SUBMISSION ON MATERNITY PROTECTION (AMENDMENT) BILL 2003

FREE LEGAL ADVICE CENTRES, JANUARY 2004

Section 3 - Reduction in obligatory leave before expected date of delivery

It is understandable that a woman would wish to keep as much leave as possible for after the birth of her baby. In practice, this has lead to expected dates of delivery being manipulated to get around the requirement that four weeks maternity leave must be taken before the end of the week of the expected date of delivery. The proposed reduction of this period of leave from four weeks to two weeks in **Section 3** of the Bill may, therefore, be seen as recognising in legislation what is happening in reality. In the Seanad debate, Minister O'Dea stated on this subject that:

"I am aware that the current four week compulsory pre-confinement period of maternity leave has given rise to a situation where many pregnant employees collude with their doctors to have a false confinement date inserted into their medical certificates so that they can avail of a longer period of maternity leave after the birth"

However, it is arguable that this proposed reduction may not be without its potential problems. What is to prevent this alleged collusion continuing so that we could have cases where a pregnant employee is working right up to the date of delivery? In certain working environments, for example, in manufacturing or in any employment where there are physical duties attached to the work, this may pose an increased risk to the employee's and her baby's health and safety. Would it not be preferable to increase the period of leave by two weeks to twenty weeks rather than to take this potential risk?

It is submitted that in order to avoid potentially significant health and safety risks, the pre-confinement period of maternity leave remain at four weeks. The total period of leave should increase to twenty weeks to allow a greater period of leave after the birth to compensate.

Section 6 - Termination of additional unpaid leave

Section 6 of the Bill allows an employee to apply to terminate their period of additional unpaid maternity leave when sick. It is questionable how much use this might be to an employee who is not entitled to sick pay. Whilst Disability Benefit is likely to be available, the level of payment is low compared to many employees net earnings.

An employee must have the employer's consent in order to exercise this right. This could lead to a situation where an employee who does have a contractual right to sick pay in the event of certified medical illness might be prevented by their employer from claiming that entitlement simply by the employer refusing termination of the leave. Where the employee on additional leave has been replaced by another employee until their return, it

is arguable that such a refusal might be justified as that employer might effectively have to pay two salaries during the period of illness. However, where there are no replacement costs, it would be hard to justify such a refusal. At present, there is no way that the employee can challenge the employer's decision and the Minister confirmed this in the debate in the Seanad.

It is submitted that an employee should be allowed to challenge before a Rights Commissioner an employer's decision to refuse to allow the termination of additional maternity leave. The employer concerned should be obliged to show that there is an operational justification for such a refusal.

Section 7 - Postponement of leave where baby is hospitalised

The proposal in **Section 7** to allow an employee to postpone maternity leave or additional maternity leave where a child is hospitalised is a good idea in principle but it is too restrictive.

Firstly, it is only allowed from the fourteenth week of maternity leave onwards. The Minister explained in the course of the Seanad committee stage that the reason for restricting postponement to the fourteenth week was in order to comply with the pregnant workers directive, in that a pregnant employee must be entitled to a minimum of 14 weeks **continuous** leave under that directive. The Minister added that advice had been sought from the Attorney General on this subject and '*it appears that we cannot do anything about this issue'*. He did undertake to take further legal advice in relation to it. However, at Report and Final stages, this advice was confirmed and amendments to the section refused.

The pregnant workers directive is a minimum harmonisation directive. This means that any given Member State can introduce more favourable measures for its citizens over and above that provided by the directive. It is certainly arguable that allowing an employee to postpone part of her leave at her own election and resume it at a later stage is more favourable treatment rather than less favourable treatment. It improves her entitlement in a particular set of circumstances and certainly does not infringe the spirit of the pregnant workers directive. Has the European Commission being consulted in relation to this? Senator Cox at the Report Stage debate refers to advice being received from the Commission but the Minister does not and at no point are we enlightened as to the precise advice received. We find it far from convincing that the directive is being used to restrict the terms of this section.

