms and institutions from the needs of pregnant workers.

Conclusion

The extent of pregnancy/workplace conflicts, the lack of legal engagement when it does occur and the low success rate at employment tribunals for those brave enough to pursue an action is at best

[19] *Ibid.* at para. 8.

an embarrassment to a government that claims to support and promote the needs of families. Recent family-friendly employment law reforms have focussed very little on the specific area of pregnancy/workplace conflicts, opting instead for broader, headline grabbing commitments to longer paid (albeit only at Statutory Maternity Pay rates) maternity and (to a lesser degree) paternity leave entitlements (see the Work and Families Act 2006 and D.T.I., 2006b). In recent years we have witnessed an unprecedented commitment, at both U.K. and E.U. level, to helping parents balance their work and family responsibilities and this is to be commended when it provides practical rights. The usefulness of these rights is, however, limited if employers ignore them, individuals are reluctant to engage in legal proceedings and if those who do are confronted by procedural obstacles, restrictive application of the law and a low success rate. The needs of pregnant women (and parents in general) require more specific attention if the rhetoric of the government and E.U. institutions is to have an impact on helping families balance their responsibilities.

At a broader, and more positive, level the family-friendly reforms provide opportunities for constant (re)engagement with the multitude of issues surrounding families and employment (see for example, Lewis & Lewis, 1996; Hattery, 2001; Conaghan & Rittich, 2005; Houston, 2005; Fudge & Owens, 2006). In essence, the discussion in this paper is part of wider discussions of labour law's response to work/family needs. At a time when more women than ever are active in the labour market (Desai et al., 1999; European Commission, 2001; Duffield, 2002) and the need to increase that participation is portrayed as crucial given our aging population and growing (female-dominated) service industry (Weir, 2002), it is important that we fully consider the implications of women's (and men's) involvement in the labour market, reproduction and the upbringing of future generations. The continuance of this exercise may lead to further questions about the ability of labour law in terms of its substance and conceptual foundations to meet the needs of pregnant workers, parents and workers generally. Indeed, it may be time "to revise the parameters of the discipline" (Conaghan, 2005, p. 42). It is certainly important that we continue to illuminate the gendered nature of the employment law framework and inform debates which will in time lead to the construction of laws capable of engaging more purposefully with women's everyday lives and experiences.

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