

- > UNDERSTAND WHAT EXAMINERS WANT
- > MAXIMISE YOUR MARKS AT EVERY STEP
- > ANSWER QUESTIONS WITH CONFIDENCE

**Question&Answer**

# **EMPLOYMENT LAW**

2nd edition

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**'The only real rival to this Q&A series is face-to-face revision sessions.'**  
Sue Radlett, Law Lecturer, Holborn College

Question&Answer

# **EMPLOYMENT LAW**



### Don't be tempted to . . .

- Simply go through all the provisions and explain what they are; you must comment on whether they help families achieve a balance.
- Assume that there is one appropriate balance for all and the law should set this down; acknowledge the importance of flexibility and choice.
- Discuss work–life balance without reference to what the law actually is; you do need to provide an accurate summary of the provisions available.
- Ignore academic commentary; it is difficult in an exam to remember what academics have said but you cannot really answer this question fully without reference to the ongoing debates.



## Question 3

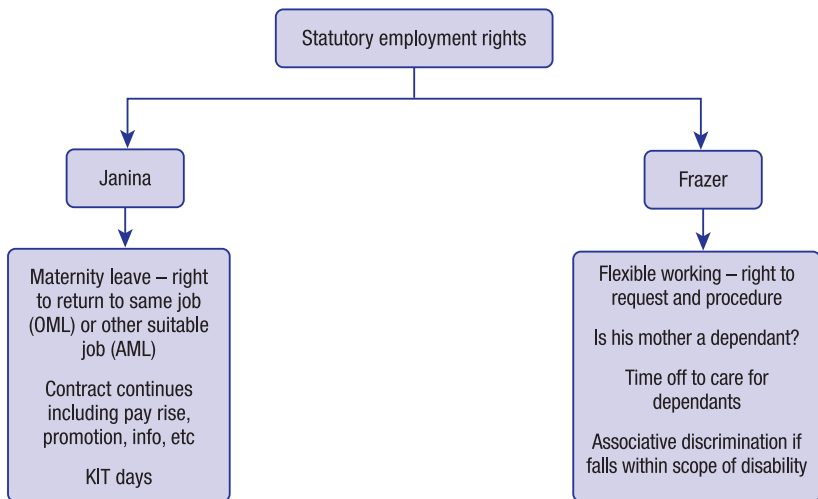
- (a) Janina is a scientist working for a research and development company and she is currently on maternity leave. She is therefore not able to take part in the monthly training provided by the employer which is specifically designed to keep the scientists' skills up to date. Janina is worried about how this 'career break' will affect her rights at work. She also wants to know whether she can exercise her professional skills or work occasionally during maternity leave.
- (b) Frazer works on the reception desk for the same employer. He would like to ask his employer for flexible working hours in order to allow him to care for his elderly and increasingly ill mother, but at a recent staff meeting the director expressed concern that the economic crisis will affect the business and he will therefore be counting on all staff to 'do their bit'.

## Answer plan

- ➔ Introduction: outline that the question is about rights at work related to family friendly rights and caring responsibilities.
- ➔ Janina: she is on maternity leave so presume she is aware of her rights there. The question requires consideration of:
  - right to return to work
  - (KIT) 'keeping in touch' days
  - general concerns about impact of career break on careers.

- Frazer: there are three separate issues:
- flexible working – he can request it but there is no right to it
  - he can take time off in an emergency if his mother is dependent on him
  - potential for discrimination by association following the decision in *Coleman* (overlap with equality law here).

## Diagram plan



A printable version of this diagram plan is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

## Answer

<sup>1</sup> Give a very quick indication of the structure of your answer – you are showing that you recognise that the answer requires a consideration of statutory rights and that a number of issues will need addressing.

<sup>2</sup> Your whole answer should be written in the context of the question, so use the names used in the question and don't talk about rights in the abstract.

Janina and Frazer wish to know what their statutory rights are at work. As the issues raised are different for each, we will deal with them in turn.<sup>1</sup>

### Janina

Janina is on maternity leave and is concerned about how this affects her rights at work.<sup>2</sup> Much research has shown that taking time out to raise a family can have a detrimental effect on career progression and the government has recognised that, too. As long ago as 1998, the White Paper *Fairness at Work*, stated: 'we need to achieve a

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<sup>3</sup> If you can remember a quote like this one, great, but even if you can't remember the exact wording you can still paraphrase.

<sup>4</sup> The question is not really asking about maternity leave and pay rights but about what the consequences of making use of those rights might be, so don't waste time outlining maternity provisions.

