Written evidence to the Public Bill Committee
Employment Rights Bill
submitted by Maternity Action (ERB08)

Introduction

1. Maternity Action is a charity providing specialist legal advice to pregnant women and new parents on their maternity pay, benefits and rights at work. Our advisers and caseworkers respond to more than 3,000 enquiries a year. Through our Health Justice Partnerships in Greater Manchester and East Cheshire, and Cheshire and Merseyside, pregnant women and new parents in some of the most deprived areas of England can access our advice service through their midwives.

2. Maternity Action is submitting evidence to the Public Bill Committee ('the Committee') because our mission includes influencing law and policy with the aim of reducing poverty, improving health, and advancing equality and human rights for all pregnant women and new parents. This submission covers aspects of the Employment Rights Bill ('the Bill') within our expertise which are of particular interest to us.

3. Katie Wood, a barrister who has practised in the field of the employment and social security rights of pregnant women and new mothers for more than 20 years and who leads Maternity Action's Employment & Social Security Casework Service, would be pleased to give oral evidence on aspects of the Bill within her expertise if this would assist the Committee.

Executive Summary

4. The main points made in this submission are as follows:

    - We welcome the introduction in Clause 7 of a new requirement that an employer may only refuse a flexible working request where it is reasonable to do so. However, we urge the Government to review the maximum compensation available to an employee whose employer breaches their obligations in relation to a flexible working request with a view to increasing it to reflect the substantive nature of the new reasonableness requirement, to give it "teeth", and to provide an effective remedy for employees.

    - We strongly support provisions in Clauses 8 and 9 to make statutory sick pay available from the initial day of illness and to remove the lower earnings threshold, which will allow more women suffering from pregnancy-related illness to receive statutory sick pay and not have unpaid days of sick leave.

    - We support the changes in Clauses 11 and 12 to render existing entitlements to parental and "paternity" leave "day one" rights.

- We strongly support the policy intention of strengthening protections against dismissal for women who are pregnant, on maternity leave, or within six months of their return to work, but it is in our view regrettable that the realisation of this intention is not on the face of the Bill and is wholly dependent on the introduction of future regulations. There is a pressing need for stronger protections against dismissal to address the widespread problem of pregnancy and maternity discrimination, so we recommend that the Government introduce the substantive changes needed to make it unlawful to dismiss pregnant women, mothers on maternity leave, and mothers who return to work during a six-month period after they return, except in specific circumstances, as soon as possible.

- The only specific circumstances in which an employer may lawfully dismiss a woman by reason of redundancy during the protected period should be limited to circumstances in which the employer has ceased or intends to cease to carry on the business in the place where the employee is or was employed, or for the purposes for which the employee is or was employed. The specific circumstances in which an employer may lawfully dismiss a woman for a reason other than redundancy during the protected period must also be narrowly drafted to provide adequate protection against pregnancy and maternity discrimination.

- We note the Bill's removal of the two-year qualifying period for the right not to be unfairly dismissed and the Government's intention, described in its factsheet on unfair dismissal in the Bill, to 'establish a 'statutory probationary period'' during which 'a lighter touch and less onerous process for businesses to fairly dismiss someone who is not right for the job will apply'. It is imperative that any diminution in the level of protection against unfair dismissal arising from the Bill does not extend to women who are pregnant, on maternity leave, or within six months of their return to work, and that the stronger protections for women which are to be introduced by future regulations under the powers in Clauses 20 and 21 are unaffected by the 'lighter touch and less onerous process' for dismissal during the statutory probation period.

- We urge the Government to introduce the necessary amendment to the Bill to give effect to the commitment in Labour's 'Plan to Make Work Pay' to 'increase the time limit within which employees are able to make an employment claim' from three months (less one day) to six months at the earliest opportunity.

- We welcome the provisions in Clause 26 for requiring employers with at least 250 employees to develop and publish an equality action plan. Gender pay gap reporting requirements for employers should include the retention rates for women one year after returning from maternity leave. We encourage the Government to give careful consideration to the development of a robust and well-resourced enforcement system with sufficient penalties to incentivise

compliance, and to explore how to address the gender pay gap within smaller organisations.

- We invite the Committee to consider any proposal to ban or restrict non-disclosure agreements with great care.

