

Written evidence submitted by Maternity Action

Introduction

1. Maternity Action is a charity providing specialist legal advice to pregnant women and new parents on their maternity pay, benefits and rights at work. Our advisers and caseworkers respond to more than 3,000 enquiries a year. Through our Health Justice Partnerships in Greater Manchester and East Cheshire, and Cheshire and Merseyside, pregnant women and new parents in some of the most deprived areas of England can access our advice service through their midwives.
2. Maternity Action is submitting evidence because our mission includes influencing law and policy with the aim of reducing poverty, improving health, and advancing equality and human rights for all pregnant women and new parents. This submission addresses matters within our expertise of particular interest to us and was prepared by Marianne Schönle, Senior Policy Officer, Employment & Social Security.

Executive Summary

- The Statutory Sick Pay ('SSP') changes will protect more women with pregnancy-related illness from unpaid sick days. The SSP rate requires significant increase. Further clarity will be needed about calculation of average weekly earnings for SSP purposes after unpaid maternity leave. The percentage of earnings some will receive instead of the SSP rate should be at least 90% to mitigate the risk of some women requiring lengthy pregnancy-related sick leave being disproportionately disadvantaged. The intended strengthening of protections against dismissal for women who are pregnant, on maternity leave, and within six months of returning to work is contingent on regulations, as clauses 20 and 21 merely confer powers to make provision by regulations.
- The Bill leaves unchanged the list of broad grounds on which a flexible working request can be refused, so employers may continue to pick from them as a pretext. The powers to make provision by regulations about dismissal of women during or after pregnancy and after maternity leave could be used to weaken protections in future with more limited parliamentary scrutiny than if primary legislation were required to do so. A requirement for employers to monitor and report on retention rates for women a year after returning from maternity leave would strengthen the equality action plan measures.
- Areas not covered by the Bill in which workers' protections need to be strengthened include the Shared Parental Leave system, health and safety protections, worker status, sponsored migration, and equality reporting requirements for organisations with fewer than 250 employees.
- As the Bill does not increase the low maximum compensation which a Tribunal can award where an employer has breached their obligations regarding a flexible working

request, we are concerned that unreasonable refusals will not be effectively remedied. Enforcement of the new equality action plan measures in clause 26 depends on the optional introduction of an enforcement system through regulations. The discretion to introduce this should be a duty and it should be well-resourced.

- We would expect the future introduction of stronger protections against dismissal for women who are pregnant, on maternity leave, and within six months of returning to work using the powers in clauses 20 and 21 to improve the retention of women, assuming the regulations introduce the protections we wish to see. We would expect these protections to increase employment levels, incomes, and household wealth for this cohort and the Bill's provisions on flexible working to do so for women with childcare responsibilities.
- Further solutions required include greater access to legal aid for employment law matters and funding of employment law legal advice services; integration of legal advice into maternity services under a health-justice partnership model¹; and greater resourcing of ACAS and the Employment Tribunal.

Written Evidence

Does the Employment Rights Bill adequately safeguard the workers it seeks to protect?

Clauses 8 and 9 - Statutory sick pay

3. We welcome the Government's commitment, as described in the DWP's 'Making Work Pay: Strengthening Statutory Sick Pay' consultation, to "strengthening Statutory Sick Pay (SSP)" by removing the Lower Earnings Limit ('LEL') and waiting period, in recognition that "no one should be forced to choose between their health and financial hardship".² The changes introduced by clauses 8 and 9 to make SSP payable from the first day of sickness and remove the LEL will entitle more women experiencing pregnancy-related illness to SSP and protect more women from having unpaid sick days.
4. Women are currently unable to qualify for SSP following return from a period of unpaid maternity leave. This is a particular problem for women unable to return to work because of childbirth injuries, postnatal depression and other childbirth-related conditions. The removal of the LEL will be particularly helpful in enabling women to qualify for SSP after

¹ See Maternity Action, 'Health justice partnerships and the wider determinants of health' (2021) <<https://maternityaction.org.uk/wp-content/uploads/HJP-and-wider-determinants-of-health-briefing.pdf>> accessed 5 December 2024.

