A right to time off work to undergo ART treatments

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Chapter 5: A right to time off work to undergo ART treatments

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Abstract

This chapter proposes a right to time off work to undergo ART treatments. Comparisons are first drawn with work-family rights in the UK to determine whether any could either extend to those undergoing treatment or provide a framework for new rights to be introduced. Lessons are then learned from the US experience of the right to medical leave in the Family and Medical Leave Act 1993. Two options are considered: namely a specific right to paid time off work to undergo ART treatments or a more general right to flexible, paid medical leave. A right for partners to accompany a woman undergoing treatment is also recommended. The challenges of undergoing treatment and the decisions of many to keep this private are acknowledged, suggesting that the right to medical leave may be more realistic in practice since it enables those undergoing treatment to do so, while valuing their rights to privacy. However, this is presented as the starting point in the process of recognising those undergoing ART treatments within the legal framework, with the possibility of more specific rights envisaged for the future.

Introduction

In this final chapter it is argued that the current limitations of UK equality law protection are only one facet of the problem facing those undergoing ART treatments, and that specific employment rights are also necessary. In particular, the absence of a specific right to time off work enabling employees to undergo ART treatments leaves them vulnerable to dismissal and/or less favourable treatment.[1] This is particularly the case if a reinterpretation of the scope of equality law cannot be achieved but is equally important alongside this. The gaps in the current employment law framework concerning rights to time off work are examined first. This shows that while those undergoing ART treatments are excluded from many of these rights, there are already frameworks in place that could either be extended to include those undergoing ART treatments or used as a model to develop new rights. Comparisons are again drawn with the experience in the US and the right to medical leave under the Family and Medical Leave Act 1993 (FMLA).[2] While the FMLA does not necessarily offer a right to leave for those involved in ART treatments in the US,[3] the legal framework is used as a model which can be modified in the UK context. Drawing from this, two alternatives are considered, namely: a specific right to paid time off work to undergo ART treatments and a more general right to flexible, paid

[1] As was argued in *Sahota v The Home Office* [2010] 2 CMLR 29, [3].
[2] Public Law 103-3.
[3] Katie Cushing, 'Facing Reality: The Pregnancy Discrimination Act Falls Short for Women Undergoing Infertility Treatment' [2010] 40 Seton Hall Law Review 1697, 1725-1726.

medical leave. Given the challenges of undergoing treatment and the desire of many to keep this private, it is acknowledged that the right to medical leave may be more realistic in practice. However, more specific rights would be preferable to recognise the increasing normalisation of treatment and reduce the stigma and burdens many of those undergoing treatment face. Consequently, the possibility of more specific rights is envisaged for the future.

Combining work and ART treatment: without a legal framework

The cases involving those undergoing ART treatments have highlighted the vulnerability of the employment security of those undergoing treatment because of the lack of legal framework enabling them to combine treatment with work. While individuals have made use of statutory and/or employer rights to sick leave and pay, where it is provided, the cases discussed previously underscored that these frameworks have proven insufficient on their own. In the UK context, guidance from both the EHRC and ACAS reinforce that there is no clear legal framework here.[4] While employers are encouraged to act sympathetically to employees engaged in treatment,[5] employer responses are varied in practice,[6] leaving those undergoing treatment without any clear guidance on how treatment may impact on their employment security. There are several rights that either do or could be extended to those undergoing ART treatments. These include: the right to statutory sick pay (SSP); the right to request flexible working; and rights to time off during the ante-natal period.

4.1.1 Statutory sick pay

The right to SSP does not afford employees with a specific right to time off work to attend appointments and/or undergo treatment. Instead the right is framed as a right to wage replacement while the employee is unable to work because of a verified medical reason. Under the Social Security Contributions and Benefits Act 1992 (SSCBA), s.151(4) limits the instances when SSP is paid in respect of a day of incapacity for work, meaning that they are unable to do reasonably expected work because of illness or disablement. While it is entirely possible to conceptualise infertility and/or undergoing ART treatment as a physical disablement, as argued in chapter three, the requirement that it render the individual incapable of doing the work they are contracted to do could be more difficult to satisfy. When the individual is undergoing specific treatments, it is more likely that this could be satisfied, but other appointments may not be as easily included within this definition. The application of SSP is also