Written Evidence

Clause 7 - Flexible Working

5. Flexible working, and in particular the ability to arrange working hours and location to accommodate child-care responsibilities, is of crucial importance to helping mothers retain their jobs and remain active in the labour market, closing the Gender Pay Gap, reducing child poverty, and improving mother and baby health outcomes. From 1 October 2023 to 30 September 2024, the 'Child-friendly working hours' information sheet on our website, which provides information on how to make a statutory flexible work application, has been viewed 46,431 times. During the same period we received 196 enquiries to our Employment and Social Security service on the right to request flexible working.

6. The cases encountered by Maternity Action indicate that at present, too many mothers' flexible working requests are unreasonably refused. For example, before maternity leave, "Helen" (whose name has been changed to preserve anonymity) worked in the office two days a week. When discussing her return, her employer told her she must return to the office full-time or face dismissal for breach of contract. Helen submitted a statutory flexible working request to continue her previous arrangement, but her employer rejected the request, citing three of the eight legally permitted grounds. Despite Helen appealing the decision, the refusal stood, showing the lack of flexibility for returning mothers even when past working arrangements were in place. Maternity Action's legal team also encounters cases in which employers have not complied with their existing obligations in respect of a statutory flexible working request.

7. Thus, whilst we consider that the introduction of a rebuttable presumption that a flexible working application should be granted unless it is not reasonably practicable would have better fulfilled the policy intention of making flexible working the default, we support the new requirement introduced by Clause 7 that an employer may only refuse a flexible working application where it is reasonable to do so.

8. The maximum compensation which a Tribunal may currently award to an employee who makes a well-founded complaint regarding their employer's refusal of a flexible working request under the existing statutory regime is limited to eight weeks' pay capped at £700 per week. This very low level of maximum compensation reflects the procedural nature of the obligations with which the employer has failed to comply. However, since it is, as stated in the impact assessment on 'Making flexible working the default', an aim of the

changes in Clause 7 to 'Allow an Employment Tribunal to scrutinise whether the decision to reject a flexible working request was reasonable', more stringent penalties should be introduced to reflect the substantive failure to act in accordance with the new reasonableness requirement. As drafted, the Bill makes no change to the current maximum level of compensation available. In the absence of stricter penalties, it is our view that the new reasonableness requirement lacks "teeth" and unreasonable refusals will not be adequately compensated. In addition, given the high costs of legal services, the low maximum amount of compensation may serve as a disincentive for employees to present a Tribunal complaint in respect of their employer's unreasonable refusal of their flexible working request.

9. Further, we are concerned that as the acceptable grounds for refusing a flexible working request remain unchanged, employers may still be able to exploit this broad list of reasons by picking one or more as a pretext to refuse a request. It is therefore imperative that parents are able to enforce the new requirement for employers to only refuse where it is reasonable to do so and that effective remedies are available where a Tribunal finds a complaint in respect of an employer's treatment of an employee's flexible working application to be well-founded.

10. We are concerned that in the absence of stricter penalties, women who need changes for childcare reasons will continue to be forced out of work and their only meaningful remedy will be to consider an indirect sex discrimination claim against their former employer. These claims are lengthy and complex, prohibiting many new mothers from taking action against their employer, and may be too stressful to pursue whilst caring for a new baby.

11. Although there is an existing power in section 80I of the Employment Rights Act 1996 allowing the Secretary of State to specify by regulations the maximum number of weeks' pay available to be paid as compensation by the employer to the employee, the maximum available per week is governed by section 227(1)(za) of the Employment Rights Act 1996, which caps the amount of a week's pay at a sum of £700, and section 34 of the Employment Relations Act 1999, which requires the Secretary of State to make an order varying this sum according to the change in RPI each year.

12. We therefore recommend that the Government reviews the maximum compensation available to an employee whose employer breaches their obligations in relation to a flexible working request with a view to increasing it to reflect the substantive nature of the new reasonableness requirement, and that the Committee give anxious scrutiny to the absence of more stringent penalties for an unreasonable refusal of a flexible working request in the Bill.

Clauses 8 and 9 - Statutory sick pay

13. Maternity Action is strongly supportive of the provisions in Clauses 8 and 9 to make statutory sick pay available from the initial day of illness and to remove the lower earnings threshold. These changes will allow more women suffering from pregnancy-related illness to receive statutory sick pay and not have unpaid sick leave days. We shall provide recommendations in respect of these proposals, including regarding the percentage of an employee's normal weekly earnings to be prescribed to be paid to an employee where this amounts to less than £116.75, in response to the Government's 'Making Work Pay: Strengthening Statutory Sick Pay' consultation.