<sup>5</sup> You should always try to clarify exactly what the application of the law means for your 'client', so say that the law should protect Janina.

<sup>6</sup> In theory, therefore, her rights are protected and she should not be subject to any detriment but she will also want to know of any legal option if things do go wrong.

<sup>7</sup> This paragraph sets out some of the important rights that continue while on maternity leave and it is useful to back up your point with a case law example.

<sup>8</sup> Here you are moving on to the next issue specifically asked about in the scenario and such a direct reference to the problem shows you are still focused on answering the question.

society where to be a good parent is not in conflict with being a good employee'.<sup>3</sup>

A number of rights do help to achieve a balance, although how effective they really are is open to some debate. As Janina is currently on maternity leave, we shall presume that she is aware of her rights and entitlements in relation to taking leave and any pay she might get either under statutory provisions or her contract.<sup>4</sup> When she returns to work she has the right to return to her old job. There is no exception to this if she has taken only ordinary maternity leave of 26 weeks (Maternity and Parental Leave Regulations 1999, reg. 18). If she has also taken additional maternity leave (a further 26 weeks), she is entitled to her old job back unless this is not reasonably practicable (see *Blundell v St Andrew's Catholic Primary School Governors* [2007] ICR 1451, EAT)). If this is the case she must be given an alternative position with terms no less favourable than her old position. Janina should therefore not worry about being demoted or receiving less favourable treatment on her return.<sup>5</sup> If she is not allowed to return to her job, this would count as an automatically unfair dismissal under the Employment Rights Act 1996 (ERA 1996).<sup>6</sup>

In addition, all contractual terms apart from those relating to pay continue while she is on maternity leave, so she should continue to benefit from things like gym membership, private health care or similar if she had such benefits before going on leave. Her holiday entitlement also continues to accrue, as does her continuity of service. She should also benefit from any automatic pay rises (coming into effect once she returns to work) and be made aware of any opportunities for promotion which might apply to her. For example, in *National Union of Teachers v Watson* [2006] All ER (D) 84 (Aug), EAT, the claimant was on maternity leave when she learned about an opportunity for promotion. She applied but was not appointed; she argued this was due to her being on maternity leave and won her case.<sup>7</sup>

According to the scenario, Janina is keen to exercise her skills and work while on maternity leave.<sup>8</sup> Regulation 12A of the Maternity and Parental Leave Regulations 1999 gives her the right to 10 'keeping in touch' (KIT) days. These allow her to work for 10 days during her maternity leave without ending that leave or her entitlement to maternity pay. These KIT days have been used to ensure women undergo a smoother transition back into the labour market, to reduce

the isolation sometimes felt by new mothers and to allow them to keep their hand in. In Janina's case, KIT days could allow her to exercise her skills and keep her hand in and could be used to attend some of the training referred to in the scenario.<sup>9</sup>

<sup>9</sup> Make sure you really engage with the question, so think about what Janina would want to know here and then tell her.

Janina can therefore draw on a number of legal rights to protect her position and make sure she is not disadvantaged by taking time off to start a family. However, in spite of these provisions, the evidence still suggests that the labour market is not a level playing field for men and women and in particular for parents with child care responsibilities. Janina has to rely on her employer and her colleagues, as well as society more generally, to help her work out an appropriate balance between work life and home life.<sup>10</sup>

<sup>10</sup> Your conclusion for Janina should summarise the legal situation but also highlight some of the limitations of the legal rights because so much depends on context.

## Frazer

<sup>11</sup> Here you've succinctly set out the legal provisions relevant to the question, which can be useful if the law is straightforward as it is here. Easy marks!

The Work and Families Act 2006 amended section 80F of ERA 1996 to extend the right to request flexible working to carers of adults. Section 80F provides statutory right to request a contract variation to make changes to working hours, working times, work places or other issues. One year's continuous employment is required to exercise this right (ERA 1996, s. 108(1)).<sup>11</sup>

<sup>12</sup> Here you apply the law to the scenario by saying what the legal provisions mean for Frazer, showing that you understand how the law works.

Frazer would therefore have to show that he has one year's service and that his mother is dependent on him as a carer. If so, he has the right to make a request for flexible working and a right to have that request considered by his employer. He does not, however, have a right to flexible working.<sup>12</sup>

<sup>13</sup> By stating the legal provision here you are indicating your knowledge of the law but can then go on to go through the procedure as it relates specifically to Frazer.

