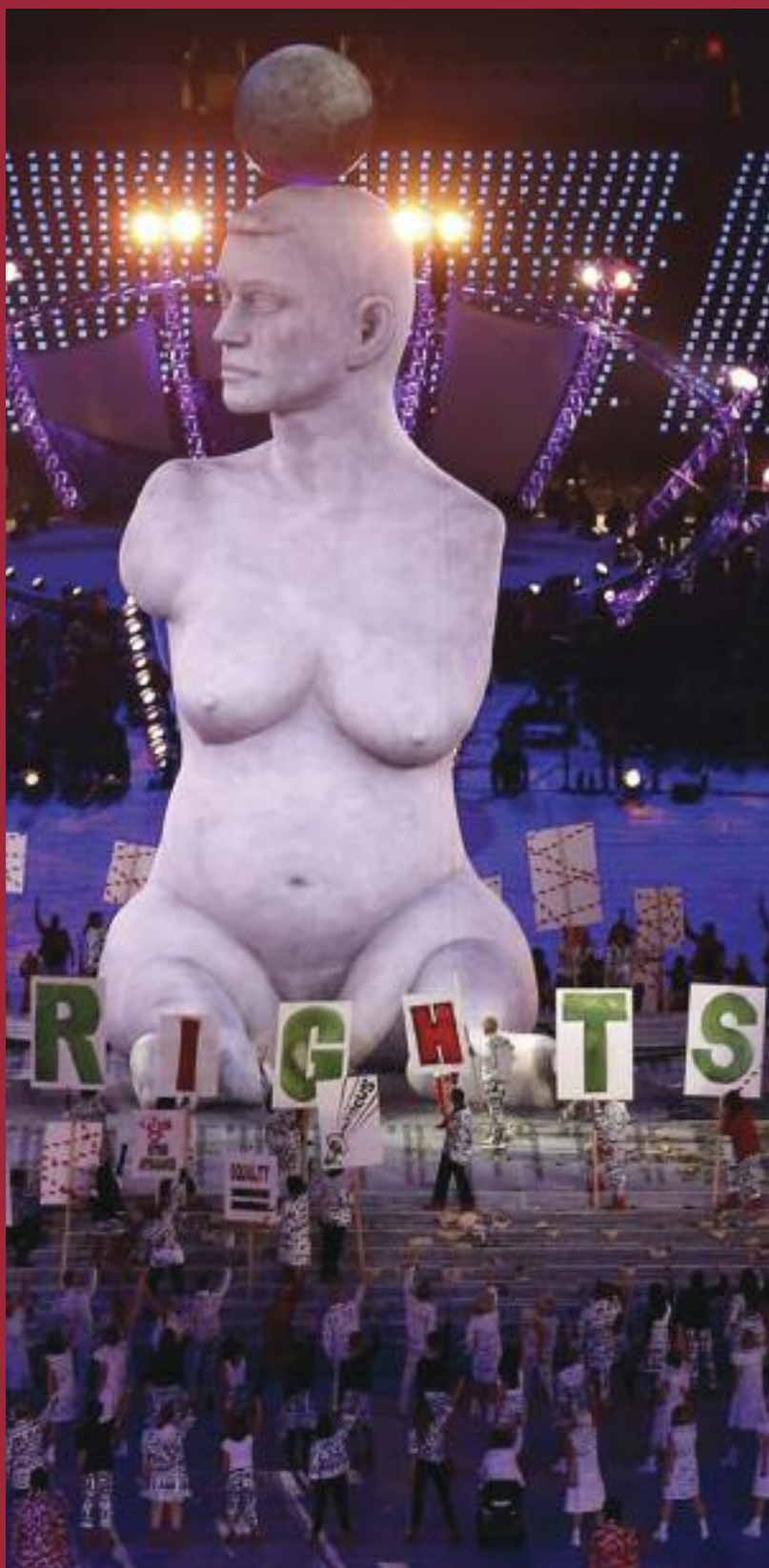


Labour & European law review

Spring 2013 | issue 131



Focus on maternity and paternity leave

■ Rights to maternity and adoption leave

What pregnant workers should know about their statutory rights

Pg 2

■ Issues for pregnant workers

Ensuring employers fulfil their obligations

Pg 6

■ Rights to paternity leave and pay

Time off for fathers and partners to support mothers and babies

Pg 9

Claire Jenkins looks at the rights and entitlements of employees to maternity and adoption leave, highlighting some of the special situations that can arise

Rights to maternity and adoption leave

Although the law clearly states that it is unlawful discrimination to dismiss or otherwise disadvantage an employee for a reason related to her pregnancy or maternity leave, thousands of pregnant women lose their jobs every year simply for being pregnant.

