On the 26 January 2018

At
Congress House
Great Russell Street
London WC1B 3LS

On the 29 January 2018

At
Dynamic Earth,
112 Holyrood Rd
Edinburgh, EH8 8AS

Michael Rubenstein Conferences Ltd

DISCRIMINATION LAW IN 2018

PREGNANCY, MATERNITY AND PARENTAL RIGHTS

RACHEL CRASNOW QC

www.cloisters.com
CONTENTS

Introduction ........................................................................................................................................ 3

Pregnancy Discrimination ................................................................................................................. 3
  Health & safety: breastfeeding at work ......................................................................................... 3
  Pregnancy and Redundancy: Guisado Bankia .............................................................................. 5

Shared Parental Leave ....................................................................................................................... 7
  Enhanced Rights ......................................................................................................................... 7
  SPL and Standalone rights ........................................................................................................... 11
  Parental leave, SPL and day one rights ..................................................................................... 12
  Self – employed access to SPL .................................................................................................. 13

Foster Carers .................................................................................................................................. 15
  Status quo: foster carers and contracts ..................................................................................... 15
  Challenges to Rowlands, Bullock and Lambert using domestic law .................................... 15
  EU law challenges to the status quo: Halva .............................................................................. 16
  ECHR challenges to the status quo: article 14 ........................................................................ 16

Conclusions .................................................................................................................................... 16
Introduction

1. The issues thrown up by working adults juggling domestic and professional life constantly raise new challenges for employment and equality advisers. This area of law is never static and as ever at this 2018 conference, we confront legal tensions which we did not earlier envisage. There are new categories of parents seeking legal protection: from the self-employed to foster parents. New situations require determination: from women obtaining redundancy rights potentially even before they know they are pregnant and claimants challenging the UK status quo on breastfeeding at work. Despite the looming shadow of Brexit, EU law continues to inform and guide the development of UK discrimination law. The law on parental rights is likewise informed by social and political debate and this lecture is in some sense a continuation of the casework and internal discussions I and my colleagues have at Cloisters, where we are fortunate enough to have responsibility for novel and ground breaking cases in this area.

Pregnancy Discrimination

Health & safety: breastfeeding at work

2. The recent Spanish case of Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social CJEU C-531/15 suggests that it is more than just good practice for employers to hold a discussion with a pregnant or breastfeeding employee to assess health and safety risks. The status quo in the UK is that there is no legal requirement to conduct a specific, separate risk assessment for an employee, once notified in writing that she is a new or expectant mother.

3. Ms Otero Ramos was a nurse in A&E who returned to work whilst breastfeeding and became concerned about her shift pattern and the possibility that she might be exposed to ionising radiation. Since her role had been classified as ‘risk-free’ her request for adjustments to her work was refused.

4. When her discrimination claim eventually reached the CJEU it decided that it would be an inadequate risk assessment for an employer to define the role as safe on the basis of a GP’s ‘Fit Note’. Rather the employer needs to show it had assessed potential risks fully by examining individual circumstances, the specific role and any relevant medical conditions.
5. This is a welcome development since without a specific requirement for an individual risk assessment, it can be difficult for the parties in question to actually take the time to address concerns and put adjustments into place.

6. In terms of where the burden lies, the Court decided that during the period where a risk assessment is mandatory (during pregnancy, breastfeeding or six months after childbirth) it is up to the employer to prove that it assessed the risks sufficiently and did not discriminate. To fail to do so would be direct sex discrimination. Currently if a UK employer refuses to allow a woman the facilities or flexibility required to enable her to breastfeed or express, she can only challenge such practice via an indirect discrimination claim, which can of course be objectively justified.

7. We need to remember that if it is not possible to avoid the risks by making reasonable adjustments, a woman must be offered her suitable alternative work and if that does not exist, the woman must be suspended for the period of risk on full pay.