² Department for Work & Pensions, 'Making Work Pay: Strengthening Statutory Sick Pay' (21 October 2024) <<https://www.gov.uk/government/consultations/making-work-pay-strengthening-statutory-sick-pay/making-work-pay-strengthening-statutory-sick-pay>> accessed 5 December 2024.

a period of unpaid maternity leave, however, further clarity will be needed in relation to calculation of average weekly earnings for SSP purposes. For comparison, the calculation of holiday pay following statutory maternity leave must not take into account a period of maternity leave.

5. Under the proposals in the Bill, some on low incomes will receive a percentage of their earnings instead of the SSP flat rate where the former is lower than the latter. The DWP's 'Making Work Pay: Strengthening Statutory Sick Pay' consultation identifies that depending on the percentage rate "some employees who currently earn just above the LEL may see a reduction in their weekly SSP entitlement as they would no longer qualify for the flat rate" and some who "have longer sickness absences could notionally receive a lower entitlement of SSP than they would under the current system".³ Maternity Action is concerned that this could have a disproportionate negative impact on pregnant women who earn the LEL or a little over it, because we often advise women who require long periods of sick leave due to pregnancy-related illness, for example, hyperemesis gravidarum, pelvic girdle pain, or gestational diabetes. It is also common for women to need to take sick leave following a miscarriage, and we often encounter women requiring up to three to four months off work due to miscarriage-related conditions such as infection, pain, and ongoing bleeding. We urge the Government to set the percentage rate to at least 90% to reduce the situations in which employees would "lose out" under these reforms and to mitigate the risk of some pregnant women being disproportionately disadvantaged, and in addition to increase the SSP flat rate.
6. The Bill does not increase the very low rate of SSP, which is far below a living wage and is described in the Government's impact assessment as being "amongst the lowest in Europe".⁴ A significant increase in the SSP rate is needed alongside the removal of the waiting period and LEL to provide an adequate safety net of sick pay to protect those who need it most.

Clauses 20 and 21 - Dismissal during pregnancy and following period of statutory family leave

7. The Government's 'Next Steps to Make Work Pay' policy document states that the Government "is making a number of immediate changes – including [...] strengthening

³ *ibid.*

⁴ Department for Work & Pensions, 'Improve access to Statutory Sick Pay by removing the Lower Earnings Limit and removing the waiting period' (21 October 2024) <https://assets.publishing.service.gov.uk/media/6715f848386bf0964853d848/Impact_assessment_improve_access_statutory_sick_pay_removing_lower_earnings_limit_removing_waiting_period.pdf> accessed 5 December 2024.

protections for pregnant women and new mothers returning to work”.⁵ Further, the Deputy Prime Minister indicated to the House of Commons during the Bill’s second reading debate that the Bill is “making it unlawful to dismiss pregnant women, mothers on maternity leave and mothers who return to work during a six-month period after they return, except in certain specific circumstances”.⁶ In fact, clauses 20 and 21 of the Bill only give new powers to the Secretary of State to make provision by regulations about dismissal (other than by reason of redundancy) during or after a protected period of pregnancy, after a period of maternity leave, after a period of adoption leave, after a period of shared parental leave, after a period of bereaved partners paternity leave, and after a period of neonatal care leave, so the intended strengthening of protections against dismissal for this cohort, which we strongly support, is contingent on the subsequent introduction of regulations.

8. We understand that in light of the Bill’s repeal of the two-year qualifying period for claiming unfair dismissal, the Government plans to “establish a ‘statutory probationary period’” during which, as stated in its ‘Factsheet: Unfair Dismissal in the Employment Rights Bill’ document, “a lighter touch and less onerous process for businesses to fairly dismiss someone who is not right for the job will apply”.⁷ Any reduction in the extent of protection against unfair dismissal must not apply to women who are pregnant, on maternity leave, or within six months of returning to work and must not dilute the new protections to be introduced by regulations using the powers in clauses 20 and 21 to avoid undermining the intention to safeguard this cohort.