Maternity leave

All pregnant employees are entitled to 52 weeks' maternity leave, irrespective of how long they have worked for their employer or how many hours they work per week. This is made up of 26 weeks' ordinary maternity leave and 26 weeks' additional leave.

Women do not have to take all their leave, but it is a criminal offence for an employer not to ensure that the woman takes two weeks immediately after the baby is born. Factory workers are prohibited from working for four weeks after the birth.

Self-employed women are not covered by the regulations.

Ordinary maternity leave

To apply for ordinary maternity leave, the woman must tell her employer (in writing if the employer asks) at least 15 weeks before the week in which the baby is due (if possible):

- that she is pregnant
- the date when the baby is due (the employer can ask to see evidence such as a medical certificate, MAT B1 form)
- the date when she intends to start her maternity leave.

If it is not reasonably practical for the woman to give that much notice, perhaps because the baby is premature or because she has just started working for that employer, she has to give notice as soon as she can.

If the woman fails to comply with any of the notification requirements, or gave them late and cannot satisfy the "not reasonably practical" test, she loses her right to start ordinary maternity leave on the date she had hoped.

Once the employee has told the employer when she intends to start the leave, the employer must write to her within 28 days, telling her when she is expected to return, based on the assumption that she wants to take her full 52-week entitlement.

If the woman is entitled to contractual maternity leave, she can take advantage of whichever right (statutory or contractual) is more favourable to her.

Additional maternity leave

The right to additional maternity leave starts straight after the end of ordinary maternity leave and runs for a further 26 weeks (unless the employee is dismissed for some reason before that date).

If the woman is entitled to contractual maternity leave, she can take advantage of whichever right (statutory or contractual) is more favourable to her



Giving notice of return to work

Women are not required to give any notice to their employer that they intend to return to work after the end of their full maternity leave.

If the woman does not wish to return, she must hand in her notice in the normal way before the end of her maternity leave period.

If the woman wants to return before the end of her full leave period (whether ordinary or additional), she has to tell her employer eight weeks before the date she intends to come back. The employer can postpone her return until they've received that notice although not past the end of the 52-week period.

If the employer refuses to allow the woman to come back, this would constitute an automatic unfair dismissal unless this was because the woman had been made redundant, or if it was not reasonably practical to take her back because of an internal reorganisation, for example.

In these circumstances, the usual rules on unfair dismissal would apply and the woman might also have claims for pregnancy-related and sex discrimination.

Terms and conditions during and after maternity leave

During maternity leave, the woman is entitled to all the same terms and conditions (apart from the right to be paid),

had she not been away from work. Equally, she is bound by any obligations under her contract, unless they conflict with her right to take leave.

All service-related benefits accrue during both ordinary and additional maternity leave.

After ordinary maternity leave, a woman is entitled to return to the same job that she was doing before she left on terms that are no less favourable.

The same applies after additional leave but with a caveat: if it is not reasonably practical for the employer to allow the woman to return to her old job, she can be offered an alternative job that is “suitable and appropriate” in the circumstances.

Sickness

If an employee is absent because of sickness during her pregnancy, this should not automatically trigger her maternity leave

and she should be treated like any other member of staff who is off sick.

However, if the employee is sick during the last four weeks of her pregnancy, the employer can insist that her maternity leave starts, although some employers may be prepared to overlook odd days of absence.

Once the employee’s maternity leave has started, she cannot claim sick pay from her employer if she becomes ill. If she is sick when her maternity leave is due to end, the usual sickness procedures will apply even if she cannot physically return to work.

Maternity equality clause

The Equality Act 2010 inserts a maternity equality clause into the woman’s contract that states:

- any pay increase the woman receives (or would have received had she not been on leave) must be taken into account when calculating her maternity-related pay
- any bonus to which she is entitled must be paid at the time she would have re-

ceived it had she not been on maternity leave

- her pay on her return to work must take account of any pay increases she would have received had she not been on statutory maternity leave.

Special situations

If the woman gives birth in the four weeks before the baby is due, her maternity leave will start automatically the day after.

It also starts automatically if she is off work with a pregnancy-related illness during that month (unless she and her employer come to an agreement allowing her to return).

If the baby is stillborn after 24 weeks of pregnancy, the woman is still entitled to take her maternity leave.

