

Debate Pack

20 November 2023

Number CDP 2023/0206

By Patrick Brione,
Khadijah Zaidi

Fertility treatment and workplace rights

1	Background	2
2	Press articles	6
3	Press releases	8
4	Parliamentary material	9
5	Further reading	11

1 Background

On 22 November 2023 at 9.30 am there will be a 90-minute Westminster Hall debate on fertility treatment and workplace rights, sponsored by SNP MP Angela Crawley.

Employment law is devolved in Northern Ireland but reserved in respect of Scotland and Wales.

At present there are no specific statutory rights to time off work for in order to attend IVF treatment in Great Britain. The number of appointments women need for IVF can vary significantly, but as an example, NHS guidance on IVF notes there are usually six main steps to each cycle of IVF treatment.¹ IVF treatment can also involve other appointments such as consultations and counselling.

1.1 Existing rights to time off work for medical reasons

There is no general statutory right to time off for medical appointments in the UK. As such, employees do not have a general right to time off to see a doctor unless their contract provides them with such a right.² If the medical appointment relates to a disability, an employer needs to ensure that they are not discriminating against the employee by failing to make a reasonable adjustment under the Equality Act 2010.³

Similarly there is no general statutory time off work due to ‘medical conditions’ – rather employees are entitled to Statutory Sick Pay during periods when they are “incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do”.⁴ Similarly, employers will have their own terms and conditions set out in employment contracts which determine what rights employees have to time off for medical appointments or periods of illness, including possibly offering contractual sick pay above the statutory minimum. For more detail on sick pay, see the Library briefing on [Statutory Sick Pay](#).⁵

Current statutory rights to time off from work can mostly be found in the [Employment Rights Act 1996](#), which applies to England, Scotland and Wales

¹ NHS, [What happens: IVF](#), 18 October 2021

² See Citizens Advice, “[Check if you can take time off work](#)”, 19 December 2022

³ The detailed rules for reasonable adjustments at work are in [Schedule 8 to the Equality Act 2010](#)

⁴ [Section 151\(4\), Social Security Contributions and Benefits Act 1992](#)

⁵ Commons Library Briefing CBP 9435, [Statutory Sick Pay](#), 27 May 2022

but not Northern Ireland where employment law is devolved.⁶ The core provisions can be found in [Part VI of the Act](#). There are also the provisions in [Part VIII](#) concerning family-related leave, and in particular section 55 which grants pregnant employees the right to time off for certain “ante-natal care” appointments.

However this right to time off for ante-natal care only exists for an employee who “is pregnant”.⁷ As noted by the IDS handbook on Maternity and Parental Rights, the point at which pregnancy begins for the purpose of employment law in cases of IVF (in vitro fertilisation) treatment has been considered by the European Court of Justice (ECJ). In *Mayr* the ECJ found pregnancy did not begin until the fertilised embryo is implanted in the uterus; this would mean IVF treatment before that stage is unlikely to be covered by section 55:

IVF treatment can involve frequent medical appointments, necessitating time away from work. Moreover, many patients undergo several attempts at conception, as the treatment is often unsuccessful. If the meaning of ‘ante-natal care’ under Ss.55 and 57A covers every appointment associated with IVF treatment, then employees and agency workers may end up taking a considerable amount of time off work under those provisions. If, however, pregnancy – and, by extension, the need for ante-natal care – is not considered to have begun until IVF treatment is successful, then employees and agency workers undergoing such treatment will have no right to any time off at all during the course of the treatment (unless, of course, they have a contractual right to such time off). As far as we are aware, no domestic court has considered the position under S.55 of S57A, but the ECJ has held that a woman is not pregnant, and therefore not covered by the EU Pregnant Workers Directive (No.92/85), until the fertilised ova have been implanted in the uterus – *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* 2008 IRLR 387, ECJ. That decision would seem to indicate that the right to time off for ante-natal care would not arise until this stage in IVF treatment is reached.⁸

Section 55 of the Employment Rights Act 1996 is retained EU law, so far as it implemented the Pregnant Workers' Directive. As retained EU law, section 55 is to be interpreted in accordance with (among other things) any retained case law. Although domestic UK courts can depart from CJEU caselaw in certain situations, it is likely that the definition of “is pregnant” will take into account the decision in *Mayr*.⁹

Discrimination protections

The IDS handbook notes that, *Mayr* notwithstanding, even in early stages of IVF women might nonetheless be protected against pregnancy and maternity discrimination under the Equality Act:

⁶ Most equivalent rights to time off in Northern Ireland are in Part VII of the [Employment Rights \(Northern Ireland\) Order 1996](#)

⁷ [Employment Rights Act 1996, section 55\(1\)\(a\)](#)