Clauses 11 and 12 - Entitlements to parental and paternity leave

14. We support the proposed Clause 11, which will have the effect of rendering the existing entitlement of an employee with responsibility for a child to be absent from work on unpaid parental leave for the purpose of caring for that child for 18 weeks up to the child's 18th birthday a right which is not conditional on the parent's duration of employment. Similarly, we support the changes in Clause 12 which will have the effect of making a "day one" right the existing "paternity leave" entitlement for an employee (who is the father of a child or married to, the civil partner of, or the partner of the child's mother / who is married to, the civil partner of, or the partner of the child's adopter) to be absent from work for two weeks for the purpose of caring for the child or supporting the child's mother / adopter following the child's birth / adoption.

15. We welcome the Government's recognition in its 'Next Steps to Make Work Pay' policy paper that the 'current parental leave system does not support working parents', as well as the Government's plan to review the system, particularly as reform of the UK's failed system of Shared Parental Leave is sorely needed. However, we query the need for a 'full review' given the amount already known about the deficiencies of the current regime. Any such review must have due regard for the need to safeguard a period of paid maternity leave as a health and safety measure to allow mothers to recover from the considerable physical and mental effects of pregnancy and birth, and (where relevant) to establish breastfeeding.

Clauses 20 and 21 - Dismissal during pregnancy and following period of statutory family leave

16. Clauses 20 introduces a new power for the Secretary of State to make provision by regulations about dismissal other than by reason of redundancy during, or after, a protected period of pregnancy, supplementing the Secretary of State's existing power to make provision by regulations about redundancy during, or after, a protected period of pregnancy. Clause 21 extends powers of the Secretary of State in order to allow him to make provision by regulations about dismissal other than by reason of redundancy after maternity leave, adoption leave, shared parental leave, bereaved partners paternity leave, and neonatal care leave. The Explanatory Notes to the Bill explain that it 'will

amend existing powers so that regulations can be made to ban dismissals of women who are pregnant, on maternity leave, and during a six-month return-to-work period - except in specific circumstances'. The effect of Clauses 20 and 21 is therefore to give the Secretary of State broad powers to make provisions by regulations, without prescribing their detail.

17. The Government's stated policy intention of strengthening protections against dismissal for women who are pregnant, on maternity leave, and within six months of their return to work is highly welcome and one which Maternity Action fully supports. However, it is in our view regrettable that this intention is not realised on the face of the Bill. The inclusion of substantive provision to make it unlawful to dismiss a woman who is pregnant, on maternity leave, or within six months of her return to work other than in specific circumstances in primary legislation would provide stronger protection than what is currently proposed, since the new executive powers introduced by the Bill could be used in future to make regulations to weaken rather than strengthen protections with more limited parliamentary scrutiny than if an Act of Parliament were required to do so.

18. The Delegated Powers Memorandum explains that the Department will consult with key stakeholders 'on the details of the protection against dismissal, which may include the length of protection and the circumstances in which it will be fair to dismiss a pregnant woman or new mother, to ensure that the ensuing regulations provide appropriate protection while balancing the need for employers/business to be able to dismiss where genuine and serious issues exist'. We are firmly of the view that the length of protection must be no shorter than that articulated in the Labour Party's commitment in its 'Plan to Make Work Pay' to 'strengthening protections for pregnant women by making it unlawful to dismiss a woman who is pregnant for six months after her return, except in specific circumstances'.

19. There is a pressing need for stronger protections against dismissal to address the widespread problem of pregnancy and maternity discrimination. Many mothers are unfairly made redundant while they are pregnant, during their maternity leave, and after their return to work. Research by the Equality and Human Rights Commission found that 'Around one in nine mothers (11%) reported that they were either dismissed; made compulsorily redundant, where others in their workplace were not; or treated so poorly they felt they had to leave their job; if scaled up to the general population this could mean as many as 54,000 mothers a year.' More recently, our briefing titled 'End pregnancy poverty: redundancy protection' highlighted the following:

    'In 2023, 11% of the 3,100 women contacting Maternity Action's advice services sought advice on redundancy. Our callers are often deeply distressed, unsure how they will manage financially during their pregnancy and while caring for a young child.

