Report on Working Families Legal Advice Service 2013

Introduction

> Katrina is a young single mother working in the care home sector. Two years ago, when Katrina separated from her partner, her then manager agreed to Katrina reducing her hours and working a set shift pattern, as Katrina no longer had anyone to share the childcare with. However, that manager has now left, and Katrina's new manager has told her that she must from now on work full-time, and on variable shift patterns. Katrina wants to keep her job, but knows she has little hope of finding affordable childcare to cover the new shift patterns that would now be involved.

Katrina is just one of the 2,585 working parents and carers – 85 per cent of them women – who called or emailed the Working Families legal helpline in 2013. The helpline team provide free advice on key work-life balance rights such as maternity and paternity leave and pay, time off in an emergency, and unpaid parental leave. They provide help with requesting and negotiating flexible working (or with contesting imposed changes to an existing flexible working arrangement), and with challenging pregnancy, maternity or other discrimination in the workplace. And they offer advice on relevant social security benefits and tax credits.

However, the helpline team don't just tell callers about their rights, and offer advice: they coach callers to negotiate with their employer to find a mutually beneficial solution that, wherever possible, enables them to remain in their job. And, should the employer prove to be unreasonably intransigent, the team can support the caller through the process of making a claim to an employment tribunal.

The work of the helpline team in 2013 – an overview

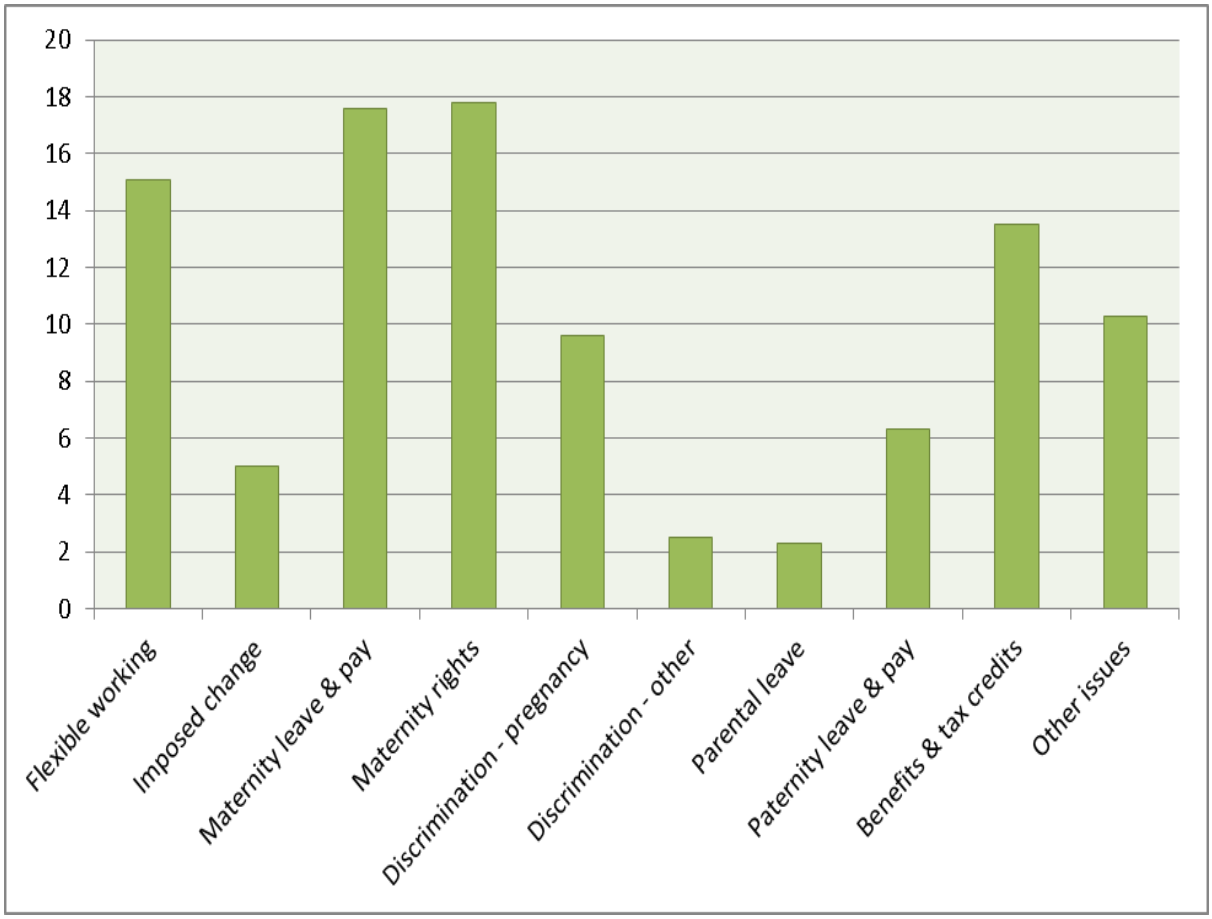
With changes and cuts to the social security system – such as the so-called 'Bedroom Tax' and a freeze on Child Benefit – continuing to hit low-income households hard, and childcare and other essential living costs continuing to rise faster than wages, many of those who called the helpline in 2013 were trying to work out how they can make work pay. Some were trying to adjust their hours or working pattern upon their return to work from maternity leave. And others were trying to adopt a flexible working pattern – part-time working, compressed hours, or working from home – in response to a major change of family circumstances, such as relationship breakdown or the onset of disability of their child.