8. What are the kind of risks associated with breastfeeding? Normally contact with chemicals or lead are the type of harmful substances which come to mind when risk assessment workplaces for pregnant women but there is also the subject of breaks for breastfeeding or expressing milk to consider in all cases, without which mastitis or engorgement may set in. The type of adjustments which minimise such risks include that of flexible working, enabling women to work shorter workplace-based hours in order that they can feed babies comfortably before and after work with the possibility of completing their daily work tasks when at home. In this way it may be that Ramos itself could be used to make paid breastfeeding breaks mandatory.

9. Ramos could also assist with requiring employers to address flexible working requests during pregnancy if, for example, travelling during rush hour is making morning sickness worse due to overcrowding on public transport, adjustments following a risk assessment could require an employer to allow the pregnant employee to shift her arrival and departure times.

10. So the second way Ramos may develop equality rights is by calling into question whether s13 of the Equality Act 2010 can lawfully exclude less favourable treatment because of breastfeeding in relation to work.
11. It should be noted that the legal regime concerning breastfeeding in public places is different from the legal regime concerning breastfeeding mothers who return to work. Subsection 13(7) of the Equality Act 2010 expressly disapplies in the context of workplace discrimination subsection 13(6)(a), which is the provision which states that less favourable treatment because of breastfeeding is sex discrimination.

12. Therefore the Equality Act 2010 does not allow for a claim of direct sex discrimination to be brought based on less favorable treatment at work because of breastfeeding. Why was it encapsulated within the Equality Act to being with? One explanation may be that requiring employees to bring indirect claims allows employers to put forward their business reasons for refusing adjustments. So an employer might wish to argue that it was not practicable to allow for a shorter working day during the time an employee was breastfeeding whereby the employee could go home in time to breastfeed her baby, but they would be prepared to allow that employee some breaks to express during the working day. The reasonableness of refusing an adjustment would depend on the particular circumstances of each and every specific case. The judgment in Ramos could clearly be used to try to read down s13(7) EqA.

**Pregnancy and Redundancy: Guisado Bankia**

13. Another Spanish pregnancy discrimination case (C-103/16) Guisado v Bankia SA throws up two novel points for UK discrimination law:

   a. Whether redundancy protection applies during an employee’s pregnancy and not merely during maternity leave and secondly
   b. Whether a pregnant employee has preferential redundancy rights – for example against dismissal - even at a time prior to her informing her employer that she is pregnant.

14. The Opinion of Advocate General Sharpston, in Guisado addressed a pregnant Spanish bank worker dismissed in a collective redundancy exercise. She was selected for redundancy as a result of her low score in an agreed assessment process. Ms Guisado disputed her dismissal and her employer claimed that it had not known that she was pregnant and because the redundancy situation
was an “exceptional case”, it was permitted to dismiss her despite her pregnancy\(^1\).

15. Whilst the definition of a “pregnant worker”, requires a worker to have told her employer of her pregnancy, (see Article 2(a) PWD) AG Sharpston was concerned about the situation of those workers whom at the very beginning of their pregnancies will not know themselves that they are pregnant, and so cannot comply with the notification requirement. This was the first time this issue had been addressed by the CJEU.

16. The difficulty with resolving such a tension in favour of the employer (and determining that no protection arises where the employer does not know that a worker is pregnant) was that it did not achieve the objective of the PWD and ignored the vulnerability of pregnant women, long recognized by the Luxembourg courts as requiring special protection.

17. Thus AG Sharpston decided that Article 10 protection under the PWD could be engaged even before an employee informs her employer that she is pregnant. Whether the CJEU will agree with her stance remains to be seen. Any purported unfairness to the employer is addressed in the Opinion by -

a. Affording to the employer the opportunity to rectify the dismissal damage (either by reinstating the pregnant employee or by reopening the dismissal procedure and following the steps which should have been taken previously) once it was notified of the pregnancy, and
b. Placing on the employee a duty not to delay unreasonably in notifying the employer of the pregnancy once she learnt of it and making her claim.

18. That many employees delay informing their employers of their pregnancies because they fear consequent detriment in the workplace may be a factor which is weighed up against such a duty.