Tribunal Time Limits

9. The Bill as introduced did not realise the commitment in Labour’s ‘Plan to Make Work Pay’ to “increase the time limit within which employees are able to make an employment claim from three months to six months”,⁸ which would help strengthen protections for pregnant women and new mothers against discrimination and dismissal by allowing

⁵ UK Government, ‘Next Steps to Make Work Pay’ (10 October 2024) <<https://www.gov.uk/government/publications/next-steps-to-make-work-pay/next-steps-to-make-work-pay-web-accessible-version>> accessed 5 December 2024.

⁶ HC Deb 21 October 2024, vol 755, cols 52-53 <<https://hansard.parliament.uk/commons/2024-10-21/debates/DC4CA46C-E3A4-4A75-A0AA-5143E3E12585/EmploymentRightsBill>> accessed 5 December 2024.

⁷ UK Government, ‘Factsheet: Unfair Dismissal in the Employment Rights Bill’ (18 October 2024) <<https://assets.publishing.service.gov.uk/media/67125b939cd657734653d7e8/unfair-dismissal.pdf>> accessed 5 December 2024.

⁸ The Labour Party, ‘Labour’s Plan to Make Work Pay’ (June 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 5 December 2024.

those who have been treated unfairly to pursue a claim after recovering from the birth of their child. However, we note that Justin Madders has laid Government amendments to make the necessary changes, which we welcome.⁹

Are there weaknesses or loopholes in the Bill that could be exploited or have unintended consequences?

Clause 7 - Flexible working

10. The Bill does not amend the list of broad grounds on the basis of which an employer can refuse a flexible working request. In the absence of measures to narrow the list of acceptable reasons for refusing, we are concerned that some employers will continue to exploit these grounds by selecting some of them as a pretext for rejecting a request, notwithstanding the Bill's introduction of a requirement that an employer may only refuse where it is reasonable to do so.

Clauses 20 and 21 - Dismissal during pregnancy and following period of statutory family leave

11. Clauses 20 and 21 expand the powers of the Secretary of State to make provisions by regulations so that, as described in the Explanatory Notes, "regulations can be made to ban dismissals of women who are pregnant, on maternity leave, and during a six-month return-to-work period - except in specific circumstances" and "to enable regulation of dismissal in the period after a person returns to work" following a period of "adoption leave, shared parental leave, neonatal care leave and bereaved partners paternity leave".¹⁰ However, these powers could be used to make regulations that would weaken protections, and could be used in future to reduce protections with more limited parliamentary scrutiny than if primary legislation were required to do so. Introducing substantive measures on the face of the Bill to strengthen protections against dismissal for these groups would therefore provide more robust protection.

Duties of employers relating to equality

12. We support the Bill's provision in clause 26 to amend the Equality Act 2010 so that regulations may require employers with at least 250 employees to develop and publish

⁹ House of Commons, 'Employment Rights Bill (Amendment paper)' (26 November 2024) <https://publications.parliament.uk/pa/bills/cbill/59-01/0011/amend/employment_rights_day_pbc_1126.pdf> accessed 5 December 2024.

¹⁰ Department for Business and Trade, 'Employment Rights Bill Explanatory Notes' (10 October 2024) <<https://publications.parliament.uk/pa/bills/cbill/59-01/0011/en/240011en.pdf>> accessed 5 December 2024.

an equality action plan showing the steps that the employers are taking in relation to their employees with regard to prescribed matters related to gender equality, as well as to publish prescribed information relating to the plan. We consider that these measures would be strengthened by a specific requirement for employers to monitor and report on their retention rates for women one year after returning from maternity leave. We are concerned that in the absence of such a requirement, we may not see reporting and action in respect of this important issue related to gender equality.