For those earning low wages and receiving in-work social security benefits, working out how to make such changes and yet retain an adequate income can be a complex calculation for an experienced adviser, let alone working parents and carers. In 2013, three out of ten callers to the helpline were a single parent, and one in three was disabled or had a disabled child or adult in their family. Such working families are particularly disadvantaged by the shortage both of local, affordable childcare and of suitable, quality jobs offering part-time or otherwise flexible working.

At the same time, there is ample evidence that, amid the deepest and longest economic recession in recent times, many employers have negotiated the downturn by reducing the working hours and even the pay of their workforce. As a result, record numbers of those who wish to work full-time are now working part-time, or have been forced into low-income self-employment.

This is the challenging context in which the helpline team worked in 2013. The following chart shows a breakdown, by issue, of the team's work sessions.

Percentage of helpline team work sessions, by issue, 2013



Key issues from the helpline team's caseload in 2013

1. Imposed change to pay, hours or work pattern

In 2013, our helpline advisers dealt with an increased number of cases in which the caller's employer had imposed, or was seeking to impose, changes in pay, hours or work pattern, without adequate consultation or discussion, and with little if any consideration for the resultant difficulty in meeting caring responsibilities.

Employment law recognises that employers will sometimes wish to vary the pay, hours or days worked, duties, supervisory relationships, or place of work of individual employees, either because of changed economic circumstances or due to a reorganisation of the business. However, an existing contract of employment can be varied only with the agreement of both parties, and Acas guidance makes clear that "an employer who is proposing to change an employee's contract should fully consult with that worker … and explain and discuss the reasons for the change."[1]

Furthermore, the Acas guidance stresses that "employees are far more likely to accept changes if they can understand the reasons behind them and have an opportunity to express their views. Involving employees makes good business sense, as it drives up levels of employee engagement and motivation."

However, in 2013, many callers to the helpline reported the flexible working pattern they had had in place for several years being changed or withdrawn virtually overnight, with no opportunity for them to express their views and negotiate either retention of the existing pattern or, failing that, a mutually agreeable compromise.

> **Kathryn**, a mother of three young children, called the Helpline after being told by her employer – a small retailer – she had to increase her hours and work Saturdays, with immediate effect. Kathryn had been employed by the company for 19 years, during which time she had only ever worked on weekdays. Kathryn's partner already worked Saturdays, and the couple could not afford extra childcare for the Saturday.
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> **Robin**, a father of two young children, one of them disabled, had been employed as a lab technician for ten years. For the past three years, Robin had worked from 6.30 am to 2.30 pm each weekday, so as to cover the afternoon school run. Now his employer had told Robin that he must change his hours to 8.30 am to 5.15 pm, which would make it impossible for Robin to be available for either school run.

[1] *Varying a contract of employment*, Acas, March 2012. Available at: http://www.acas.org.uk/index.aspx?articleid=816

Harini, a children's centre worker, was told that on her return from maternity leave she would have to change her long-established flexible working pattern so as to do more work from the office and less from home, despite her role having become more strategy-based. With the helpline team's assistance, Harini submitted a formal grievance, and the employer then backed down, allowing Harini to return to work on her previous working pattern.

Such imposed changes to terms and conditions can have a calamitous and long-term impact on family income and well-being, especially where they force a parent or carer out of work altogether. Yet, as the law stands, employees are poorly empowered to resist changes to their pay, hours or working pattern that are incompatible with their caring responsibilities.

