

Equality Act 2010: Pregnancy Discrimination Mystery

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Jane is an FX trader working at a bank. In November 2010 she gets married. Returning from her honeymoon, she shudders at the thought of resuming the boozy lunchtime drinking sessions of her past. Come Friday, the desk decants to the wine bar and Jane orders a fizzy water. Her male companions exchange knowing looks. The next day she is summoned to a meeting with the Head of Desk: "You know me, Jane. I am the first to promote the interests of girls in this bank. I can't have you being pregnant though luv, so here are your belongings."

Jane is the victim of an act of perceived pregnancy discrimination. What must she prove to establish her claim? The answer to this question requires us to solve some mysterious drafting in the Equality Act 2010.

The old days

Until 2005 there was no specific prohibition on discrimination on grounds of pregnancy. Pregnancy discrimination claims would be dealt with as cases of direct sex discrimination (**SDA 1975, s.1**). To treat a woman less favourably on grounds of her pregnancy was to treat her less favourably on grounds of her sex. Logically, being treated less favourably because your employer believed that you were pregnant would fall to be treated in the exactly same way.

Back in the 1980s, the Tribunal would have decided the question of "less favourable treatment" by identifying a suitable male comparator. Their efforts to devise a male analogue for a pregnant woman were by turns amusing and disturbing. They were saved from all that by the European Court of Justice which, in a series of cases beginning with **Dekker** (177/88), made it clear that pregnant women are in a unique and sex-specific position and that identifying a male comparator is neither necessary nor appropriate.

From that point forward, a woman would succeed in her claim if she could show that she had been treated *unfavourably* because of her pregnancy (or perceived pregnancy). In 2002, the **Equal Treatment Directive 76/207/EC** was amended to introduce a specific protection for pregnant women. In due course the **SDA 1975** was amended to implement the change to the Directive and **SDA s. 3A** was born. In its original form **S. 3A(1)** prohibited an employer from treating an employee less favourably than he would have treated her had she not been pregnant:

*"... a person discriminates against a woman if -
(a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably than he would treat her had she not been pregnant."*

Had Jane been dismissed in 2006 she would not have been able to rely on **S. 3A(1)** for two reasons. The first is that the protection only applies during the so-called "protected period". The protected period begins "each time she becomes pregnant" (**S. 3A(3)(a)**). Since Jane was never pregnant, no protected period ever began. The second reason is that the comparison is expressly between a pregnant Jane and a hypothetical non-pregnant Jane. However, all was not lost for Jane because she could still have brought a claim for direct sex discrimination under **SDA 1975 s. 1**. Since there was no reason to suppose that the introduction of **S. 3A** was intended to make it harder for victims of perceived pregnancy discrimination to bring successful claims, it must be assumed that there would still have been no need for a male comparator to be identified.

The drafting of **S. 3A** was subject to a successful challenge on the basis that it still required a comparison even though there was no such requirement in the Directive. In 2008 the Government had another go:

*“... a person discriminates against a woman if -
(a) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably than he would treat her had she not been pregnant.”*

The re-draft is not going to win any prizes. The hypothetical non-pregnant auto-comparator vanishes into oblivion but the section still seems to require “less favourable” treatment, which begs the question “less favourable than what?”

The Brave New World of the Equality Act 2010

The new model pregnancy discrimination protection is to be found at **EA 2010 s. 18**. It rinses away the last of the comparative language:

*“(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably -
(a) because of her pregnancy ...”*

The statutory language thus finally implements the protection that has existed in practice since the early nineties: you cannot treat a woman *unfavourably* because of her pregnancy. The section goes further and, at **sub-section (7)**, disapplies “*Section 13, so far as relating to sex discrimination*” where the complaint concerns unfavourable treatment because of pregnancy during a protected period. **EA 2010, s. 13**, as we will see below, is the prohibition on direct discrimination.

Returning to Jane’s predicament, it is immediately clear that she can no more rely on **EA 2010 s. 18** than she could on **SDA 1975 s. 3A** because, again, no protected period has come into play. Equally, **s. 18(7)** does not bite, so can she do what she would have done in the old days and bring a direct sex discrimination claim inviting the tribunal to disregard the requirement for a comparator?

Direct sex discrimination is dealt with by **EA 2010, s. 13**. The section is a general discrimination prohibition:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

The “protected characteristics” are listed at **EA 2010, s. 4** and include “sex”. Significantly, the list also includes “pregnancy and maternity”. This is where the mystery begins.

Jane has been dismissed for perceived pregnancy so the obvious choice for her is a **S. 13** pregnancy discrimination claim. It is worth noting, in passing, that since **s. 18(7)** only disapplies **S. 13** “relating to sex discrimination”, it would appear to be possible to bring a **s. 13** pregnancy discrimination claim during the protected period. The test of liability under **S. 13** is expressly a comparative one. There needs to be “less favourable treatment”. The point is emphasised by **EA 2010, s. 23(1)** which provides:

“On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.”