If the woman becomes pregnant again just before her leave is due to finish, she is entitled to another period of maternity leave in the same way as the first pregnancy.

However, if she doesn’t return to work (or doesn’t return for very long) she may not earn enough to qualify for statutory maternity pay for the second period of leave, as it is based on her average earnings from weeks 17 to 25 of her pregnancy.

Keeping in touch

Except for the first two weeks after the birth, employees can do up to ten days’ work for their employer without losing any maternity pay or leave. These keeping-in-touch days could include attending a training day or staff meeting or actually doing a full day’s work.

Any work the employee does will count as though she had worked a full day, (even if she only does two hours). Women are not obliged to take up these days, nor is the employer obliged to offer them.

Adoption leave

Statutory adoption leave largely mirrors maternity rights, with ordinary adoption leave reflecting ordinary maternity leave, and additional adoption leave mirroring additional maternity leave.

If the employee is sick during the last four weeks of her pregnancy, the employer can insist that her maternity leave starts



To qualify, the employee must:

- be the child's adopter
- have been continuously employed for at least 26 weeks ending with the week when they were notified of having been matched with the child
- have agreed the date of placement with the adoption agency.

The employee has to tell their employer (in writing, if the employer wishes) within seven days of being notified of a match, or as soon as is reasonably practical if that is not possible:

- the date on which notification was received
- the expected date for the placement
- the date on which adoption leave is to begin
- how long the leave will last.

The start date can be varied if the employee gives the employer 28 days' notice of the change or, if not reasonably practical, then as soon as possible.

Overseas adoptions are also covered, in which case the employee must give their employer notice of:

- the date on which they expect to receive official notification and the date on which the child is expected to enter the country
- the date on which the employee has chosen to begin their period of adoption leave
- the date on which the child enters Great Britain.

The employee will also be entitled to 26 weeks' additional leave as long as she took ordinary adoption leave and it did not end prematurely.

Jo Seery discusses some of the key issues workers face when they become pregnant. In particular, she looks at particular issues around risk assessments, annual leave, sickness and return to work.

Employers have a range of obligations once a woman has informed them that she is pregnant, so it's important that pregnant women (and their union representatives) know what these are and ensure they are fulfilled.

Risk assessments

Under health and safety regulations, employers have to carry out two different kinds of risk assessment for women of "childbearing age" (this is not defined). The first involves assessing any general risks they may face, including hazards posed by processes, working conditions or any physical, biological or chemical agents that could pose a problem for their health.

Then, once an employee has told her employer that she is pregnant, has given birth in the last six months or is breastfeeding, the employer must carry out a further risk assessment (and review it on an ongoing basis) of any other specific health and safety risks.

As the duty is to assess the risk to the working environment (and not the worker herself), the employer does not have to review the

situation if, say, the employee becomes more tired as a result of being heavily pregnant. If, however, this tiredness means she can no longer stand on her feet to work, the employer should reassess the risks to her health and safety.

Employers have to keep a record of the findings and inform the employee about any risks, if any, the assessment has identified.

The employer should consult with the employee when carrying out the assessment, which should include doing an inspection of the work area and how they do their work. If the employer fails to carry out a proper risk assessment or ignores a

Issues for pregnant workers

Only if there is no suitable work to offer may they suspend the woman on full pay for as long as is necessary to protect her from the risk

risk that has been flagged up, they could face a claim of sex or pregnancy discrimination.

If the employer identifies a risk, they have to do something to avoid it. If that is not possible, they have to alter the woman's conditions and/or hours of work with no loss of pay or benefits. If the working conditions or hours can't be altered, the employer has to offer suitable, alternative work.

Only if there is no suitable work to offer may they suspend the woman on full pay for as long as is necessary to protect her from the risk.

If the employee is not offered suitable alternative work, she can bring a claim in a tribunal within three months less one day of the first day of being suspended.

Sickness

If a woman has a pregnancy-related illness at any time in the four weeks leading up to the week in which her baby is due, then her

be pregnant and want to exercise their rights to maternity leave, in
 returning part time



ordinary maternity leave and statutory maternity pay (SMP) will automatically be triggered, even if she feels fit enough to return to work.

Although pregnancy-related absence is not defined in the regulations, it could include back pain, high blood pressure, anaemia, fatigue and urinary track infections. As it will often be difficult to know whether it is pregnancy-related, it's best to obtain a medical certificate from a GP stating the cause of the sickness.