2. Pregnancy, maternity and other discrimination

As in previous years, in 2013 a significant proportion – about one in ten – of all callers to the helpline appeared to our advisers to have been subjected to pregnancy or maternity discrimination by their employer.

Sally, a young woman pregnant with her first child, and working 30 hours per week as a waitress, had been told by her employer that she would only be allowed six weeks of maternity leave, and would be sacked if she did not return to work at the end of that period. A few weeks later, Sally had been told that her working hours were being reduced, with immediate effect, to just 15 hours per week. This coincided precisely with the calculation period for statutory maternity pay, and as a result Sally had lost her entitlement to SMP.

Mona, a qualified care worker employed in an office-based planning role, had taken some time-off work to care for her younger sister when their mother was unwell. A few months later, Mona informed her manager that she was pregnant. Soon after, Mona was told that she would have to return to front-line care work.

Mona had a high-risk pregnancy and presented her employer with her doctor's advice that she should not undertake physical work. The employer initially appeared to accept this, but then refused to offer suitable alternative work (or to suspend Mona on full pay), despite there being plenty of administration-based care work available.

With the assistance of the helpline team, Mona submitted a formal grievance and, when her employer failed to respond, issued an employment tribunal claim. In defending the tribunal claim, the employer argued that Mona had

been moved from planning work not because of her pregnancy, but because of the time-off that she had taken to care for her sister. However, the tribunal ruled that that Mona had been unlawfully removed from her planning role, as well as subjected to unlawful pregnancy discrimination by not being offered safe and suitable alternative work. The tribunal awarded Mona £6,600 for injury to feelings and lost earnings.

And, in some of the cases involving imposed changes to pay, hours or working patterns, the employer appeared to have imposed changes to the contracts of all employees in a misguided attempt to be 'fair'. However, imposing such blanket changes, no matter how well-intentioned, can give rise to sex discrimination issues. For example, imposing a requirement on all employees to share evening and weekend working hours, when it is next to impossible to find affordable childcare, may open the employer to an employment tribunal claim for sex discrimination.

When **Alex** returned to work from maternity leave, her shift pattern was changed by her employer, without her agreement. Alex rang our helpline as she was unable to comply with the new shift pattern due to her childcare responsibilities. The helpline team helped Alex to raise a grievance against her employer, and to submit a subsequent appeal. As this did not resolve the problem, the team assisted Alex with issuing an employment tribunal claim for direct and indirect sex discrimination.

The employer defended the claim, and the case went all the way to a substantive hearing, for which the helpline team coached Alex to represent herself. Alex won her case and was awarded £4,000 for injury to feelings by the tribunal. More importantly, Alex remains with her employer, working the shift pattern she had prior to her maternity leave.

Marian called the helpline towards the end of her maternity leave with her second child. She had just called her line manager to confirm her return to work date, only to be told that her previous post at a workplace 20 minutes from her home, which she had held for five years, was "no longer available" and that she would have to return to a job at a different, more distant workplace. However, this would have added two hours travel time to Marian's working day, and made her existing childcare arrangements impracticable. And, by speaking to work colleagues at her workplace, Marian had discovered that her original post in fact still existed.

With support from our helpline team, Marian raised a formal grievance and, when this was ignored by the employer, in issued a tribunal claim for direct and indirect sex discrimination and pregnancy-related detriment. And, with further support from the helpline team, this claim was settled by the employer, with Marian returning to her original post and the employer paying Marian £5,000 in compensation.

It is always especially rewarding for the helpline team when, as in these two cases, they are able to support a caller in both resolving the problem and remaining in work with the same employer. On the other hand, it is greatly frustrating when a parent or carer who has clearly been subjected to unlawful discrimination by their employer is unwilling to challenge the employer through the tribunal system, for fear of losing their job or because of the likely time, stress and cost involved. And, in both Alex and Marian's cases, had they not been able to access the tribunal system – both issued their claims before the introduction of fees in July 2013 – it is doubtful whether they would have achieved such a positive outcome.

In this context, we welcome the Government's recognition that such pregnancy and maternity discrimination is widespread and, seemingly, on the increase. In November 2013, the then minister for equalities & women, Maria Miller, announced £1 million of additional funding to enable the Equality & Human Rights Commission to undertake a "programme of independent research to examine the extent of pregnancy discrimination in the UK and its effect on both families and the economy."[2] We look forward to working with the Commission in relation to this research.

