



INVESTOR IN PEOPLE

FULL MEETING THURSDAY 11 MARCH 2010

MEMBERS' BRIEFING NOTE

1. IVF Treatment

In the recent case of *Mrs PK Sahota v The Home Office & Mr P Pipkin [2009] UKEAT/0342/09* the EAT had to consider the extent of protection afforded to an employee receiving IVF treatment under the Sex Discrimination Act 1975.

Mrs Sahota had been employed by the Border and Immigration Agency for a number of years. During her employment, Mrs Sahota commenced a course of IVF treatment. She had a number of incidents at work involving comments made about her treatment and the majority of these comments came from her direct line manager: Mr Pipkin. She claimed that the comments amounted to direct sex discrimination and harassment.

The claims were initially dismissed by the Employment Tribunal and they found that the acts Mrs Sahota was complaining of did not amount to sex discrimination, they were not related to the fact she was undergoing IVF treatment and she had not suffered any detriment. Mrs Sahota appealed.

Mrs Sahota's lawyers relied on the case of *Mayr v Backerei und Konditorei Gerhard Flockner OHG (C-506/06) (2008) All ER (EC) 613 ECJ (Grand Chamber)* where essentially the court said that an employer treating a female employee undergoing IVF treatment differently as compared to a man undergoing medical treatment thus subjecting the employee to a detriment would constitute direct sex discrimination. The Respondents argued that *Mayr* was confined to the particular circumstances of that case and should not be relied upon.

The EAT rejected Mrs Sahota's argument and noted that the ECJ was evidently willing to make a limited exception in the *Mayr* case and made it very clear that is only for the "important" advance stage of IVF between the 'follicular puncture' and transfer of the in vitro fertilised ova into the uterus that there was protection afforded to employees. This means that for protection under the Sex Discrimination Act, female employees should be treated as being pregnant from the date on which the fertilised ova are first implanted into their uterus until the end of the 14 day "protected period". This occurs on the date that the pregnancy comes to an end, either as a result of the baby being born or the implantation being unsuccessful.

In Mrs Sahota's case her IVF treatment was unsuccessful and she was not protected for the entire duration of her treatment. The EAT also commented that fertility treatment is not the same as pregnancy for the purposes of protection under the SDA and therefore less favourable treatment on the grounds that an employee is undertaking IVF does not constitute sex discrimination.

Therefore, if councils find that they have an employee undergoing IVF treatment, they need to handle the situation sensitively, however, other than during the specific period of the treatment detailed above, protection does not extend to the entire duration of IVF treatment.

2. Shah v First West Yorkshire – holiday entitlement and sick leave

This is the first Tribunal ruling on holiday pay and sickness leave since the cases of *Stringer v HMRC* and *Pereda v Madrid Movilidad SA* both heard by the European Court of Justice in 2009.

A Tribunal has ruled that employees should be permitted to carry over holiday and into a new holiday year where he/she has been off work because of sickness.

In the case of *Shah –v- First West Yorkshire Ltd*, Mr Shah had broken his ankle and had taken three months off work. He had booked four weeks leave before he had his accident and before the sick leave commenced (the holiday leave fell due to be taken during his sick leave). He asked his employer whether he could reschedule the leave for a period when he returned to work. His employer refused on the basis that the holiday would fall into the next holiday year.

The Tribunal stated that the employer's approach was incorrect and the judge commented: "Mr Shah is entitled to take the holidays which he was prevented by ill health from taking in March of 2009 at some subsequent time in the following leave year." This is despite the fact that our Working Time Regulations only allow employees to carry 8 days over into the next holiday year.

Whilst the judgment is not binding on other Tribunals, it is likely that the principle of carry over will be followed by our judges because of the two European cases heard last year. As a matter of good practice, we would advise our councils to ensure that those employees on sick leave are permitted to take their annual leave when they return to work even if that leave falls into the next leave year and this is despite the fact that they will be acting contrary to the UK's Working Time Regulations.

3. Fit Notes to replace Sick Certificates as from 06 April 2010

The Government has published its findings on the consultation on the new 'fit notes' which are set to replace the existing MED3 sick notes currently used by our GPs. The Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 will come into force on 6 April 2010.

The main changes under the new system are:

- GPs can only certify the employee "not fit for work" or "may be fit for work", as opposed to "fit for work". The purpose of this is to shift the onus from the GP to the employer to establish whether the employee is fit for work and this can be decided after carrying out

an assessment of the employees needs in order that they may carry out their duties. This will involve a discussion with the employee to establish their needs.

- The new 'fit note' will contain the common types of changes employers can introduce to assist the employee returning to work. The GP should indicate on the 'fit note' which change is most appropriate. The changes included are:
 1. "a phased return to work";
 2. "altered hours";
 3. "altered duties"; and
 4. "workplace adaptations".

The intention behind the changes is to encourage better communications between the employer, employee, GP and patient.

Other changes to the system include:

- The maximum duration of a 'fit note' issued during the first six months of a patients' health condition coming to the attention of the GP will be reduced from six months to three months.
- If an employer is not able to facilitate the required adjustment, a revised statement will not be necessary as it will be deemed that the existing statement will be evidence that the employee can no longer perform the duties required in the current role.

The Department for Work and Pensions has now published guidance for employers on the new scheme. However, there is criticism that stakeholders have not had chance to fully consider and take the changes on board before the implementation is to take place.

The guidance can be found at: <http://www.dwp.gov.uk/docs/fitnote-employer-guide.pdf>

4. Additional paternity leave for fathers

Currently fathers can take up to two weeks statutory paternity leave. Leave must be taken as two consecutive weeks and be completed within 56 days of the birth. The statutory rate for paternity pay is £123.06 a week or 90% of average weekly earnings.

As from 06 April 2010, the Additional Paternity Leave Regulations 2010 will entitle employees who are fathers or partners of mothers or adopters, to take paternity leave of up to 26 weeks in the first year of their child's life or the first year after the child's placement for adoption.

Whilst the Regulations will be in force as from the 06 April, the additional paternity leave will only have effect in relation to children whose expected week of birth is on or after 3 April 2011 and this is to give employers the time to adjust to the changes.

There are a number of requirements that must be satisfied, including that the mother or adopter has returned to work. The draft regulations can be viewed on the OPSI website at the following link:

http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111491157_en_1

5. Preventing Workplace Harassment and Violence

New joint guidance giving practical advice to employers and employees on preventing workplace harassment and violence has been published following a European social partner agreement between employers and trade union organisations. Europe feels that this issue needs more publicity and employers need more guidance on tackling harassment and violence in the workplace. Readers may be interested to know that according to the 2006/07 British Crime Survey: “there were an estimated 684,000 workplace incidents, comprising 288,000 assaults and 397,000 threats of violence” in the UK.

The guidance has been produced after collaboration between the Government, employers, trade unions, Acas, BIS, HSE and other relevant agencies. As well as raising awareness of the issues, it provides employers, workers and their representatives with ways of identifying, preventing and managing problems of harassment and all forms of violence at work.

The agreement can be downloaded from the following link:

http://www.workplaceharassment.org.uk/wp-content/uploads/2009/11/HRE_100_Guidance_report.pdf

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