[4] Equality and Human Rights Commission (EHRC), *Equality Act 2010: Employment Statutory Code of Practice* (EHRC, 2011) 8.44 and 17.28-17.29; ACAS (Advice, Conciliation and Arbitration Service), Employees' rights during IVF treatment <https://www.acas.org.uk/index.aspx?articleid=5457> accessed 30 July 2019.
[5] *Ibid*.
[6] Nicola Payne, Susan Seenan and Olga van den Akker, 'Experiences and psychological distress of fertility treatment and employment' [2019] 40(2) Journal of Psychosomatic Obstetrics & Gynecology 156, 159-160.

limited in practice because it requires a minimum period of 4 consecutive days of incapacity before it is engaged.[7] Given that the treatment necessitating absence from work often occurs over a discontinuous but concentrated period it is unlikely that it will always satisfy the requirement of consecutive days of incapacity required here. It must also fall within a period of entitlement, which begins when the period of incapacity begins and ends: when that period ends; when the entitlement to SSP ends; when the contract ends; or if in the case of a pregnant employee, when the disqualifying period begins.[8] However, if there are two periods of incapacity for the same reason, within an eight-week period, this will be treated as a single period of incapacity,[9] meaning that there is no requirement for an additional three-day waiting period. This could be useful for those undergoing treatments, if the first period of incapacity met the requirements. It must also be a qualifying day, meaning a day in which they are required to work,[10] and they must earn more than the lower earnings limit.[11] The maximum amount of SSP is 28 weeks' pay in any 3-year period,[12] which is capped at the statutory amount currently £94.25.[13] The maximum period of leave may be challenging for those undergoing multiple cycles of treatment, particularly alongside ordinary sickness absences.

While these provisions allow for payments to be made while an employee is absent from work, they provide no right to time off work and no protections against detriments and/or dismissal while doing so. Consequently, an individual remains vulnerable to dismissal for absences from work as a potentially fair reason for dismissal under the Employment Rights Act 1996 (ERA). Periods of absence could be used to justify dismissal on the grounds of capability, relating to ill health, or conduct,[14] which is particularly likely where there is a persistent level of short-term absences from work, often with little notice, as would be the case for those undergoing ART treatments. However, an employer must still consider the employee's situation and reasons for absence as well as provide warnings, as appropriate, that continued absences could result in dismissal.[15] Nevertheless, the lack of specific rights to time off work to undergo treatment leaves employees vulnerable to dismissal, and/or having to choose to forgo ART treatments, because of the employer's application of their absence management policies.

[7] SSCBA, s.152(2) and s.155(1).
[8] *Ibid*, s.153(1)-(2).
[9] *Ibid*, s.152(3).
[10] *Ibid*, s.154.
[11] *Ibid*, sch.11, para.2 and s.5(1)(a).
[12] *Ibid*, s.155(4).
[13] *Ibid*, s.157.
[14] *Ibid*, s.98(2)(a)-(b).
[15] See further: Astra Emir, *Selwyn's Law of Employment* (20th edn, OUP 2018) paras 17.103-17.113.

The right to request flexible working

The right to request flexible working offers a potential framework that could enable those undergoing ART treatments to combine treatment while remaining in work. This right extends to all employees with 26 weeks continuity of employment.[16] Previously this was limited to persons with caring responsibilities, but is no longer restricted to certain groups now extending to all employees.[17] This enables an employee to request a change in their hours, time and/or place of work.[18] Changes made are permanent, although the statute requires that the employee 'specify the changes applied for' when making their application, which would appear to allow, or at least not prevent, changes of limited duration being applied for in the original request.[19] This could be useful for those undergoing ART treatment as it would, in principle, enable them to modify their working arrangements to allow them to undergo a course of treatment.

However, this right is only a right to request flexible working and not a right to change working patterns and is consequently a 'weak' right in practice.[20] The burdens on the employee making the request are high. They must specify: that it is such a request; the changes sought and when they would come into effect; and identify the effect it would have on the employer and how that could be dealt with.[21] The employer, in contrast, has only an obligation to 'deal with the application in a reasonable manner' and to inform the employee of their decision.[22] There are no requirements for the decision to be reasonable and no recourse to challenge the reasonableness of the decision itself.[23] Although, when first enacted Anderson suggested that the requirement to put the reasons for refusal in writing could be useful for employees pursuing claims on other grounds, e.g. discrimination.[24] Nevertheless, the employer can justify their refusal of the request on numerous grounds,[25] making it easy for them to deny requests in practice. If they do refuse, the employee will have to wait another year before making a new request as only one can be made in a one-year period.[26]