3. Access to and denial of paternity leave

While 85 per cent of all those who approached the helpline in 2013 were women, almost every day the helpline team dealt with at least one male caller. And in the vast majority of these cases, the caller was experiencing difficulty in taking his legal entitlement to two weeks' paid paternity leave at or soon after the time of birth.

In one week in April 2013, for example, the helpline team took calls from five new fathers. **Martin** had been disappointed to be told by his employer that, as he had not quite completed the legally required 26 weeks of service by the end of the 15th week before the expected week of childbirth (known as the 'qualifying week'), he was not entitled to any paid paternity leave. **Duncan** had been denied any paid paternity leave, on the grounds that he had failed to give *written* notice by the 'qualifying week', even though he had given oral notice to his manager.

Like Martin, **Rafael** had been denied paid paternity leave on the basis that he was just short of a total of 41 weeks' service when his child was born, so had taken one week of his paid holiday entitlement after the birth; Rafael called the helpline towards the end of this week, as his partner still needed him at home but he was reluctant to use any more of his paid holiday entitlement.

Alan did meet the 26 weeks of service eligibility requirement, and had also given written notice in plenty of time, but his employer was now refusing to let him take his

[2] "£1m to help tackle pregnancy discrimination in the workplace", DCMS news release, 4 November 2013.

two weeks' paternity leave as the firm was 'too busy'. And **Philip** was disappointed to be told by our helpline adviser that, as he is self-employed, he has no right to statutory paternity pay.

Working Families has long considered the service requirement of at least 26 weeks by the end of the 15th week before the expected week of childbirth – an effective requirement of 41 weeks' service by the time of the birth – to be unduly onerous for a period of just two weeks' leave. This eligibility requirement mirrors that for statutory maternity pay, supposedly for reasons of simplification. However, as the above cases illustrate, such an unduly lengthy service requirement results in many fathers missing out on the right to ordinary paternity leave.

This matters, because an ever-growing body of research evidence shows that fathers who do not take – or are unable to take – paternity leave at the time of the birth are less likely to become engaged in parenting during the child's first year of life. Official figures indicate that take-up by fathers of the right – introduced in April 2011 – to up to 26 weeks of additional paternity leave has been pitifully low, with the employers of fewer than 3,900 fathers reclaiming statutory additional paternity pay from HMRC in 2012/13.[3] If this low level of take-up of additional leave by fathers is to be improved upon under the new system of shared parental leave due to come into force in April 2015, then it is important to ensure that as many new fathers as possible have access to, and take, ordinary paternity leave after the birth.

A relatively small number of callers to the helpline were experiencing difficulty in taking their legal entitlement to up to six months of additional paid paternity leave, or were disappointed to learn from the helpline adviser that they have no such entitlement because they are self-employed, or because the child's mother has not herself returned to work.

> **Peter** had taken additional paternity leave from his post as a manager for a large employer. During this leave, his employer had contacted Peter and asked him to work at very short notice on a particular day. Peter had refused, explaining that he was on additional paternity leave and that he had no childcare organised for his baby. He was later disciplined by his employer for refusing to work as requested.
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> With assistance from the helpline team, Peter issued an employment tribunal claim for detriment for taking paternity leave and direct sex discrimination (the claim was issued prior to July 2013). The employer subsequently dropped the disciplinary proceedings, and the tribunal claim was settled.

[3] Source: *Hansard*, House of Commons, 3 April 2014, col. 746W. Available at: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140403/text/140403w0001.htm#14040391000030

4. The right to request flexible working

From 30 June 2014, the existing right to request flexible working, currently limited to working parents and carers, will be extended to *all* employees (subject to a 26-week service requirement). This is a very welcome move, one that Working Families has called for over many years, and which we hope will help accelerate progress towards 'flexible by default' in job design and recruitment.

However, as in previous years, some of the calls to our helpline in 2013 confirm that negative assumptions about flexible working persist in all too many workplaces, and that many employers still interpret a request to work flexibly – and especially a request to work reduced hours – as lack of commitment or ambition. This applies especially to women returning to work from maternity leave, and the employers concerned vary from small businesses to large and well-known companies.

Our helpline advisers are able to explain to callers that a request to work flexibly is a request for a change of hours or work pattern in their *existing* job, not a request for a demotion. And in many cases they can coach them to negotiate a mutually-agreeable flexible working solution.

