

1. Introduction

1.1. Slate Legal welcomes the opportunity to provide a written response to the call for evidence of the Equality, Local Government and Communities Committee of the National Assembly for Wales. We are also pleased to participate in this consultation and for the opportunity to provide related oral evidence to the Committee.

2. About Slate Legal

2.1. Slate Legal¹ is a specialist employment law firm based in Newport, South Wales, advising clients across Wales and England in the private, public and third sectors. We are regulated by the Solicitors Regulation Authority.

2.2. The firm launched in January 2016, headed by James Moss, a specialist employment solicitor with 20 years' experience of advising a wide variety of employers and employees in the private, public and third sectors. James has advised Welsh public sector employers including universities, local authorities, student unions, auditors and large drainage boards. He has also advised Welsh public sector employees mainly employed by the police, the Ministry of Defence, local authorities (mainly schools and health boards) and universities. James is independently recommended for employment law in the Legal 500 and Chambers & Partners legal directories of leading UK law firms and is also top 3 rated locally by *Three Best Rated*.

2.3. Our aim is to make employment law work for our clients, whether they be employees or employers, advising on a wide range of employment law issues – chief of which is discrimination law - as well as bringing and defending employment-related claims in the Employment Tribunals and civil courts.

2.4. We consider it important to promote values of diversity, equality and inclusion throughout our business which is why, within our first month of trading, we became a signatory to the Law Society's Diversity & Inclusion Charter - the flagship diversity initiative of the solicitors profession which encourages law firms to develop and implement best practices in diversity, equality and inclusion. We are also proud members of *Working Forward*, the Equality & Human Rights Commission's campaign to support pregnant women and new parents at work. We also take our Corporate Responsibility seriously and this is now our third year of being a signatory to the Welsh Government's Sustainable Development Charter and a member of the Legal Sustainability Alliance.

3. The extent of pregnancy and maternity discrimination in the Welsh public sector - the effect of the Public Sector Equality Duty

¹ www.slatelegal.co.uk

- 3.1. In our experience, the extent of pregnancy and maternity discrimination in the Welsh public sector has been greatly reduced due to the positive effect of the introduction of the Public Sector Equality Duty (“**PSED**”) on 5 April 2011, and the additional Wales Specific Duties on 6 April 2011.
- 3.2. The PSED and the additional Wales Specific Duties have undoubtedly brought beneficial changes in a number of areas within the Welsh public sector, and even beyond - since the well-being benefits for public sector staff whose employers actively promote cultures of inclusivity, fairness and respect are often felt not only by the staff but by their families and friends.
- 3.3. It is clear from the report of July 2014 by the Equality & Human Rights Commission Wales following their review of the PSED in Wales², that the PSED has helped mainstream equality and diversity issues and has rightly raised the profile of the equality and diversity agenda. The contrast between how such issues were addressed 15 years ago compared to today is, in many public sector organisations, stark. The profile of the equality and diversity agenda in public sector organisations in Wales was clearly much lower 15 years ago, than it is today. Seven years on from the introduction of the PSED, cultures of fairness, dignity and respect in the workplace appear to be embedded in most of the public sector organisations that we have come across.
- 3.4. It should be said that a number of public sector employers were doing the right thing as regards equality and diversity long before they became legally obliged to do so and in this regard the PSED and the additional Wales Specific Duties have supported/supplemented such work. However, for the most part, we doubt progress would have happened, or at least, we doubt significant progress would have happened by now, had there not been a change in the law.
- 3.5. It is clear that as a result of the PSED and the additional Wales Specific Duties, the public sector in Wales leads the way in promoting equality and diversity in the workplace. A job candidate today choosing to work in the public sector can realistically expect their potential employer to spend time and resources actively promoting equality and diversity, rather than merely treating it as an ‘*add-on*’. If they have come from the private sector, they may have been unlucky enough to have worked for an employer who, cynically, viewed their equality and diversity obligations as amounting to no more than having a policy and being able to tick the box in order to be in with a chance of winning public sector contracts.
- 3.6. Many public sector organisations with 250 or more employees have published their gender pay gap data long before they were legally obliged to do so on 30 March 2018. Our impression is that few similarly sized private and third sector employers have done likewise (ahead of the deadline of 4 April 2018).
- 3.7. The current threshold of 250 employees excludes too many women. According to the Fawcett Society’s Sex Discrimination Law Review of January 2018³, 99% of businesses

²https://www.equalityhumanrights.com/sites/default/files/review_of_psed_in_wales_full_report_english_nov2014.pdf

³ <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116>

across the UK fall below the threshold⁴. Looking beyond our national borders, gender pay gap reporting regulations in France apply to organisations with over 50 employees and in Sweden to those with over 25 employees⁵. We support the Fawcett Society's recommendation for the regulations to be amended by 2020 to progressively lower the threshold to workplaces with over 50 employees and for the gender pay gap to be further broken down by age, disability, race, LGBT and part-time status.