    Many are unable to secure a comparable job, or any job at all, to replace the one they have lost, leaving them out of the workforce for extended periods or working in much

lower paid roles. These women face high levels of financial stress and many are living in poverty, impacting on their health and the health of their babies.

Many of these redundancies are manifestly unfair. The women may have been selected for redundancy because they became pregnant or else the redundancy is not genuine.

[...]

Maternity Action advice service data shows a consistently high level of demand for advice on redundancy. Our in-house legal team produces more than 50 free to access detailed information sheets on maternity rights at work, of which the redundancy information is consistently amongst the most used. In 2023, it was viewed 94,000 times. Our casework service, which offers legal representation to low income women, continues to take on a disproportionately large number of redundancy cases. Of the 675 cases we undertook in 2020-2023, nearly a quarter (24%) involved redundancies potentially resulting from maternity discrimination'.

20. However, few women who suffer pregnancy or maternity discrimination at work take action to challenge it, underscoring the need for stronger protections. The Equality and Human Rights Commission reported in relation to negative or possibly discriminatory experiences during pregnancy, maternity leave, and on their return from maternity leave that:

    'Three in four mothers (77%) reported a negative or possibly discriminatory experience and just over a quarter (28%) of these raised issues either formally or informally (22% of all mothers). Many mothers experienced barriers to raising complaints and concerns with employers.

    [...]

    The employer survey suggests that complaints or discussions about unfair treatment are rare. One in 20 (5%) of employers with experience in the last three years of a pregnant employee at their workplace or a mother returning to work following maternity leave had received either: a formal complaint relating to pregnancy or maternity discrimination (1%) and/or had informal discussions with women about perceived unfair treatment (4%).'

21. The need for enhanced protections also arises from the insufficiency of the current legislative framework, which remains inadequate notwithstanding the extension of redundancy protections through regulations following the enactment of the Protection from Redundancy (Pregnancy and Family Leave) Act 2023. For example, we advised "Anna" (whose name has been changed to preserve anonymity), an employee with less than two years' service, who had a high-risk pregnancy and requested reasonable adjustments at work. Her employer refused to conduct a risk assessment or make adjustments, and after raising concerns with her manager, she was told she was

redundant two months before her due date. No suitable alternative roles were offered, but the employer advertised a similar role shortly after her dismissal. This highlights the misuse of redundancy and lack of protection for pregnant employees even after the new regulations.

22. A recent judgment of the Employment Appeal Tribunal further illustrates the limited scope of existing protections. Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 applies where, during an employee's maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment, and provides that where there is a suitable available vacancy, she is entitled to be offered alternative employment. In *Carnival PLC v Hunter* [2024] EAT 167, the EAT considered the applicability of Regulation 10 in circumstances where the claimant was made redundant while on maternity leave as part of a redundancy exercise in which 21 team leader posts were reduced to 16. The EAT held that the Employment Tribunal had erred in holding that the remaining 16 roles amounted to suitable alternative vacancies within the meaning of Regulation 10, distinguishing between a redundancy exercise involving an amalgamation of roles resulting in newly created positions (which would engage the Regulation 10 obligation) and a reduction of pre-existing roles (in which case Regulation 10 would not be engaged until the redundancy process was completed).

23. It is therefore our view that in order to provide a sufficient level of protection, the only specific circumstances in which an employer may lawfully dismiss a woman by reason of redundancy during the protected period should be limited to circumstances in which the employer has ceased or intends to cease to carry on the business in the place where the employee is or was employed, or for the purposes for which the employee is or was employed.

24. The primary issue which our in-house legal team encounters in relation to the dismissal of women who are pregnant, are on maternity leave, or have returned to work is redundancy. However, our legal team also encounters cases in which an employer seeks to remove a woman from her position because she is pregnant or has taken maternity leave by dismissing her for a reason other than redundancy, for example by performance managing her out on capability grounds, or dismissing her on conduct grounds, among others. The specific circumstances in which an employer may lawfully dismiss a woman for a reason other than redundancy during the protected period must therefore also be narrowly drafted to provide adequate protection against pregnancy and maternity discrimination.