> **Dagmar**, who works in sales marketing, had had to take a significant time off work to care for her child, who had developed serious health problems. Dagmar contacted the helpline because she was now having difficulty meeting her performance targets, which hadn't been adjusted to take account of the time she had had off, and her manager was complaining that Dagmar was "unreliable".
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> With the assistance of the helpline team, Dagmar submitted a formal grievance. At first, the employer responded in an extremely negative way, denying the grievance with 22 pages of notes. However, the helpline team coached Dagmar through the appeal process, and the employer eventually backed down, confirming that Dagmar could take more time off if necessary and opening a dialogue on flexible working.

In cases such as this, a statutory right to a period of unpaid adjustment leave would enable workers to cope with a life crisis such as the bereavement, serious illness or onset of disability of a partner or child, with the security of having their job to return to once new caring arrangements have been put in place and/or life has returned to a more 'normal' pattern.

However, where an employer proves unreasonably intransigent, the principal option – other than leaving the employer and seeking alternative work – is to initiate a formal grievance and, ultimately, issue and pursue an employment tribunal claim.

And with the introduction of upfront tribunal fees that is simply not a realistic option for many parents and carers.

> **Martha** was nearing the end of her maternity leave when she contacted the Working Families legal helpline. Prior to going on maternity leave, Martha had been working four days per week as a receptionist, but now wished to reduce her working hours to three days per week. After her informal request had been rejected by her employer, Martha had submitted a formal flexible working request, but this had also been rejected, without reasons and without the meeting required by law. And now the company was insisting that Martha return to work on a full-time basis, i.e. five days per week.
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> Martha told our helpline adviser that, prior to her going on maternity leave, the receptionist post had always been covered by two part-time members of staff. But whilst Martha had been on maternity leave, the company had recruited a young woman, with no children, who was happy to work full-time.
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> The helpline adviser explained to Martha that, given the employer's intransigence to date, her principal option – other than resigning – was to bring a formal grievance and, if the company still refused to accommodate Martha's request to reduce her hours without good reason, to issue and pursue an employment tribunal claim.
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> However, when the adviser explained to Martha that this would involve paying an issue fee of £250 and – if the claim was not then settled by the employer – a hearing fee of £950, Martha concluded that this was not a practicable option for her. Martha was shocked by the level of the upfront tribunal fees: "I simply don't have that sort of money – I've just been on maternity leave".

5. The impact of the employment tribunal fees introduced in 2013

Whilst the imposition of changes and/or a new contract unilaterally may open the employer to a claim to an employment tribunal (or the civil courts) for constructive dismissal (where the imposed change is fundamental or significant), a claim to an employment tribunal for unlawful deduction from wages (where the imposed change affects pay), or a claim to an employment tribunal for sex discrimination, that relies on the employee being willing and able to issue and pursue such a claim.

For a working parent or carer, that has always been a daunting challenge, given the substantial time, financial expense and stress that is invariably involved. As the BIS employment relations minister, Jenny Willott MP, noted recently, it costs "on average £1,800 to present a claim at tribunal", including time spent on the case and the cost of legal advice. But the addition to that sum of the upfront tribunal fees introduced in

July 2013 – of up to £390 for an 'unlawful deduction from wages' claim, and up to £1,200 for a constructive dismissal or discrimination claim – appears to have put this legal remedy beyond the reach of many.

The most recent figures made available by the Ministry of Justice show a dramatic fall in the number of employment tribunal claims by individual claimants, from an average of 4,530 per month before the introduction of fees in July 2013, to just 1,000 in September, 1,620 in October, 1,840 in November, and 1,500 in December.

For more than 40 years, the employment tribunal system has provided an invaluable backstop in disputes between individual workers and their employer – a legal remedy of last resort – as well as a more general incentive to employers to 'get it right first time'. And if vulnerable workers cannot access the tribunal system, then unlawful practice by less scrupulous employers – whether inadvertent or deliberately exploitative – will go unchecked, and more employers will be tempted to disregard the rights of their workers when seeking to 'cut corners'.

That is clearly unfair to the workers concerned, as well as to the great majority of employers who readily abide by the law and do their best for their workforce. But it also makes the work of our helpline team that much more difficult, and that much more important.