3.8. However, despite the improvements brought by the PSED and the additional Wales Specific Duties in countering harassment and discrimination within public sector organisations, and reducing the extent of pregnancy and maternity discrimination in the Welsh public sector, there remain areas where improvements can and should be made to further reduce the extent of such discrimination.

4. Examples of pregnancy and maternity discrimination in the Welsh public sector

4.1. We have advised on a number of incidences of pregnancy and maternity discrimination in the Welsh public sector. Examples range from low level one-off incidents or isolated events which would be classed as being within the bottom of the updated Vento⁶ bands (injury to feelings compensation for which would be £800-£8,400), to serious cases which would be within the middle Vento band (compensation for which would be £8,400 - £25,200), to the most serious cases which would be within the top Vento band such as where there has been a lengthy campaign of harassment (compensation for which would be £25,200 - £42,000).

Lack of consultation during maternity leave

4.2. In a number of cases, changes have been made to employees' jobs, by stealth, without prior consultation whilst they were on maternity leave. Some complained that managers had allowed work colleagues to chip away at their role whilst they were on maternity leave with the missing pieces never being restored following their return to work. The changes in question were often relatively minor, but were nevertheless changes which the employer would have been less likely to have attempted had the employee not been on maternity leave.

4.3. Similarly, it is surprising how often we have come across business reorganisations taking place whilst employees are on maternity leave without the employee being informed or consulted. Finding out about such reorganizations by chance a long time after the event and shortly before returning to work, has caused further anxiety to many employees at a time when they should be enjoying their maternity leave.

4.4. When redundancy situations purportedly arise during maternity leave, it is particularly difficult for pregnant employees to prove unfavourable treatment and Employment Judges

4 Rhodes, C (2016). House of Commons Library: Briefing Paper Number 06152 Business Statistics

5 DLA Piper (2017). Gender Pay Reporting: An International Survey.

https://www.dlapiper.com/~/_media/Files/Insights/

Events/2017/01/Annual%20Employment%20CLE%20Briefing_Gender%20pay%20survey.pdf

⁶ In **Vento v Chief Constable of West Yorkshire Police** (No 2) [2003] IRLR 102 (CA), the Court of Appeal set clear guidelines for the amount of compensation to be given for injury to feelings and set out three bands of potential awards. These bands were updated on 05 09 17 by Presidential Guidance for claims on/after 11 09 17.

are understandably reluctant to deny an employer's right to manage their business as they see fit.

- 4.5. Another common issue is that of internal vacancies arising, which would often amount to promotion opportunities, which are simply not communicated to the employee on maternity leave. Despite employers being entitled to make '*reasonable contact*' with employees who are on maternity leave, they often fail to do so. Such issues could be avoided by putting in place an agreed communication plan (see best practice point 6.5.1 below).

General lack of communication with employees on maternity leave

- 4.6. In one case, the only correspondence received by a client during 12 months of maternity leave was a letter telling her about the office Christmas party and a second letter shortly prior to her anticipated return to work confirming the date when her SMP would end and the anticipated return to work date. The client felt as though she had been '*cut off*' from communication during maternity leave.

Unconscious bias & stereotypical assumptions

- 4.7. Unconscious bias frequently appears at the recruitment stage. For example, in assessment centres, the questions and tests set for candidates often do not take into account emotional intelligence or '*soft skills*' but frequently look at skills that are more geared towards men.
- 4.8. Employees who have recently returned to work following maternity leave have reported managers making stereotypical assumptions that they are less interested in career progression than their male work colleagues.
- 4.9. Similarly, male gender-biased language (such as *active, confident, lead, analyse and competitive*) often features in job adverts (and job descriptions), describing traditional '*alpha male*' roles. We are aware of several female clients who have been dissuaded from applying for jobs because they did not identify with such a job description.

Tight time limit for discrimination claims

- 4.10. Where women have experienced discrimination shortly before or during maternity leave, many do not feel that they are in the right place, physically or mentally, to bring a claim. We support the Fawcett Society's recommendation⁷ that the time limit for all discrimination and harassment claims linked to pregnancy and maternity be increased to six months.
- 4.11. Without the benefit of legal advice, many employees - both male and female - struggle to understand how to calculate the relevant extended time limit for bringing any discrimination claims and ACAS are not at liberty to advise on such matters. There is an urgent need for a user friendly online calculator to assist potential claimants in this regard.

Discrimination Questionnaires

⁷ <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116>

4.12. Discrimination Questionnaires – which were unjustifiably scrapped on 6 April 2014 - should be reintroduced for all types of discrimination. I am old enough to remember and to have completed and responded to such questionnaires on behalf of clients. Such questionnaires were a vital tool for prospective claimants as they provided an opportunity to gather the information necessary to decide whether or not to proceed with a claim by front-ending much of the disclosure and information gathering process long in advance of any disclosure exercise as part of Employment Tribunal proceedings. They also empowered the Employment Tribunal to draw adverse inferences of discrimination in the event that the employer's reply was late (later than 8 weeks from the date of receipt), evasive, equivocal or non-existent. Answers to a statutory questionnaire were admissible in evidence at a Tribunal Hearing.