---

\(^1\) Article 10 of the Pregnant Workers' Directive (92/85/EEC) (PWD) provides that in order to guarantee the health and safety of pregnant workers and those on maternity leave: "Member States shall take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice..."
19. Secondly on the question considered by the AG as to whether the PWD requires pregnant workers to be given priority for retention in cases of collective redundancy, it is notable that in the UK the priority treatment which applies during a redundancy exercise under Reg 10 of MAPLR 1999 (SI 1999/3312) only applies where a redundancy situation arises during an employee’s maternity leave (not during pregnancy). In short this involves putting the woman forward before other workers for any suitable alternative vacancies.

20. If the CJEU agrees with this Opinion will Reg 10 have to be amended to achieve compliance with EU, so as to apply from the start of pregnancy, not just during maternity leave? In terms of priority for retention in a redundancy context, AG Sharpston says the PWD does not impose “an absolute obligation” on employers to retain pregnant workers; instead the employer must show there is no plausible possibility of reassigning them to another suitable post. It is not clear what this means in terms of the duty to prioritise them for alternative vacancies or why it is logical to prioritise those on maternity leave but not those who are pregnant (unless it is because of the disadvantage which comes with being actually absent from the workplace). So in querying whether Reg 10 goes further than the PWD requires or if it is deficient - we must await the judgment.

21. Less controversially the AG confirmed pregnant workers facing a collective redundancy exercise must benefit from the protection of the PWD and the CRD (collective redundancies directive), meaning that the employer must

   a. show prior to dismissal that there is no “plausible possibility” of reassigning the pregnant worker, and

   b. ensure that the dismissal notice is sufficiently reasoned and acknowledges the exceptional circumstances which justify the dismissal of a pregnant worker.

**Shared Parental Leave**

**Enhanced Rights**

22. Legislation relating to shared parental leave (SPL) pursuant to the Shared Parental Leave Regulations 2014 does not set out a requirement to mirror shared parental pay (ShPP) with maternity pay.
23. However in making a decision to pay female employees enhanced maternity pay and not replicating this for men taking SPL, employers take the risk of accusations of sex discrimination between men and women in the workforce.

24. The government anticipates that only between 2 – 8% of fathers will use SPL because it is paid at such a low statutory rate\(^2\). In contrast in Sweden, Norway and Iceland, new parents are paid between 80% – 100% of their income during their period of leave. Between 85% - 90% of fathers use their leave\(^3\).

25. Prior to SPL coming into force, the take up of Additional Paternity leave extremely low: was around 1% of eligible fathers in 2012/2013\(^4\). This arose from families not affording to live on the rate of APP rather than the (frequent breadwinner) father’s normal salary as well as for cultural reasons.

26. Can a shift towards equality in the workplace initiated by a more equal sharing of family responsibilities be achieved by SPL when the ShPP rate of pay is so low? As the PWD recognised over 20 years ago, a right to leave serves no purpose unless it is accompanied by payment at an adequate level. Choices for parents are dependent on their financial circumstances. Where maternity pay is enhanced and ShPP is not, fathers will simply not take up rights to leave. Some even argue that paying enhanced maternity leave and not matching it for ShPP reinforces an environment in which this discrimination festers, by discouraging fathers to take leave. Less controversially, enhancing ShPP would give families real choice about who works and who cares. But is this likely to be achieved via litigation?

27. These cases dwell on the extent to which SPL remains tied to maternity leave (ML) or is in practice a form of parental leave. ML remains a special domain of protection for women, but the fact that mothers can share all but the first two weeks of such leave is highly significant.

28. It is worth remembering that in \textit{Shuter v Ford} [2014] EqLR 717, a case on enhanced additional parental leave, the ET said a woman on ML could only be the correct comparator if Parliament had “detached” ML from that which is necessary to protect health and safety arising from the biological condition of pregnancy.