Sub-sections 23(2) and **(3)** then make special provision for disability comparisons and sexual orientation comparisons. There could have been a further subsection disappling the need for comparison in **S. 13** pregnancy discrimination cases but there is not. Either we are faced with some very very bad drafting or

else the Government actually wants Jane to have to identify a comparator. If the requirement for a comparator is intentional, Jane will be worse off under the new regime than she was under the old one.

In favour of the approach being intentional is that **S.13** creates a brand new express protection against pregnancy discrimination unqualified by any need for it to have occurred within a protected period. It has been created against the background of decades of wrangling about the need for a comparator in pregnancy discrimination cases and it seems unlikely that the Government decided, whilst being so careful in drafting **S. 18**, just to assume that everyone would understand that no comparator was necessary or appropriate under **S. 13** when the protected characteristic at issue was pregnancy.

On the other hand, there are sections in the Act which suggest that the Government may not have had it in mind to create a **s. 13** pregnancy discrimination cause of action at all. Take a look at **EA 2010, s. 25**. That section defines what is meant by each form of discrimination. Let's start with Age Discrimination as an example:

*“(1) Age discrimination is -
(a) discrimination within section 13 because of age ...”*

Next on the list is Disability Discrimination:

*“(2) Disability discrimination is -
(a) discrimination within section 13 because of disability”*

Now let's look at what it says about Pregnancy Discrimination:

“(5) Pregnancy ... discrimination is discrimination within section ... 18”

As “spot the difference” challenges go, this is not the hardest. There is no reference of any kind to **EA 2010 s. 13**. Why not? There are really only two possibilities. The first is that **EA 2010 s. 25** is very badly drafted and should refer to **S. 13**. The second possibility is that **EA 2010 s. 13** is very badly drafted and it should exclude pregnancy discrimination leaving sex discrimination to pick up the slack.

There is a chance to amend the Act before it comes into force. This is what I think they should do:

(1) Create a direct form of pregnancy discrimination in addition to **s. 18** which covers perceived pregnancy discrimination, associative pregnancy discrimination and pregnancy-related discrimination outside the protected period (where, for instance, an employee is dismissed for announcing an intention to try start a family). This can be done by leaving **EA 2010, s. 13** as it is presently drafted;

(2) Make sure the **S. 13** and **S. 18** claims do not overlap by amending **S. 18(7)** so as to preclude **S. 13** claims during the protected period whether they are on grounds of sex or pregnancy or maternity;

(3) Amend **S. 23** so as to make it clear that **S. 13** pregnancy discrimination claims should not require a comparator; and

(4) Amend **S. 25** so as to make reference to **S. 13** in the definition of pregnancy discrimination. I appreciate that others may take a different view.

A bonus mystery

Does really it matter whether **S.13** pregnancy discrimination exists or not? The issue does have an unexpected and potentially significant side-effect.

EA 2010, S. 26 prohibits harassment consisting of unwanted conduct relating to “a relevant protected characteristic”. A protected characteristic is only a “relevant” one if it appears at the list in **S. 26(5)**. “Pregnancy and Maternity” do not appear in the list. The omission is plainly deliberate. The use of the phrase “relevant protected characteristic” limits the scope of the protection against harassment to a subset of the protected characteristics. There would be no warrant, therefore, for trying to argue that unwanted conduct relating to pregnancy should be treated as a form of sex harassment.

Until the week before Royal Assent it seemed that the Government was determined to make it lawful to harass pregnant women. Putting it mildly, this seemed like a very odd thing for the Government to want. At the last minute **S. 212** was amended.

EA 2010, s. 212 is the general interpretation provision. It defines detriment so as to exclude “*conduct which amounts to harassment*”. The point of the provision is to ensure that if you are complaining about being harassed you must bring your claim under **S. 26** and not under **S. 13**. The amendment made the definition subject to a new **S. 212(5)** which provides:

“Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic”

Those who are long in the tooth will remember that this was how all cases of harassment were once dealt with, i.e. as a form of direct discrimination. Shoe-horning harassment into direct discrimination led to some unfortunate side effects including the fact that since you had to show less favourable treatment it allowed an employer to run the “bastard” defence. Provided the employer harassed everyone, he got off.

Pedants will ask whether not including “pregnancy” in the list of “relevant protected characteristics” at **S. 26(5)** amounts to a “disapplication”. Fie!

However, even if we ignore the pedants, that leaves two questions. The first question is *why* the Government wanted to deal with it this way rather than just including pregnancy in the list at **S. 26(5)**. Again, if I were free to redraft the legislation, that is what I would do. Why should employees harassed because they are pregnant have to show less favourable treatment when those harassed because of their sex do not?

The second question brings us back to the one discussed at length above. If there is no **S. 13** pregnancy discrimination liability, **S. 212(5)** won't help the harassed pregnant employee. This is another good reason, therefore, for taking **S. 13** at face value and hoping that the other apparently inconsistent provisions are amended to remove any uncertainty.