25. We note that as a corollary to the Bill's repeal of section 108 of the Employment Rights Act 1996 to remove the two-year qualifying period for the section 94 right not to be unfairly dismissed, the Government will, as described in its factsheet on unfair dismissal in the Bill, 'establish a 'statutory probationary period' to ensure that employers retain the ability to ensure that the job is a good fit for both the employee and the employer', during

which 'a lighter touch and less onerous process for businesses to fairly dismiss someone who is not right for the job will apply'. Clause 19 and paragraph 3 of Schedule 2 to the Bill introduce a power for the Secretary of State to make regulations modifying the application of section 98(4) of the Employment Rights Act 1996 (which concerns the determination of the question whether the dismissal is fair or unfair) in relation to the dismissal of an employee that meets the specified conditions. It is imperative that any diminution in the level of protection against unfair dismissal arising from the Bill does not extend to women who are pregnant, on maternity leave, or within six months of their return to work, and that the stronger protections for women which are to be introduced by future regulations under the powers in Clause 20 and 21 are unaffected by the 'lighter touch and less onerous process' for dismissal during the statutory probation period.

26. Under the current proposals, the promised protections for women who are pregnant, on maternity leave, and within six months of returning to work will not be realised until a consultation has been undertaken, the Bill has been enacted, regulations have been made to commence clauses 20 and 21, and regulations have been made to introduce the substantive changes to protections against dismissal. It is not clear how long this might take. Given the pressing need for stronger protections, we recommend that the Government introduce the substantive protections required to adequately protect women who are pregnant, on maternity leave, and within six months of their return to work against dismissal as soon as possible.

Tribunal Time Limits

27. The Bill as drafted does not make provision to fulfil the commitment in Labour's 'Plan to Make Work Pay' to 'increase the time limit within which employees are able to make an employment claim' from three months (less one day) to six months, although the Government has indicated in its 'Next Steps to Make Work Pay' policy paper that measures to extend the time limit for bringing claims will be 'added via amendment'. This extended timeline would be of particular assistance to pregnant women and new mothers as it would enable women experiencing unfair treatment to pursue action after they have recovered from birth, so we urge the Government to introduce the necessary amendment at the earliest opportunity.

Clause 26 - Equality Action Plans

28. We welcome the measures in Clause 26 to amend the Equality Act 2010 to provide that regulations may require employers with at least 250 employees to develop and publish an equality action plan. In our view, the gender pay gap reporting requirements for employers should include the retention rates for women one year after returning from maternity leave. We also note that the proposed new section 78A(7) of the Equality Act 2010 introduced by Clause 26 states that 'regulations may make provision for a failure to comply with the regulations to be enforced, otherwise than as an offence, by such means as are prescribed', and we encourage the Government to give careful

consideration to the development of a robust and well-resourced enforcement system with sufficient penalties to incentivise compliance. Further, we encourage the Government to explore how to address the gender pay gap within smaller organisations.

Non-disclosure agreements (‘NDAs’)

29. We note that the Bill does not currently make provision in relation to non-disclosure agreements. However, noting relevant amendments tabled and in anticipation that the subject might arise as the Bill undergoes its scrutiny, we encourage the Committee to consider any proposal to ban or restrict NDAs with great care. Given the high legal costs, time, and risks associated with bringing a Tribunal claim where a woman has experienced pregnancy or maternity discrimination, settlement agreements (which usually contain a confidentiality clause) form a key means by which pregnant women and new mothers can resolve workplace disputes. Settlement agreements provide pregnant women and new mothers with an opportunity for prompt resolution of their dispute and confidentiality clauses serve as an incentive for employers to settle early to avoid bad publicity. In addition, confidentiality provisions in exit settlements can serve to preserve the anonymity of women who challenge maternity discrimination. The Solicitors Regulation Authority has published a ‘Warning Notice’ as ‘a reminder of some of the key issues and risks’ for those ‘negotiating, drafting, advising on, enforcing or being a party to an NDA’, to which it will have regard when exercising its regulatory functions, and there is clear guidance on what a confidentiality clause cannot restrict.

Further information

30. Evidence prepared by Marianne Schonle, Senior Policy Officer, Employment & Social Security, Maternity Action
31. For further information, please contact Rhian Beynon, Senior Public Affairs and Communications Officer, at rhianbeynon@maternityaction.org.uk.

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