\(^2\) [https://www.tuc.org.uk/news/just-one-172-fathers-taking-additional-paternity-leave]
\(^3\) [https://www.ft.com/content/2c4e539c-9a0d-11e7-a652-cde3f882dd7b]
\(^4\) [https://www.tuc.org.uk/news/just-one-172-fathers-taking-additional-paternity-leave]
29. This is consistent with the position in EU jurisprudence. Once national legislation has divorced the fact of childbirth from the right to leave, thereafter the derogation is to be read narrowly and the member state is required to be consistent in its treatment of men and women: see the CJEU decisions in *Roca Álvarez v Sesa Start España* (C-104/09) [2011] 1 C.M.L.R. 28 and *Maistrellis v Ypourgos Dikaiosynis* (C-222/14) [2015] I.R.L.R. 944.

30. Has this detachment taken place in UK law? As was pointed out in two ongoing cases, now at EAT level, *Ali v Capita Customer Management Ltd* 1800990/2016 (judgment June 2017) and *Hextall v Chief Constable of Leicestershire Police* ET/2601223/2015 (judgment August 2016), notably the SPL Regulations ring-fence the first two weeks of SPL for the mother but thereafter the father or other partner of the working mother has the same right to leave as the working mother, and a greater right than some non-working mothers. Moreover, under the Children and Families Act 2014 UK parents having children born through surrogacy receive employment protection, leave and pay equivalent to maternity rights.

31. So it might be thought that as a result of these developments, the trigger for a right to leave to care for a newborn child is no longer giving birth, but parental responsibility. If the fact of being pregnant and giving birth is no longer relevant to the right to leave, it cannot be a material circumstance that differentiates a father (or other parent) and a mother.

32. Examining the cases *Ali* and *Hextall* further gives an insight into the competing arguments.

33. Mr Ali sought to take SPL to care for his newborn daughter after his wife was diagnosed with postnatal depression. He wanted this period of leave to begin 2 weeks after the birth (directly after his 2 weeks of ordinary paternity leave). However, he was deterred from taking SPL because he was told he would only receive statutory ShPP during this period. Female employees on ML received 14 weeks of enhanced pay.

34. Mr Ali argued before the ET that, after 2 weeks compulsory ML, either parent (mother or father) could care for their baby and it was directly discriminatory to deter him from doing so by refusing to pay him enhanced pay. The Respondent argued that Mr Ali could not compare himself to a woman on ML because he had not given birth.
35. Mr Ali had accepted that the first two weeks after childbirth were specifically associated with recovery from childbirth, a condition unique to women. After those two weeks, the ET held, a female employee who took ML to care for her baby was an appropriate comparator. It did not matter Mr Ali had not given birth. It therefore upheld Mr Ali’s direct sex discrimination claim.

36. So on one hand,

a. the outcome of Ali at ET level accords with the purpose of the Shared Parental Leave Regulations 2014 (the Regulations) - to allow parents to share the care of young babies and alleviate the burden on working mothers.

b. Equality for women in the workplace will be easier to achieve with parental leave that can be genuinely shared between mothers and fathers, according to the circumstances and choices of the family.

c. The ET directed itself that legislation had to be read in the context of parental roles and choices as they are in 2016, explicitly reminding itself that either parent could perform the role of caring for their baby in the first year.

37. On the other hand,

a. the Ali ET took a novel approach when accepting that the purpose of the Regulations is relevant to a claim of sex discrimination under the Equality Act 2010.

b. It is arguable that the purpose behind one piece of legislation has no bearing when applying different legal provisions.

c. What is the mechanism by which pieces of purely domestic legislation can affect the interpretation of provisions in EU-derived legislation? This approach was rejected by the ET in H Certainlly this was the approach of the tribunal in Hextall where a male employee’s claim for direct sex discrimination on very similar facts was rejected.

38. In Hextall a father argued before an ET that he should be entitled to the same 18 weeks of enhanced pay for taking SPL as a mother in the same workforce would be paid when taking ML (using a female colleague on ML as his comparator).
39. The ET rejected this father’s claim for direct sex discrimination and took the view that the correct comparator was a woman taking SPL (i.e. a partner of a birth mother). In such a case the women taking SPL would be treated just the same way as Mr Hextall and entitled to the same ShPP – despite being female. Likewise the ET rejected a submission that the policy of paying only statutory ShPP amounted to indirect sex discrimination. When taking this more traditional approach, the ET was scathing of attempts to portray a female police constable on maternity leave as an appropriate comparator.