Harassment

4.13. A number of clients have complained that they have felt under pressure by their manager not to have any more children. For example, whilst pregnant their male manager questioned them about whether they planned to have any more children, commenting that he hoped they would not as the team was a close-knit small team which worked well and he wanted to minimise any disruption.

Third party sexual harassment

4.14. Clients have recounted their experiences of sexual harassment from external training providers engaged by their employers to carry out workforce training. Examples include inappropriate jokes, asking about whether they have plans to have any more children and unwelcome touching of their bump. Prior to 2013, such conduct was prohibited by section 40 of the Equality Act 2010, subject to there having been at least 2 such incidents. However, this section was repealed in 2013 thus removing this protection.

4.15. We refer to the Fawcett Society's excellent Sex Discrimination Law Review of January 2018⁸ and support their call for the reintroduction of section 40 of the Equality Act 2010 with an amendment so that it requires only a single prior incident of harassment - after all, why should protection from such harassment be harder to obtain just because the harasser is a third party? Pregnancy and maternity, as well as marriage and civil partnership status, should also be included as protected characteristics for the purpose of prohibiting such harassment.

5. Variances between different groups of women

- 5.1. Single parents often have less support than those who have a partner, spouse or civil partner who can be relied on for help and support with child care. They consequently have even less free time within which to submit a discrimination claim (see 4.10 above).
- 5.2. For practical or economic reasons, women whose partners, spouses or civil partners work long hours or are higher paid, tend to be expected to take responsibility for the majority of child-care.

⁸ <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116>

- 5.3. Generally, the more senior a woman within the organisation, the easier it is for her to return with greater flexibility because of her greater autonomy. More junior female staff will find it even harder to progress their careers within an organisation as with less flexibility their options are more limited.
- 5.4. Recent evidence from the Fawcett Society⁹ shows that the gender pay gap in Britain is shaped by racial inequality. In particular, Pakistani and Bangladeshi women have the largest gender pay gap of all – their aggregate (full and part-time) gender pay gap with white British men being 26.2%.

6. Examples of good practice

- 6.1. Happily, most of the examples of good practice that we have come across as employment law practitioners have come from the public sector. This is not due to any particular magic unique to the public sector, it is not inherently better at tackling discrimination than the private sector, it is simply that the public sector equality duty has forced public sector organisations to take steps to actively promote equality and diversity or face claims in the Employment Tribunals.
- 6.2. **Mixed sex recruitment panels** – Having mixed sex recruitment panels and where there are no appropriate female personnel, engaging female HR consultants. Requiring all members of recruitment panels to have undergone unconscious bias training within 2 years prior to joining the panel.
- 6.3. **Flexible working** - Allowing staff to work their core hours flexibly. Flexibility being the norm, rather than the exception. Leaders setting the culture of the organisation, leading by example, talking and walking the talk.
- 6.4. **Agile working** – Exploiting modern technologies to facilitate flexible and remote working (skype for business; encrypted smart phones, wifi enabled encrypted laptops; cloud-based solutions) and more open internal communications channels like Yammer/instant messaging.
- 6.5. **Maternity Policy** – Promoting a consistent approach to maternity across the organisation and increasing awareness of the support available for pregnant employees including:
 - 6.5.1. **Agreed communication plans** – agreeing how to notify stakeholders about the maternity leave, and how often and who will communicate with the employee during her maternity leave.
 - 6.5.2. **Agreed handover plans** - ensuring that the employee's work will be covered with the minimum of interruption to the organisation whilst on maternity leave.
- 6.6. **The right corporate culture** - Fostering a flexible and dynamic corporate culture where the leaders champion equality and diversity and practise flexible working and live these

⁹ Li, Y. and Breach, A (2017). *Gender Pay Gap by Ethnicity – Briefing*. (London: Fawcett Society). <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=f31d6adc-9e0e-4bfe-a3df-3e85605ee4a9>

values as role models so that more junior female employees are encouraged and empowered to exercise their family friendly rights knowing that it will not be frowned upon.

- 6.7. **Women's networks** – Important for inspiration, learning from other women, boosting self-belief and giving perspective to the decisions and challenges ahead.
- 6.8. **Mentoring & coaching** – Actively supporting, guiding and developing female employees to be the best they can be, including encouraging more women into senior management roles.
- 6.9. **Unconscious bias training** – Unconscious bias can and often does permeate all aspects of the day-to-day management of employees having unfortunately become part of our psyche due to the constant subtle reinforcement of stereotypes from generation to generation. Requiring all managers to undergo unconscious bias training within 3 months of their appointment (to be repeated every 3 years), if they have not already had such training.

7. Conclusion

Slate Legal is delighted to have been able to assist the Equality, Local Government and Communities Committee by providing evidence relevant to its inquiry into pregnancy, maternity and work in Wales.

We hope that the inquiry will result in prompt, effective action being taken by Welsh Government that will build on the progress already made towards combatting this type of discrimination in workplaces across Wales.

23 March 2018