Are there areas of employment law not covered by the Bill that weaken workers' protections?

Shared Parental Leave

13. The UK's failed system of Shared Parental Leave is inherently flawed on account of its complexity and its transferable nature, whereby the father or co-parent's leave entitlement comes out of the mother's maternity leave entitlement. It does not protect an adequate period of maternity leave for mothers (beyond a minimum of two weeks), which results in some women feeling compelled to transfer most of their maternity leave to the father or co-parent on account of their access to leave which is better paid. We therefore support the acknowledgement in the Government's 'Next Steps to Make Work Pay' policy paper that the "current parental leave system does not support working parents" and the commitment to "review this system".¹¹

Health and safety

14. As explored in Maternity Action's report 'Unsafe and Unsupported',¹² the Covid-19 pandemic saw many pregnant women required to work in unsafe working conditions, highlighting a pressing need for review of the operation of health and safety protections for pregnant women and new mothers as well as their enforcement. The Government's planned review of health and safety guidance and regulations must address the experiences of pregnant women and new mothers, with due regard to the need for better enforcement of protections intended to safeguard them.

¹¹ UK Government, 'Next Steps to Make Work Pay' (10 October 2024) <<https://www.gov.uk/government/publications/next-steps-to-make-work-pay/next-steps-to-make-work-pay-web-accessible-version>> accessed 5 December 2024.

¹² Maternity Action, 'Unsafe and Unsupported: workplace health and safety for pregnant women in the pandemic' (December 2021) <<https://maternityaction.org.uk/wp-content/uploads/UnsafeandUnsupportedHSFinal-compressed.pdf>> accessed 5 December 2024.

Employment status

15. The UK's complex tiered system of employment status results in some pregnant women and new mothers classed as workers having weaker rights or protections than those classed as employees. For example, only employees can make a statutory flexible working request. We hope that the Government's planned reforms in respect of "single 'worker' status" provide an opportunity to strengthen protections for pregnant women and new parents in less secure jobs.

Interplay of immigration and employment law

16. An area of law where workers' protections are weakened is at the intersection of employment and immigration law, where a worker's visa is sponsored by their employer and their immigration status is thereby dependent on their employer, increasing the worker's vulnerability to mistreatment at work. Maternity Action's legal team has encountered many care workers on Skilled Worker visas who have been dismissed upon notifying their employer of their pregnancy and are unable to get a new job in the late stages of pregnancy. Whilst some interventions needed to better protect sponsored migrant workers, such as granting sponsored migrant workers more time to switch sponsors, are in the sphere of immigration policy, the development of employment law should take account of the vulnerability of this cohort, including by having particular regard to it and the corresponding need for enhanced safeguards in the design of the regulations flowing from this Bill which will introduce stronger protections against dismissal for pregnant women and new mothers.

Equality reporting

17. Whilst we welcome the Bill's introduction of provision in clause 26 to amend the Equality Act 2010 so that regulations may require employers with at least 250 employees to develop and publish an equality action plan, we see this as a missed opportunity to extend existing gender pay gap reporting requirements and introduce new equality action plan publication requirements to employers of medium and small sizes.

Can the measures in the Bill be adequately enforced?

Flexible working

18. At present, the maximum compensation which may be awarded by a Tribunal to an employee who has made a well-founded complaint in respect of their employer's refusal of a flexible working application is eight weeks' pay with a cap of £700 per week. The Bill

does not introduce any increase to the maximum compensation which may be awarded to reflect its addition of a new, substantive requirement that an employer may only refuse such a request where it is reasonable to do so to the employer's largely procedural existing obligations in relation to flexible working requests. We are concerned that in the absence of more stringent penalties, the new reasonableness requirement will lack "teeth", unreasonable refusals will not be effectively remedied, and employees may be disinclined to bring a Tribunal complaint in respect of a flexible working request refusal considering the expense of legal services.