40. So the issue of whether the act of giving birth is a material circumstance for the purpose of defining the correct comparator is a key point for these EAT cases.

41. In the EAT Ali argues it is wrong to say that differences (such as the fact of giving birth, or being entitled to SMP under the PWD) amounted to material differences between him and his comparator -who was a women who had had a baby and took maternity leave to care for it. This reason why such differences were not material; the difference in pay arose solely because of the employer’s own policy to maintain a pay difference between men and women in the 12 week period (following the compulsory maternity leave period).

42. Indeed the ET held it did not matter that Mr Ali had not given birth. However it did not comment on Hextall or Shuter.

43. Hextall is shortly to be heard by the EAT and the judgments from both appeal cases expected to follow soon afterwards. For the time being, employers who do not offer enhanced ShPP but offer enhanced maternity pay need not necessarily amend their policies yet, since appellate clarification in this area is needed.

**SPL and Standalone rights**

44. In order to confer a right to SPL on her partner, rather than a right to SPL herself, a mother or primary adopter must possess a right to SMP, SAP or maternity allowance. If a father satisfies employment criteria in terms of his own eligibility but the mother of the child is not in work (and not entitled to maternity allowance (e.g. where she has recently stopped working and has paid insufficient NI contributions lately) under UK law he cannot take SPL.
45. Is the fact that UK Parental leave rights are partly derivative contrary to EU law?
There has as yet been no challenge to this status quo, such as that relying on the 2015 CJEU decision of Maïstrellis v Ypourgos Dikaiosynis (Case C-222/14) [2015] IRLR 944. Here a father challenged the failure of Greek parental leave provisions to include a standalone right to a man to receive paid parental leave if his wife does not work or exercise any profession. The Court of Justice found this prohibition breached the Parental Leave Directive 96/75/EC and the Equal Treatment Directive, because –

a. parental leave is an individual right which cannot depend on the situation of the spouse;

b. the entitlement falls within the Parental Leave Directive, the objective of which was to facilitate the reconciliation of the parental and professional responsibilities of working parents; and

c. the status of parental leave entitlement is a fundamental social right recognised by the Charter of Fundamental Rights of the EU.

46. Maïstrellis raises a possible challenge to UK law in relation to SPL and free-standing rights. If it can be argued that the domestic SPL eligibility provisions fall short of the requirements of EU law and are discriminatory in that a provision which extends beyond the statutory minimum can still amount to unlawful discrimination. These complex arguments are rendered much more difficult if a challenge is not able to rely on EU law.

47. The EAT judgments in Hextall and Ali may also shed light on how the UK courts would view such a challenge. It is doubtful that without a reference to the CJEU SPL could shake off its derivative nature.

Parental leave, SPL and day one rights

48. Very recently the debate about the qualifying period of 26 weeks attached to SPL gained momentum in Parliament when in a November 2017 evidence session of the Fathers and the Workplace Inquiry undertaken by the Women and Equalities Committee\(^5\), Jess Phillips MP asked Margot James MP (at the time Parliamentary Under Secretary of State at the Department for Business, Energy

---

and Industrial Strategy) what was the justification for statutory maternity leave but not statutory paternity leave being a day-one right for an employee? It was suggested that the acts of giving birth and breastfeeding were reasons for the difference in treatment but these did not seem to explain why they qualifying period was needed for fathers.

49. There was no substantive answer from the Government witnesses concerning the fact that the lack of equity as to qualifying periods for PL and SPL meant fathers were in effect considered secondary parents rather than equal partners. The most Government could say was that in the first 1-2 months after childbirth, a mother’s needs differed from a father’s and that in legislating on employment rights there is a need to balance the benefit to the employee and the uncertainty and the planning ability of the employer. Mark Holmes (Deputy Director, Labour Market, Individual Rights, Department for Business, Energy and Industrial Strategy) said when employers are employing someone they should be able to plan around the first six months of that employment, although it was right not to apply this to mothers. There was no indication that Parliament was looking at removing the qualifying period for SPL of its own volition.