Although the regulations state that a pregnancy-related illness in the four weeks before the birth will trigger ordinary maternity leave and statutory maternity pay, some employers may agree to delay the start of the leave so that the woman does not lose any of her entitlement. However, this will not stop SMP from being triggered.

This then poses a problem as the regulations state that SMP cannot be paid during any week in which the employee

works. So if she stays in work she will lose her entitlement to the statutory maternity pay element for each week she works.

Women should therefore seek advice from their union before reaching an agreement with their employer to continue working where maternity leave would have been automatically triggered because of a pregnancy-related sickness absence.

However, if the illness has nothing to do with her pregnancy (for instance, she had flu), then the employer must allow her to return to work after her sick leave, just like any other worker.

Redundancies

If a woman is made redundant during her maternity leave, her employer must offer her suitable, alternative employment (if it exists) that is appropriate for her to do and that is not substantially less favourable than her previous job.

She has priority in being offered alternative work over other staff who are not on maternity leave.

The courts have held that the suitability of a vacancy must be assessed from the employer's perspective and not the employee's. The employer should, however, take into account the employee's work experience and personal circumstances.

Returning part time

Women returning from maternity leave (whether ordinary or additional) do not have an automatic right to return part time.

After the first 26 weeks, they have the right to return to their old job on terms and conditions no less favourable than those prior to the leave.

After the full 52 weeks, they have the right to return to a suitable and appropriate alternative job on no less favourable terms and conditions, if it is not reasonably

If the illness has nothing to do with her pregnancy (for instance, she had flu), then the employer must allow her to return to work after her sick leave, just like any other worker

By wanting to return on part time hours, the woman is effectively requesting to work on different terms and conditions, which the regulations do not allow

practicable for them to return to the job they were doing prior to their maternity leave.

By wanting to return on part time hours the woman is effectively requesting to return to work on different terms and conditions, which the regulations do not allow. She may, however, be able to argue that it amounts to indirect sex discrimination not to allow her to return part time.

For instance, someone who wants to return to work on a three-day basis but whose employer says they can only offer reduced hours over five days could argue that a requirement to work every day puts more women at a disadvantage compared with men. The issue is likely to be whether or not the employer is justified in requiring the woman to work every day of the week. The employer would have to show they have a legitimate aim and that the means of achieving that aim (reduced hours over five days) are proportionate.

Annual leave

Women continue to accrue paid statutory holidays under the Working Time Regulations 1998 during their maternity leave.

Although the regulations state that workers are not entitled to be paid for statutory holidays that they have been unable to take during the leave year, case law has established that, if they fall during a period which coincides with a woman's maternity leave (such as a factory closure), then she should be able to take that annual leave at some other time.

This could be either before or after the maternity leave even if that means the

holidays would have to be taken in a new leave year.

If the woman wants to take the leave after she returns to work, she has to give her employer notice that is twice the length of the holiday she wants to take.

For example, if she wants to add four weeks' holiday onto the end of the maternity leave period, she would need to give eight weeks' notice in advance. If the employer refuses or does not allow her to take the holiday, this may amount to sex discrimination.

Surrogacy

The surrogacy provisions are complex. This is because there are several ways surrogacy can occur and they depend on whether the intended mother has donated an egg and also whether the sperm of the intended father is used.

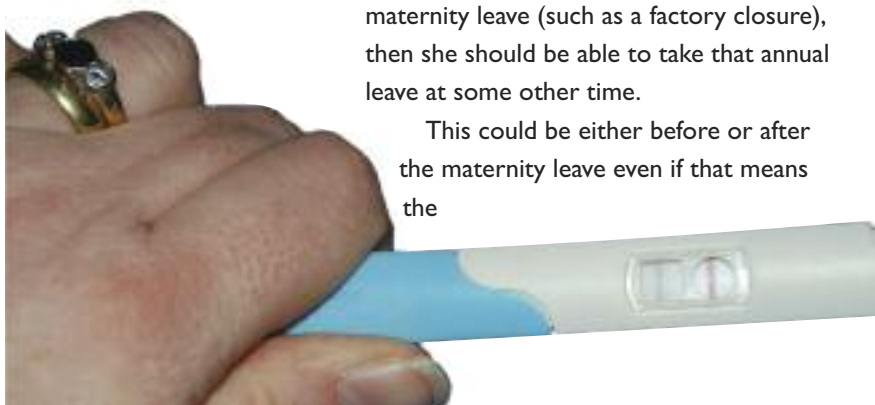
If an embryo is created using gametes from two anonymous donors (in other words, not from either of the intended parents) this is not considered to be surrogacy. The intended parents in a surrogacy usually obtain a parental order; this is not the same as adoption.

