AN IER BRIEFING

The Children and Families Bill

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Children and Families Bill

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The *Children and Families Bill 2012-13* was introduced in February 2013 and is intended to implement many of the proposals made in the Government's Consultation on *Modern Workplaces.* Whilst there is much to be commended in the Bill, there remains a number of concerns that the proposals in the Bill do not entirely reflect the original aspirations of the *Modern Workplaces* proposals - those of flexibility, efficiency and fairness - and in practice might prove either ineffective in terms of achieving its objectives or too challenging for employers to implement.

Shared parenting

The Bill extends Labour's system of transferable maternity leave. Under the new Bill, maternity leave from 2-12 months can be transferred to fathers and partners. Whilst a welcomed step, fathers have been able to share leave from 5 months and there is little evidence of take up. This may be a societal issue, but it is certainly also a workplace issue. Where for example are the safeguards to ensure that taking up this opportunity would not negatively affect fathers' careers in the way it has affected careers for mothers? There is plenty of research highlighting the scale of pregnancy discrimination in the UK and there is already emergent evidence that fathers are also experiencing discrimination when seeking to exercise their rights to take leave. There is a danger, therefore, that the Bill might result in more cases and/or deter fathers from taking leave. In order to strengthen the provisions of the Bill there must be a clear right of return to the same job for those taking leave to look after a child, irrespective of the length of that leave.

The Bill also imposes more restrictive service conditions for Shared Parental Leave than are in place for maternity leave. Currently, women are entitled to maternity leave from the first day of employment (a day one right). If workplace (and societal) attitudes are to change then this right should also be extended to fathers as well, and with shared parental leave underpinned by adequate statutory pay. In other European countries, ring fencing 'paternity leave' leave on a use-it or lose-it basis has been shown to have a positive effect on take up. For example, Iceland has recorded a very high proportion (90 per cent) of fathers taking parental leave since the introduction of a period of three months' non-transferable leave supported by adequate statutory paid arrangements (Gislason, 2007). The idea of reserved leave was included in the original *Modern Workplaces* consultation and Government has indicated it will be subject to review in 2018. Why the delay?

Ante natal appointments

Currently, pregnant women are entitled to reasonable time off to attend ante natal appointments. The Bill provides fathers and partners with the right to unpaid time off to attend two appointments. Whilst this might be adequate provision where there are no complications during the pregnancy, what happens where this isn't the case? Also the fact that time off is unpaid is a deterrent. The Bill would be strengthened by replacing the current specified allowance with "reasonable time off", and for leave to be paid.

Flexible working

The Bill provides for an extension of the right to request flexible working from working parents with children up to the age of 17 or 18 if disabled, and to those employees who have caring responsibilities for an adult dependant, to all employees. However, the Bill removes the procedures by which employers should respond to a request from primary legislation, with a duty to respond “reasonably” to requests and within a three month timetable, which will be supported by a statutory ‘Code of Practice’. This could result in a weakening of instructions for employers. Under the current legislation, there is a clear procedure that needs to be followed by employers to deal with requests to work flexibly, which also provides for a right of appeal. This procedure has been in use since the right to request to work flexibly was introduced, so it can be assumed that it has already been tried and tested and that - more importantly - it provides some clarity and certainty for both employers and employees in terms of dealing with these requests.

Many employers have already voluntarily extended the right to request to work flexibly to all of their employees. However, in the event of competing demands, where an employer can only accommodate one of them, the current legislation is providing a 'default' position by enabling employers to give priority to those applications which come from employees with a statutory right to request. Under the proposed new legislation, employers will need to carefully consider that when determining how to prioritise employees' requests to work flexibly they do not inadvertently discriminate, either directly or indirectly, against employees with protected characteristics under the Equality Act 2010.

The government has conceded in its response to the consultation that this is an issue, but has rejected the idea of introducing additional legislation to guide employers on how to resolve these potential issues. They have judged that the existing anti-discrimination legislation combined with the proposed flexible working legislation will provide a sufficient legal framework to enable employers to prioritise requests for flexible working without running the risk of inadvertently discriminating against employees with protected characteristics. They have also asked ACAS to provide some guidance for employers to help them deal with the interaction between anti-discrimination legislation and the right to request flexible working. However, this could prove quite challenging especially for small businesses that may not have easy access to HR expert advice, unlike larger businesses. Thus there is a risk that if employers find the process of prioritisation too complex to deal with they may be less sympathetic towards requests for flexible working and more inclined to find business reasons as to why they cannot be accommodated.

Another important point to note is that the right to request retains a qualifying period of 26 weeks before an employee can make an application to work flexibly. This partly frustrates the aim of facilitating access to the labour market for those people with caring responsibilities who need a flexible job. As highlighted by the TUC in their response to the Bill, ‘many parents and carers, particularly lone parents, find it hard to gain employment because so few jobs are advertised part-time or flexible basis from day one’ (TUC, 2013). Thus this extension is more likely to benefit those who are already in employment and have a qualifying period of 26 weeks. This could have a particularly negative impact on women many of whom are employed in the

public sector and need flexible working to manage their caring responsibilities. As the public sector is shrinking this is resulting in many women losing their jobs who could find it difficult to find new employment if they cannot access flexible working from ‘day one’ of their new job.

References

Gíslason, I.V. (2007) Parental leave in Iceland: bringing the fathers in. Developments in the wake of new legislation in 2000, Ministry of Social Affairs and Centre for Gender Equality, available on line at www.jafnretti.is/D10/_Feles/parentalleave.pdf