50. At that same session, the only justification put forward by Government for not paying fathers 90% of their pay in the first 6 weeks of their SPL was cost (see the recommendations of Fawcett’s Sex Discrimination Law Review at https://www.fawcettsociety.org.uk/fawcett-sex-discrimination-law-review). These witnesses agreed that a standalone period of leave for fathers would encourage take up but had no positive evidence that the status quo would be changing in the future.

51. This brings us back to litigation. If we want to make SPL rights effective challenges need to be brought now, prior to Brexit, to maximise the utility of such litigation.

Self – employed access to SPL

52. In 2017 the campaign group Parental Pay Equality wrote an open letter calling to extend SPL to the self-employed. The current system of providing Maternity Allowance to self-employed women who have paid NI contributions places the burden of childcare on mothers with self-employed fathers and adopters getting nothing.

53. If a mother is an employee but the father is self-employed, the father cannot SPL as he lacks employee status.
54. If the father is an employee but the mother is self-employed she cannot take SPL because she is not employed, but if she qualifies for maternity allowance, she can shorten this, and give her partner access to SPL if he complies with the continuity of employment test.

55. The following example makes this clear:

The mother is a self-employed worker who satisfies the employment and earnings test and is eligible for maternity allowance. Her partner is an employee who satisfies the continuity of employment test. The mother is not entitled to SPL because she is self-employed. But, if she shortens her maternity allowance (i.e. gives some of the 39 weeks up) her partner can take up to 50 weeks SPL. The amount of SPL he can take is calculated by deducting from 52 weeks the number of weeks’ SMP or MA claimed. This also applies if the mother was entitled to SMP not maternity leave.

56. Parental Pay Equality noted that 44% of those in the creative industries are self-employed. They suggested that even if self-employed fathers were eligible for ShPP at the same rate as MA for the same number of weeks (this is the same rate as SMP) parents could share the leave flexibly and women’s careers would suffer less. Their campaign enlisted many in the music world to call for the extension of SPL rights to the self-employed.

57. The lobbying described above as well as the ongoing litigation will all be reviewed in the expected 2018 evaluation of the SPL scheme scheduled to look at the availability of SPL, the cultural barriers fathers face in asking for leave, what is preventing a greater take-up and to see “how it can benefit as many people as possible”. It will also consider the issue of mothers who are eligible for Maternity Allowance.

---

6 http://www.sharedparentalleave.org.uk/key-faqs/
7 https://inews.co.uk/culture/music/chris-martin-extend-shared-parental-pay-benefit-self-employed-roadies/
8 Questions put about Pay for Parental Leave in the House of Lords at 2:36 pm on 9th January 2018 https://www.theyworkforyou.com/lords/?id=2018-01-09a.109.0
9 https://www.theyworkforyou.com/wrans/?id=2018-01-10.121944.h&s=speaker%3A10753
Foster Carers

Status quo: foster carers and contracts

58. The reason why foster carers are denied workers’ rights is due to 1990s Court of Appeal case law stating they are not workers since they do not work under contracts. See in particular W v Essex CC [1998] 3 W.L.R. 534 CA. This means foster carers cannot argue an entitlement to holidays, or bring whistleblowing claims, or even attempt to gain statutory recognition for the purposes of forming a trade union.

59. Recently a Scottish ET found that foster parents Mr and Mrs Johnson were employees of Glasgow County Council, but this was on the basis that the Johnston’s agreement with the Council differed from the normal foster care agreements.

60. However there are four ways in which this status quo will be challenged in the coming year. Cloisters are acting in at least two forthcoming cases.

Challenges to Rowlands, Bullock and Lambert using domestic law

61. The domestic line of cases where foster parents have been found not to work under contracts, will be challenged. They are based on a misconstrued reliance on a case involving electricity suppliers (Norweb v Dixon [1995] 1 WLR 636) leading to the ratio that if there is a statutory obligation to enter into a form of agreement the terms of which are laid down there is no contract. This does not in fact apply to employment contracts or a foster carers’ situation.