In terms of available leave, only surrogate mothers are entitled to take full maternity leave regardless of whether or not they continue to have contact with the child following birth.

Intended parents are eligible for parental leave as they will have parental responsibility for the child. This will be the case even though a parental order cannot be made within six weeks of the child's birth. This is because parental leave is available when an employee **expects** to have responsibility for a child.

The intended father or other parent may be entitled to paternity leave even if their partner does not qualify for adoption leave, if they are the child's father.

Under the government's proposals for flexible parental leave published in November 2012, intended parents who apply for a parental order may qualify for flexible parental leave in the future (see article opposite).



Charlotte Moore explains the current entitlement of fathers to paternity leave and pay and provides an overview of flexible parental leave, to be introduced by the government in 2015

Rights to paternity leave and pay

As with many aspects of employment law, the government is making changes to the provision of paternity and parental leave. Unlike most of the other changes, however, these are, on the whole, an improvement on current provision and certainly offer more flexibility to employees.

Ordinary paternity leave

Fathers and partners are currently entitled to take up to two weeks' paid time off around the time that the baby is due to be born (or matched for adoption) to care for the baby or support the child's mother.

The law defines a partner as someone who lives with the mother in an "enduring family relationship" but who is not a relative. Paid leave is also available to women when the father has taken adoption leave.

To qualify, the employee has to have worked continuously for 26 weeks for their employer by the 15th week before the date the baby is due.

Fathers and other qualifying employees can take either one or two weeks leave, which must be taken within 56 days of the child's expected week of birth or placement. It cannot be taken as odd days off and the two weeks must be taken together.

If the mother gives birth to more than one baby, the father still only receives one period of paternity leave.

Fathers who want to apply for ordinary paternity leave must tell their employer (in writing, if requested) the date that the baby is due, how long they expect to be off (one week or two) and when they want the leave to start.

And they have to tell the employer all this by the 15th week before the baby is due. They can, however, vary the date by giving 28 days' notice before the first day of the expected week of birth, if that's practical. If not, then as soon as they can.

In the case of adoption, the notice has to be given no more than seven days after the date on which the adopter is notified of having been matched with the child. Again, the employee can vary this date by giving 28 days' notice.

Additional paternity leave

Fathers and other eligible employees can also take up to 26 weeks' additional paternity leave to care for a baby between 20 weeks and a year old, but only once the mother has returned to work (so if she does not return, they cannot take it). This is in addition to the two weeks' ordinary paternity leave.

The qualifying conditions are the same for both types of leave, but fathers/partners must give eight weeks' written notice before taking additional paternity leave. They must also provide a declaration that they are the father/partner of the mother

Fathers and partners are currently entitled to take up to two weeks' paid time off around the time that the baby is due to be born

Parental leave is also available for adopted children and runs for five years from the date of the adoption or until the child's 18th birthday, whichever happens first

and expect to have responsibility for bringing the child up. The mother must also provide a declaration that, among other things, includes the date she intends to return to work.

The leave must be taken in multiples of complete weeks (a minimum of two and a maximum of 26). Fathers/partners can only take one period of leave regardless of the number of babies born or adopted at the same time.

Statutory paternity pay

This is paid at a flat rate, which changes every April, or at 90 per cent of the employee's earnings if they are lower than that.

To qualify for ordinary statutory paternity pay, the father has to satisfy the same criteria as for paternity leave, but must also have been earning more than the lower earnings limit for National Insurance in the eight weeks ending with the qualifying week. This is the 15th week before the baby is due (or the week in which the adopter is notified of being matched).

To qualify for additional statutory paternity pay, the employee must have qualified for additional paternity leave and the mother must also have returned to work and stopped claiming any statutory pay or allowance. She must also have at least two weeks left of her remaining entitlement. This is paid at the same rate as ordinary statutory paternity pay and is limited to the mother or adopter's statutory pay period.

Parental leave

Employees with one year's continuous service are also entitled to 13 weeks' unpaid parental leave per child up to their fifth birthday and unpaid parental leave of up to 18 weeks for a disabled child (if they are entitled to disability living allowance) to care for a child. This will increase to 18 weeks from March 2013.

Parental leave is also available for adopted children and runs for five years from the date of the adoption or until the child's 18th birthday, whichever happens first.