Equality action plans

19. A research report by the Fawcett Society, the Global Institute for Women's Leadership at King's College London, the Thomson Reuters Foundation, and Bowmans identified that "strict enforcement is central to the success of gender pay gap reporting regimes".¹³ We note in respect of the provisions in clause 26 that regulations may require employers with at least 250 employees to develop and publish an equality action plan that the new section 78A(7) of the Equality Act 2010 proposed by the Bill states that "regulations may make provision for a failure to comply with the regulations to be enforced, otherwise than as an offence, by such means as are prescribed". Adequate enforcement of the new equality action plan measures is therefore dependent on the optional subsequent introduction of an enforcement system through regulations. We are concerned that the incentive for employers to comply with the new equality reporting obligations will be insufficient in the absence of a robust penalty regime that provides an appropriate deterrent to non-compliance. We recommend that the discretion to introduce an enforcement system be converted to a duty and that the enforcement system be well-resourced in order to ensure that these measures can be adequately enforced. Similarly, the effectiveness of the "Regulatory Enforcement Unit for equal pay"¹⁴ described in the Government's 'Next Steps to Make Work Pay' policy document by which the measures on equality action plans will be "backed up" will at least partly depend on its funding.

What impact will these measures have on staff retention, hiring practices, probationary periods and wages?

¹³ The Fawcett Society, The Global Institute for Women's Leadership at King's College London, The Thomson Reuters Foundation, and Bowmans, 'Bridging the gap? An analysis of gender pay gap reporting in six countries' (October 2021) <<https://www.kcl.ac.uk/giwl/assets/bridging-the-gap-full-report.pdf>> accessed 5 December 2024.

¹⁴ UK Government, 'Next Steps to Make Work Pay' (10 October 2024) <<https://www.gov.uk/government/publications/next-steps-to-make-work-pay/next-steps-to-make-work-pay-web-accessible-version>> accessed 5 December 2024.

20. Assuming that future regulations provide the protections we wish to see, given the lack of detail in clauses 20 and 21, we would expect the introduction of stronger protections against dismissal for women who are pregnant, on maternity leave, or within six months of returning to work through regulations using the powers in these clauses to improve the retention of women.

How will the Plan to Make Work Pay impact:

- Employment levels?
- Incomes?
- Household wealth?

21. We would expect the strengthening of protections against dismissal for pregnant women and new mothers to increase employment levels, incomes, and household wealth for this cohort. We would also expect the Bill's provisions on flexible working (particularly if reinforced by stricter penalties for employers who breach their obligations regarding flexible working requests) to assist women who have children to retain their jobs and stay in full-time work (if they so wish) instead of moving to part-time work to accommodate childcare responsibilities, positively impacting employment levels, incomes, and household wealth.

What solutions or actions are required by Government, businesses and workers to effectively support the labour market while boosting productivity and protecting workers' rights?

22. The solutions or actions required beyond our recommendations above include, but are not limited to:

- a. greater access to legal aid for employment law matters and funding of legal advice services providing employment law advice, particularly given the likely increase in matters for which people will need advice and representation;
- b. the integration of legal advice into maternity services pursuant to a health-justice partnership model,¹⁵ whereby pregnant women and new mothers are connected to advice services by midwives to allow them to access their rights at work;
- c. greater resourcing of ACAS's advice and mediation services; and
- d. greater resourcing of the Employment Tribunal to reduce the backlog of claims.

Further information

¹⁵ See Maternity Action, 'Health justice partnerships and the wider determinants of health' (2021) <<https://maternityaction.org.uk/wp-content/uploads/HJP-and-wider-determinants-of-health-briefing.pdf>> accessed 5 December 2024.

Written submission from Maternity Action (ERB0052)

23. For further information, please contact Rhian Beynon, Senior Public Affairs and Communications Officer.

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