[16] Flexible Working Regulations 2014, SI2014/1398, Reg.3.
[17] Children and Families Act 2014, s.131.
[18] ERA, s.80F(1).
[19] *Ibid*, s.80F(2)(b).
[20] Grace James, 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' [2006] 35(3) ILJ 272, 277.
[21] ERA, s.80F(2).
[22] *Ibid*, s.80G(4)(1)(a)-(aa).
[23] *Ibid*, s.80H. Grace James, 'Mothers and Fathers as Parents and Workers; Family Friendly Employment Policies in an Era of Shifting Identities' [2009] 31(3) JSWFL 271, 278.
[24] Lucy Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents' [2003] 32(1) ILJ 37, 41.
[25] ERA, s.80G(4)(1)(b).
[26] *Ibid*, s.80F(4).

While requesting a change in working arrangement may be beneficial for those undergoing ART treatments during the treatment process, this is unlikely to require a permanent change in working arrangements. Even if an employer were to accept a temporary change in working arrangements, given the unpredictability of success rates for treatment this may be insufficient. In addition, given the specificity required in making such a request in the first instance,[27] the changes made may be not be sufficiently flexible to respond to the, at times, unpredictable requirements of treatment. Furthermore, the lack of guarantees that requests will be granted as well as the acceptable timeframes in which decisions should be made,[28] means that this right in practice offers little support for those undergoing ART treatments to re-arrange their work to accommodate treatment.

Rights to time off during the ante-natal period

There are several rights to time off during the ante-natal or pre-placement for adoption period that could be extended to include those undergoing ART treatments. These include: the right to paid time off for ante-natal care for the pregnant employee;[29] the unpaid right of a partner of a pregnant woman and of commissioning parents in surrogacy situations, to accompany the pregnant woman when attending two ante-natal appointments;[30] and the rights of adopting parents to attend either five paid or two unpaid pre-placement meetings.[31] While there are various limitations to these rights themselves, particularly given the limited number of appointments and lack of paid leave for 'secondary' parents,[32] some lessons can be learned for those undergoing ART treatments. Also notable is that employees utilising these rights are protected by the right not to suffer a detriment and protection against dismissal if the reason, or principle reason, is because they exercised any of these rights.[33] This ensures that not only can they access these rights, but they are protected while doing so. Any rights extended to those undergoing ART treatments should also include these protections. The potential of these rights, and the underpinning legal frameworks, to extend to those undergoing ART treatments and their partners are considered in turn.

An analogous right to time off work to undergo ART treatments could be created mirroring the framework of the right to paid time off work to attend ante-natal appointments. This right is not limited by any continuity of employment requirements, nor is it limited to a specific length of time per

[27] *Hussain v Consumer Credit Counselling*, ET Case No.1804305/04.
[28] Within 3 months or longer if both agree: ERA, s.80G(1B).
[29] *Ibid*, ss.55-57.
[30] *Ibid*, ss.57ZE-57ZF.
[31] *Ibid*, ss.57ZE(7)(e)-(f).
[32] Michelle Weldon-Johns, 'From modern workplaces to modern families – re-envisioning the work–family conflict' [2015] 37(4) JSWFL 395, 405-406.
[33] ERA, s.47C and s.99.

appointment. The only limitations are that the employee is pregnant and that she has been advised to attend such appointments by a medical practitioner, registered midwife or registered nurse.[34] Other than for the first appointment, the employer can request evidence of the employee's pregnancy and of appointments scheduled.[35] A similar right for those undergoing ART treatments would recognise that such employees require comparable access to medical appointments and/or treatment, and a corresponding right to paid time off to facilitate this. Such a right could be framed in the same way as the right to ante-natal care, with employers having the right to request evidence of undergoing treatment and of appointments scheduled in the same way, as well as having not being able to refuse access to such treatment. Such a right offers the ideal response to the current gap in the legal framework, because it would signify that this experience is valued and would facilitate its normalisation. While recent research undertaken by Payne et al shows that most people undergoing treatment do disclose this to their employer in order to gain time off work, many would still prefer not to. The reasons given include: privacy; not understanding; negative career impact, including the tensions between work and undergoing treatment; stigma; negative attitudes; confidences being breached and not wanting special treatment.[36] The lack of a legal framework and consequent diversity in employer's responses was also a factor.[37] While this research indicates that specific employment rights would be beneficial here, it also underscores that this may be challenging for those who do not want to disclose, particularly in the absence of overarching equality law protections. Consequently, a similar framework could be used to underpin an equivalent general right to leave for those undergoing treatment, discussed further below.