Secondly, it is again dependent on the employer consenting to the employee's application and exercising their discretion to allow the leave to be postponed. A similar provision in the Parental Leave Act whereby the employer's consent is required in order for an employee to take parental leave in piecemeal fashion has given rise to problems. These are well illustrated in the case of O'Neill v Dunnes Stores where the employer's refusal to grant parental leave other than in one block of 14 weeks was reluctantly found to be within the bounds, if not the spirit of that Act.

Subsection (3) of the proposed amending section only requires the employer in question to notify the employee of their decision as soon as practicable. In other words, the employer can unilaterally refuse postponement of maternity or additional maternity leave without having to justify that decision to any authority. Minister O'Dea said in the Seanad that the intention here 'was to mirror Section 7 of the Parental Leave Act'. Our understanding is that the review group looking at the Parental Leave Act have suggested a change to this provision. If so, the Minister and social partners are mirroring flawed legislation.

It is submitted that the potential right to postpone maternity leave should apply at any point during maternity leave. In addition, a refusal to allow the postponement of such leave by an employer should be challengeable before a Rights Commissioner. The employer concerned should be obliged to show that there is an operational justification for such a refusal.

Section 8 - Right to paid time off for ante natal classes

Under **Section 8** of the Bill, a pregnant employee will be entitled to attend one set of ante-natal classes without loss of pay. However, the exception to this otherwise sensible amendment is that the last three classes in the set will not attract paid time off. One possible explanation for this is that the employee may be on maternity leave at that point. This is unlikely given that the bill proposes to reduce the pre-confinement period of leave to a minimum of two weeks in theory, which, in practice, may amount to a lot less.

However, at the report stage in the Seanad, the true reason for this exclusion is explained by Minister O'Malley (deputising for Minister O'Dea) as follows:

"The implementation of the recommendation has a direct cost implication for employers. As part of the compromise reached during negotiations, employers representatives agreed that the legislation should provide that employers pay employees for time off to attend a full set of antenatal classes except for the last three"

It appears from this statement that the cost for employers comes before the health and safety of pregnant employees. How many women, especially in receipt of low pay, will fail to attend the last three ante natal classes if this provision stands? This was not the first time in the debate that the attending Minister effectively hid behind the mantra of social partnership to argue that his hands were tied. If proposed legislation is ineffective or unfair, it is the job of the legislature (and the Executive) to amend it. If this means overruling the supposed consensus of the social partners, then so be it.

It is submitted that a full set of ante natal classes be available to a pregnant employee without loss of pay.

Section 9 - Breastfeeding provisions

As a general comment, the provisions on breastfeeding in **Section 9** of the Bill, although laudable, are long on aspiration and short on detail. It will be interesting to see the detail in the implementing regulations that will follow. An employer is obliged either to provide time off and facilities for breastfeeding in the workplace (although the provision of facilities is subject to a nominal cost limitation) or to allow a reduction in an employee's working hours i.e. time off work for the purposes of breastfeeding outside the workplace. The latter option appears to have potential difficulties especially where the employee lives a significant distance from her place of work, an increasing feature of the employment landscape in Ireland.

The provision in the Bill as initiated that such rights would only apply until the child was four months old appears to have been removed but it has not been replaced by any other limit. Again, it will be left to regulations to provide for this.

It is submitted that any limitation on the employee's rights to avail of the breastfeeding provisions be more generous and realistic than the four month provision in the Bill as initiated

Section 18 - Return to work provisions

Under the 1994 Act an employee is entitled, where it is not reasonably practicable for her to return to her original job following leave, to be offered suitable alternative work on terms that are not **substantially** less favourable than in her previous job. At the time FLAC called for the removal of the word 'substantially' in its submission on the 1994 legislation as it implied that the terms of the suitable alternative employment could be less favourable as long as they were not substantially so.

It is heartening if slightly ironic that almost a decade later the word 'substantially' has finally been removed to ensure compliance with the pregnant workers directive. However, the old wording still remains in Section 19 of the Adoptive Leave Act 1995, Section 16 of the Parental Leave Act 1998 and Section 15 of the Carers Leave Act 2001 respectively. This is surely an anomaly.

It is submitted that other leave related legislation as outlined above be brought into line with the Maternity Protection Act (as amended) in relation to what constitutes suitable alternative work where the employee's original job is no longer available.

For further information on this submission, please contact Paul Joyce

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