⁸ IDS Employment Law Handbook “Maternity and Parental Rights”, Thompson Reuters, 2021, para 1.19

⁹ For a discussion of how these principles will apply from 2024, see the [Commons Library briefing CBP 9841, Retained EU Law \(Revocation and Reform\) Act 2023](#), 28 July 2023

Note, however, that while a woman who is undergoing the early stages of IVF may not enjoy any rights under the ERA [Employment Rights Act] to time off for ante-natal care, the less favourable treatment of a woman because she is undergoing IVF treatment might nevertheless be considered pregnancy and maternity discrimination.¹⁰

Alternatively, it is possible that an employee could argue that it constituted sex discrimination to deny them the right to take time off for IVF appointments in some circumstances where time off would have been granted for a different reason – this was the case in *Ginger v Department of Work and Pensions ET Case No.3401940/15* in which, among other incidents of discrimination, a woman was denied leave for the purposes of attending IVF appointments.

Guidance

The Advisory, Conciliation and Arbitration Service (Acas) and working parents charity [Working Families](#) have both published guidance on how these employment rights apply to those undertaking IVF treatment.

The [Acas guidance](#) states that “There’s no legal right for time off work for IVF treatment” but that such appointments or any sickness arising from IVF treatment should be treated “the same as any other medical appointment or sickness” are treated by an employer’s staff policy.¹¹

The Acas guidance also states that “You have pregnancy rights once you’ve had the last part of the IVF process (‘embryo transfer’) and might become pregnant.” These pregnancy rights include the right to “reasonable time off with full pay for pregnancy-related (‘antenatal’) appointments.” Even if the embryo transfer was unsuccessful, employees are protected against pregnancy discrimination for two weeks after finding out, which might limit an employer in refusing requests for further appointments.¹²

1.2

Fertility Treatment (Employment Rights) Bill 2022-23

On 20 June 2022 Conservative MP Nickie Aiken introduced a Private Member’s Bill, the [Fertility Treatment \(Employment Rights\) Bill 2022-23](#), as a Presentation Bill. The Bill’s long title was “A Bill to require employers to allow employees to take time off from work for appointments for fertility treatment; and for connected purposes.”

The Bill would have added several new sections to the Employment Rights Act 1996 giving employees who have made fertility treatment appointments “on

¹⁰ As above

¹¹ Acas, [“Having IVF treatment”](#), 4 October 2023

¹² As above

the advice of a registered medical practitioner or registered nurse, to paid time off during their working hours and at their usual rate of pay, to attend those appointments, providing they produced some evidence on request from their employer.¹³

The Bill did not receive a second reading and fell at the end of the 2022-23 parliamentary session.

¹³ [Fertility Treatment \(Employment Rights\) Bill 2022-23 \(as introduced\)](#) (PDF)

2

Press articles

The following is a selection of news and media articles relevant to this debate.

Please note: the Library is not responsible for either the views or the accuracy of external content.

[One in Five Workers Undergoing Fertility Treatment Have Quit Their Job Due to The Way They Were Treated, With Women's Progression Hit Hardest](#)

Totaljobs

14 September 2023

[Top 10 HR questions June 2023: Time off for fertility treatment](#)

Personnel Today

4 July 2023

[One in four women undergoing IVF treated unfairly at work](#)

Personnel Today

24 April 2023

[1 in 5 UK employees concerned about missed career opportunities due to fertility struggles](#)

Business Matters

13 April 2023

[Leicestershire mum campaigns for workplace fertility rights](#)

BBC News

25 November 2022

[Major employers back Fertility Workplace Pledge](#)

PET (Progress Educational Trust)

7 November 2022

[Opinion: Fertility treatment and work are often incompatible – employers need to step up](#)

The Guardian

6 November 2022

[Allow employees paid leave to attend fertility treatment appointments, MP says](#)

The Independent

23 June 2022

How providing infertility support can foster an inclusive culture

Personnel Today

17 August 2021

Supporting staff undergoing IVF

HR Magazine

3 June 2019

3

Press releases

[£1.97 million awarded to support women in the workplace](#)

Department of Health and Social Care

9 December 2022

[Co-op launches leading new colleague fertility treatment policy](#)

Co-op

31 October 2022

[Grant fund launched to support women's reproductive wellbeing in the workplace](#)

Department of Health and Social Care

13 May 2022

4 Parliamentary material

4.1 Parliamentary Questions

Employment: Fertility

18 November 2022 | 83733

Asked by: Mr Tanmanjeet Singh Dhesi

To ask the Secretary of State for Business, Energy and Industrial Strategy, what recent assessment he has made of the adequacy of (a) workplace rights and (b) support for people undergoing fertility treatment.