62. The test for a contract does not require the parties to negotiate about all or any of the terms under offer; not does that fact that the relationship involves statutory obligations prevent the existence of a contract.

63. Another appeal decision to utilise in the contract argument is that of Armes v Nottinghamshire County Council [2017] UKSC 60, a 2017 Supreme Court case about a county council’s vicarious liability for abuse committed by foster carers. There Lord Reed said torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority, because -

---

a. foster carers could not be regarded as carrying on an independent business of their own, and

b. the local authority’s powers of ‘approval, inspection, supervision and removal’ were sufficient to vest control in the local authority.

**EU law challenges to the status quo: Halva**

64. In challenges relying on EU law derived rights there is no need to rely upon the existence of an employment contract establish an “employment relationship” and worker status. There foster carers will rely on the 26 July 2017 CJEU decision in (C-175/16) *Hannele Hälvä and Others v SOS-Lapsikylä ry* where foster parents were found to be workers.

**ECHR challenges to the status quo: article 14**

65. The arguments under the Human Rights Act 1998 are that denying foster carers rights (such as statutory recognition or whistleblowing), amounts to a breach of their Convention rights under Article 11 (statutory recognition), Article 10 (whistleblowing) or Article 8 (holiday pay) all read with Article 14. This argument is similar to the one utilised in the whistleblowing judge case of *Gilham v MOJ* [2017] EWCA Civ 2220 (currently awaiting a decision on PTA to the Supreme Court) and relies on using the “other status” ground under Article 14 to compare foster carers - deemed not to work under contracts - with other similar employees such as those who care for minors in children’s homes.

**Conclusions**

66. 2018 is the year when the Government will have to decide what to do with a number of reviews pressing for law reform. I have already mentioned the promised SPL evaluation. The Sex Discrimination Law Review, which I and other senior Cloisters barristers have worked on, calls for significant developments in the law on parental rights.

67. However we face the real risk that this could be undone in the years following March 2018 as the rest of the EU presses ahead with enhancements to parental leave. It is vital to remember a point made firmly in the SDL Review:

“There must be a broad commitment from the Government to set a positive post-Brexit agenda for the promotion of women and girls’ rights and gender equality. The Government should also commit to keeping pace with the EU and rest of the international community with regards to equality and human rights law, employment rights, and measures aimed at furthering gender equality. For
example, the European Commission this year introduced proposals for a Directive on work-life balance for parents and carers, which would provide for four months paid non-transferrable leave for fathers. This goes further than current UK provision. Failing to keep pace with these improvements would leave UK families without protections enjoyed by their European neighbours.”

RACHEL CRASNOW QC

January 2018
© 2018 Cloisters
We are at the heart of all the major equality and discrimination cases and our barristers play an important role in the development of law and policy in this area. We cover every aspect of discrimination and equality law and work on the most complex, high profile and high value cases as advisers and advocates.

Cloisters were once again ranked a leading set in Chambers and Partners 2018 and Legal 500 2017.

"Simply the go-to set if you want to win an Equality Act case. It fields counsel at all ranges of the spectrum, all of whom are accessible, down to earth and able to put clients at ease."

(Legal 500)

OUR CLIENTS
We represent employers and employees in multinationals, SMEs, non-government organisations, charities, government departments, regulators, local authorities, associations and individuals. Many of our members are qualified Public Access barristers especially trained to provide legal advice and litigation support directly to organisations.

OUR TRAINING SERVICE
Cloisters offers CPD accredited training courses, workshops and seminar programmes. Cloisters training programmes are highly regarded and well attended. Our members can deliver bespoke in-house training to law firms and professional bodies at their premises.

OUR PEOPLE
We have a well-earned reputation for fearless advocacy and the highest of standards. Over three quarters of our employment team are ranked leaders. Many of our barristers achieve ground-breaking results and appear in almost all major employment litigation and landmark cases.

CLOISTERS’ EMPLOYMENT AND DISCRIMINATION BARRISTERS