The Flexible Working (Procedural Requirements) Regulations 2002 state the procedure to be followed for requests of this nature.<sup>13</sup> Frazer's employer should arrange a meeting with Frazer to discuss the request within 28 days of having received it. Within 14 days after the date of the meeting, the employer must write to Frazer either to agree to a new work pattern and a start date; or to provide clear business grounds as to why the application cannot be accepted. The sort of reasons the employer could give might include additional costs or an effect on ability to meet consumer demand (see ERA 1996, s. 80G).<sup>14</sup> However, if the employer agrees to a contract variation, it must provide a written note of the contract variation agreed to and the date on which it is due to take effect.

<sup>14</sup> This is a little abstract because you have little information.

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<sup>15</sup> You need to clarify that Frazer's mother falls within the definition to show your application of the law clearly.

<sup>16</sup> Frazer would want to know if he is in any way protected if his employer does discriminate against him, you should still mention it.

<sup>17</sup> Conclude your advice for Frazer by telling him specifically what you think he should do.

Under section 57A of ERA 1996, which relates to emergency time off to care for dependants, 'dependants' are defined as: the spouse or partner; child; parent; someone living with the employee as part of his/her family and others who reasonably rely on the employee for help in an emergency may also qualify. Under section 57A there is therefore little doubt that Frazer could take time off to deal with an emergency relating to his mother.<sup>15</sup>

It is also important to note that if Frazer is discriminated against at work because of his mother's disability, he is afforded some protection<sup>16</sup> following the case of **Coleman v Attridge Law** [2008] All ER (D) 245 (Jul), ECJ, which confirmed that discrimination by association is covered by disability discrimination legislation. Therefore, if flexible working requests are granted to others but not to Frazer he may, depending on the circumstances and whether his mother is actually classed as disabled, have a claim under the Equality Act 2010.

In conclusion, therefore, Frazer has the right to request flexible working and the employer must seriously consider the request; and if there are economic or business related reasons as to why the employer considers the request to be problematic for the business, it can legitimately be refused. However, this should not stop Frazer from making the request. If it is refused, Frazer must wait 12 months before he can make such a request again.<sup>17</sup>



### Make your answer stand out

- You could expand your discussion on whether Frazer's mother is a dependant or not and add more detail in relation to time off for emergencies.
- You could draw on some of the academic debate around work–life balance for Janina and flexible working and caring for Frazer. Check what you have covered in your lectures.
- You could refer more directly to the exact legal provisions in relation to your advice to Janina.
- Useful arguments are put forward in J. Kodz *et al* (2002) *Work–Life Balance: Beyond Rhetoric* (Report 384, Brighton: Institute for Employment Studies) or S. Dex and F. Sheibl, 'Should We Have More Family Friendly Policies?' (1998) 16(5) *European Management Journal* 586.



### Don't be tempted to . . .

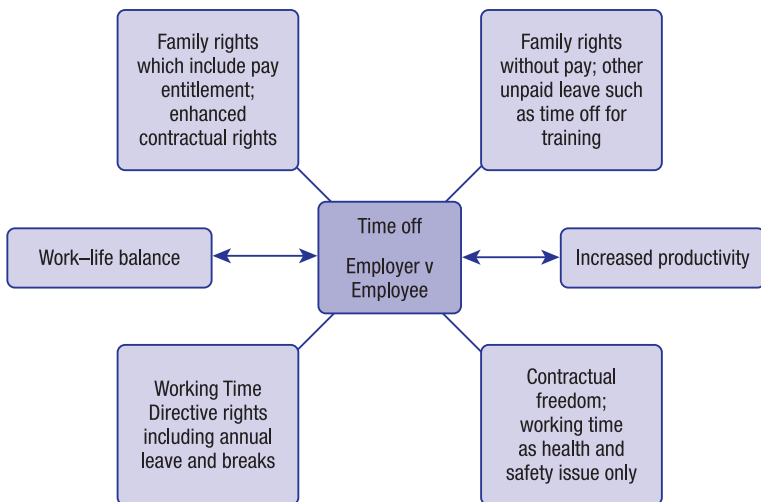
- Just cite the legal provisions and then jump straight to a conclusion without discussing how the law applies to the facts.
- Cover in detail maternity leave provisions – from the question you can presume that Janina is aware of her rights in this area as you are told she is on maternity leave.
- Cite lots of cases; pick a few to illustrate your points.
- Ignore time off to care for dependants or possible discrimination issues. While not central in this case, they are important provisions.



## Question 4

Does the law achieve a fair balance between the needs of employers for work and the needs of employees for time off?

### Diagram plan



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