Answering member: Kevin Hollinrake | Department: Department for Business, Energy and Industrial Strategy

The Government regularly considers whether the employment rights framework remains fit for purpose. Legislation is not the only way take employment issues forward. We were pleased to note the launch of the “Fertility Workplace Pledge” and encourage employers to sign up.

4.2 Debates

Fertility Treatment and Employment Rights

1 November 2022 | Westminster Hall | 721 cc336WH-352WH

Motion, That this House has considered fertility treatment and employment rights. Agreed

Fertility Treatment (Employment Rights) Bill

25 November 2022 | House of Commons | 723 cc625-627

Second reading. Debate adjourned. To be resumed on 9 December.

4.3

Early Day Motions

EMPLOYMENT RIGHTS AND ASOS'S HUMAN RESOURCES POLICIES

EDM 517 (session 2021-22)

Patricia Gibson (18 supporters)

That this House commends highly the approach of online fashion retailer ASOS to support its staff during challenging health related life events as it introduces trailblazing new human resources policies; notes it is hugely impressed that ASOS employees will now receive ten days paid leave should they, their partner or a surrogate, suffer a pregnancy loss, in recognition of the impact such a loss can have on individuals, couples and families; salutes the fact that additional paid leave will now be provided to staff who are undergoing fertility treatment, and that this leave is not limited to a set number of cycles, is gender neutral and provides support consistently across all types of families; applauds the introduction of paid leave of up to six weeks for staff undergoing other major health related life events such as cancer treatment and escaping domestic abuse; welcomes the offer of flexible working to support staff going through the menopause, allowing them to work in a way that suits them while reducing the stigma around what can be a challenging time for many; congratulates the company on its enlightened approach to staff welfare, recognising the need for employees to be supported through periods of difficult personal circumstances; hopes keenly that other private sector businesses will be inspired to introduce similar policies; and urges the Government to introduce adequate statutory provision to ensure such support is not entirely dependent on the goodwill of employers.

5 Further reading

5.1 Government reports

Women's Health Strategy for England

Department of Health and Social Care
30 August 2022

5.2 Other reports

Fertility Network UK Survey on the Impact of Fertility Problems

Fertility Network UK
October 2016

(see especially section on work and treatment (p20-23); also p6-7, p17, p25-26)

The 2023 Workplace Infertility Stigma Survey: do UK workplaces offer sufficient support for employees on their fertility journeys?

Fertility Family
6 April 2023

Fertility in the workplace: The emotional, physical and psychological impact of infertility in the workplace

F Steyn, A Sizer, A Pericleous-Smith

Human Reproduction, Volume 37, Issue Supplement_1, July 2022, deac104.127
30 June 2022

Complex Fertility Journeys and Employment

Dr Krystal Wilkinson, Dr Clare Mumford & Dr Michael Carroll
May 2022

5.3 Webpages

Maternity leave and pay: Having IVF treatment

Acas (Advisory, Conciliation and Arbitration Service)
4 October 2023

Ultimate Guide to Creating a Fertility Policy

The IVF Network
2 October 2023

[Building a fertility policy to support employees at work](#)

Totaljobs

14 September 2023

[Paths to parenthood: Navigating fertility at work](#)

Totaljobs and the Fawcett Society

September 2023

[Fertility challenges, investigations and treatment: Guide to offering workplace support](#)

CIPD

15 May 2023

[Practical tips for employers drafting policies for baby and pregnancy loss and fertility support](#)

Mishcon de Reya LLP

14 June 2022

[Navigating Fertility Journeys In The Workplace](#)

Fertility Matters at Work

June 2022

[How employers can support staff facing fertility problems, miscarriage and the menopause](#)

CREATE Fertility

May 2022

[Rights at work for those undertaking IVF treatment](#)

Working Families

9 May 2022

[Fertility treatment and the workplace](#)

Tommy's

11 June 2021

[Factsheet: EMPLOYMENT ISSUES](#)

Fertility Network UK

October 2016

5.4

Organisations

[Fertility Matters At Work](#)

[Fertility Network UK](#)

[Pregnant Then Screwed](#)

[The IVF Network](#)

[Tommy's](#)

[Working Families](#)

Disclaimer

The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing '[Legal help: where to go and how to pay](#)' for further information about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Sources and subscriptions for MPs and staff

We try to use sources in our research that everyone can access, but sometimes only information that exists behind a paywall or via a subscription is available. We provide access to many online subscriptions to MPs and parliamentary staff, please contact hoclibraryonline@parliament.uk or visit commonslibrary.parliament.uk/resources for more information.

Feedback

Every effort is made to ensure that the information contained in these publicly available briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below:



 commonslibrary.parliament.uk

 [@commonslibrary](https://twitter.com/commonslibrary)