If there is no collective agreement in the workplace, a default scheme kicks in. This states that parents can only take periods of leave in blocks of a week (unless the child is entitled to disability living allowance in which case that restriction does not apply). No employee can take more than four weeks' leave per child per year.

Employees must give 21 days' notice before they want to start the leave and must tell their employer the start and end dates when giving notice.

Under the default scheme, an employer can only postpone a request for parental leave on the basis that their business would be "unduly disrupted".

They cannot postpone it indefinitely and must allow the employee to take the same amount of leave they requested within six months of the date of the original leave.

Employers cannot, however, delay the leave if that would clash with the day the baby is born or placed for adoption, or if it would mean that the employee would no longer qualify for parental leave (for instance the delay would mean it would start after the child's fifth birthday).

If it is postponed, the employer must write and explain why, within seven days of the request, setting out the start and end dates to which they would agree a period of parental leave.

Employee rights

Employee rights during parental leave are limited to the contractual right to trust and confidence, notice, redundancy and discipline and grievance.

If an employee takes less than four weeks off, they have the right to return to their old job. If they take more than four weeks, their entitlement to have their job back is similar to the situation that applies to a woman returning from additional maternity leave.



An employee can complain to an employment tribunal if the employer unreasonably postpones a period of parental leave or has prevented or attempted to prevent an employee from taking parental leave.

The time limit for bringing a claim is three months less one day from the date of the matter complained of.

Flexible parental leave

The government announced in November 2012 that it intends to introduce something called (rather confusingly) flexible parental leave in 2015. Additional paternity leave will be abolished when the new arrangements come into effect.

Under this system, working mothers will still have the right to 52 weeks of maternity leave, but can opt to share 50 weeks of the leave with their spouse/partner if they both meet the qualifying conditions. They may take the leave in turns or take it together, provided that they take no more than 52 weeks in total and in blocks of a minimum of one week.

Although parents should, in theory, be able to decide how much leave they want to

take, they will have to fall back on the default position of a single block of leave starting on a date specified by the employee if they cannot get their employer to agree to their proposal.

Women who qualify will be entitled to statutory maternity pay for 39 weeks of their maternity leave and fathers will be entitled to two weeks' ordinary statutory paternity pay. In addition, the government has said it will introduce statutory flexible parental pay for parents who meet the qualifying criteria that will replace additional statutory paternity pay.

However, the Chancellor's cap on benefits, announced in the autumn statement, will amount to a cut in real terms in statutory maternity and paternity pay.

Fathers and other eligible employees will also gain the right to take unpaid leave to attend two antenatal appointments.

Adopters who meet the qualifying criteria will be able to take flexible parental leave, as will parents of children born through surrogacy.

Statutory adoption leave will be available from day one and statutory adoption pay will be brought into line with statutory maternity pay.

Thompsons is the most experienced personal injury firm in the UK with an unrivalled network of offices and formidable resources.

HEAD OFFICE

Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

MANCHESTER
0161 819 3500

ABERDEEN
01224 589 406

MIDDLESBROUGH
01642 554 162

BELFAST
028 9089 0400

NEWCASTLE UPON TYNE
0191 269 0400

BIRMINGHAM
0121 262 1200

NOTTINGHAM
0115 989 7200

BRISTOL
0117 304 2400

OXFORD
01865 332150

CARDIFF
029 2044 5300

PLYMOUTH
01752 675810

CHELMSFORD
01245 228 800

SHEFFIELD
0114 270 3300

DAGENHAM
0208 596 7700

SOUTHAMPTON
023 8021 2040

DERBY
0133 222 4680

SOUTH SHIELDS
0191 4974 440

EDINBURGH
0131 225 4297

STOKE-ON-TRENT
01782 406 200

GLASGOW
0141 221 8840

SWANSEA
01792 484 920

LEEDS
0113 205 6300

WIMBLEDON
020 8543 2277

LIVERPOOL
0151 2241 600

WOLVERHAMPTON
01902 771 551



Visit us at www.thompsons.law.co.uk

Call us on 08000 224 224

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

Download this issue at www.thompsonstradeunionlaw.co.uk

To receive regular copies of LELR email lelr@thompsons.law.co.uk

Contributors to this edition:
Claire Jenkins, Charlotte Moore
and Jo Seery

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Front cover picture: Alison Lapper Pregnant
sculpture by Mark Quinn in the opening
ceremony for the Paralympic Games 2012
Printed & Distributed by DST Peterborough