In April, in a letter published in *The Times*, leading employment barrister Caspar Glyn QC, Chair of the Industrial Law Society, wrote:

> "The Government's own figures show that its introduction of employment tribunal fees of between £390 and £1,200 in July 2013 have wiped out 80 per cent of claims. Most of the claims that have gone were brought by employees alone and without lawyers.
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> The shop assistant whose boss didn't pay him the minimum wage, the pregnant woman underpaid for maternity leave, the factory worker denied proper holiday pay, the transport worker sacked for raising a safety concern, the abused migrant worker – they are just not bringing their claims. The effect on women has been to reduce sex discrimination claims by 77 per cent, and the effect on minority groups such as the disabled has been almost as severe.
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> Should business rejoice at the lower costs in not fighting claims? Not the many good employers I work for. The cowboys are now waking up to a new Victorian landscape where they can strip employees of statutory rights and discriminate, hire and fire at will, safe in the knowledge that justice has been locked up behind a pay wall unaffordable to four out of five members of their staff.

> The facts now show that tribunal fees are bad for business, bad for hard-working families, and have destroyed access to justice to employment tribunals."

Since July 2013, our helpline team has noted a significant increase in the proportion of callers who require more than one interaction with the team, from an average of six per cent of all callers in each month during the first half of 2013, to an average of ten per cent in each month since August (i.e. including the first three months of 2014). Whilst it is not possible to explain this increase with any certainty at this stage, it might well indicate that callers to the helpline are facing greater difficulty in resolving the problem at work that has caused them to contact the helpline, as employers calculate that there is less risk of the dispute leading to a tribunal claim.

Conclusions and policy recommendations

The world of work has changed enormously in recent decades – in many ways for the better. But the evidence from the calls and emails to our legal helpline in 2013 demonstrates that, for all too many working families, work simply isn't working. Time-poor or cash-poor – or both – they struggle to achieve a good work-life balance. For them, the world of work has not changed anywhere near enough.

In 2014 and beyond, therefore, we will be using this evidence to press for legal and policy reform that will ensure work actually works for more working families, while helping employers retain talent they might otherwise lose to full-time caring.

- We will seek to explore with government officials, Acas, and other stakeholders such as the CBI, the Federation of Small Businesses and the TUC, what more can be done to ensure that employers act legally *and* follow best practice when seeking to make changes to an employee's pay, hours or working pattern (including withdrawal of an existing flexible working pattern).

- We will continue to press for greater eligibility for statutory paternity leave and pay – all new fathers should be able to take at least two weeks of paid leave at the time of or soon after the birth, without having to meet an inordinately long service or notice requirement.

- To achieve a good work-life balance, working parents need a flexible job that pays enough to raise a family. So we will continue to urge employers to adopt Living Wage, where they can afford to do so. And we will continue to highlight the shockingly low rate at which statutory maternity and paternity leave is paid – currently less than 60 per cent of the adult national minimum wage rate. In the words of employers surveyed by the Department for Business, Innovation

& Skills (BIS), that is simply not "a liveable wage".[4]

- We will also be pressing the Government to go further in providing support with childcare costs to working parents, and especially parents of disabled children and those working atypical hours. And we will urge ministers and shadow ministers to consider a new statutory right to a period of unpaid 'adjustment leave', to enable families to weather life crises such as the death, serious illness, or onset of disability of a partner, parent or child, or other major change in caring responsibilities, without having to give up work.

- Most immediately, we call on the Government to urgently review and reform the employment tribunal fees introduced in July 2013. There is now a broad consensus – including both the CBI and the TUC – that the Government has got it badly wrong on fees, and that the fees regime should be "redesigned to incentivise early resolution of disputes rather than maximise revenue".[5] In the words of the CBI, claimant fees "should never be a barrier to justice".[6] We suggest that, to protect gender equality, tackle the widespread discrimination around pregnancy and maternity leave, and support the extension of the right to request flexible working and the new right to shared parental leave, fees for claimants must, at the very least, be reduced to a nominal level.

The Working Families legal Helpline can be contacted by phone or by email:

By phone: 0300 012 0312

The Helpline is open: Mondays 10am to 1pm, and 6pm to 7pm; Tuesdays 10am to 2pm; and Thursdays and Fridays 10am to 1pm.

By email to advice@workingfamilies.org.uk

We aim to respond to emails within two working days.

The Helpline team has an Advice Quality Standard Quality Mark.

4 Employer perceptions of maternity and paternity leave and flexible working arrangements, BIS, March 2014. Available at: https://www.gov.uk/government/publications/maternity-and-paternity-leave-and-flexible-working-arrangements-employer-perceptions

5 *The right balance: delivering effective employment tribunals*, CBI, March 2013.

6 "Employment tribunals are failing employers and employees", CBI news release, 15 April 2011.

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