A similar right for a partner to take time off to accompany a woman undergoing ART treatments to that available to partners of pregnant women would also be beneficial here. However, the right to unpaid time off to accompany a pregnant woman to two ante-natal appointments of a maximum of 6.5 hours each is insufficient for pregnancy,[38] let alone for those undergoing ART treatments. A more useful framework is that provided for adoptive parents, where one parent is entitled to attend five paid pre-placement meetings,[39] although the other is only entitled to unpaid time off to attend two such appointments.[40] Focusing on the former right, the employee is entitled to attend these appointment subject to providing the employer with evidence, if requested, of the appointment and

[34] ERA, s.55(1).
[35] *Ibid*, ss.55(2)-(3).
[36] Payne, Seenan and van den Akker (n.5), 160-163.
[37] *Ibid*, 156-157 and 159.
[38] ERA, ss.57ZE(2)-(3); Weldon-Johns (n.32), 405-406.
[39] *Ibid*, ss.57ZJ(4)-(5) and s.57ZK.
[40] *Ibid*, s.57ZL.

that the employee has elected to exercise this right where they are one of two joint adopters.[41] While these are also limited to 6.5 hours off per appointment,[42] they otherwise provide enhanced rights in comparison with partners and commissioning parents. While this is an attempt to mirror the framework for pregnant employees, it nevertheless fails to adequately reflect the position of alternative family forms.[43] However, it does offer a useful starting point in the developing a framework for the partners of those undergoing ART treatments. While it also may be unnecessary for the partner to accompany the woman to all appointments, a more broadly defined right to attend a greater number of appointments, particularly those during which treatment will be carried out, would be welcome. The position of commissioning parents in surrogacy should not be forgotten here. While certain rights have been extended to them, as discussed in chapter two, these focus on the post-conception period and similarly ignore their experiences in their journey to parenthood which begin much earlier and may also involve them personally undergoing ART treatments. Consequently, the rights proposed here would similarly extend to them, including enabling them to attend ART appointments with the surrogate. While it would also be preferable to frame this as a right to accompany someone undergoing ART treatments, similar concerns raised above are equally applicable here. Nevertheless, this framework also offers a useful starting point to propose an equivalent right to accompany a someone undergoing treatment, discussed further below.

This discussion of current UK work-family rights underscores the limitations of the existing frameworks, but also the potential for rights to be extended to those undergoing ART treatments, their partners and commissioning parents. This discussion has also highlighted the potential challenges of opting for specific rights for those undergoing ART treatments with requirements of disclosure, particularly without an overarching equality law framework extending protection to them throughout the treatment process. The following section examines the possibility of a more general right to medical leave to address this gap, with reference to the experience in the US.

A right to medical leave

An alternative to a specific rights approach is instead enacting a more general right to medical leave. This could address some of the concerns regarding disclosure and could be related to the rights already available under the SSP framework. However, proposing a right to medical leave is also problematic because it returns to the comparison and assimilation with sickness, which pregnancy discrimination has strived to move away from. However, unlike pregnancy, those undergoing ART treatments are

[41] ERA, ss.57ZJ(8)-(9).
[42] *Ibid*, s.57ZJ(6).
[43] Weldon-Johns (n.32), 405-406.

engaged in medical treatments and procedures. In these respects, the need to accommodate time off to undergo treatment and attend appointments can be conceptualised as a right to time off for medical leave. The experience of the US is again relevant here and the rights to leave contained within the FMLA are considered next to assess what lessons can be learned from them.

The US Family and Medical Leave Act 1993

The FMLA contains gender-neutral rights to leave for either family or medical purposes. The right does not automatically include those undergoing ART treatments, although its potential to do so is considered below. The rights are only available to those employees who satisfy certain fairly restrictive conditions. In the first instance, the employee must have 12 months continuous service with their current employer and have worked a minimum of 1250 hours in the previous 12 months period.[44] This requirement restricts the rights to US citizens, with an established labour market attachment and those who work full-time or long part-time working hours. Such a requirement excludes many employees, particularly those in atypical or part-time work. There are also specific exceptions to these provisions for certain Federal officers or employees, and employers engaging less than 50 employees at a particular worksite and within a 75-mile radius.[45] Consequently, many employees fall outside of the scope of the Act in practice. There are also certain restrictions that may prevent employees using leave. While employees have the right to return to work in their previous or an equivalent position if they do so before or at the end of the maximum leave period,[46] there is a specific exception for those within the highest paid 10% of the company.[47] This exception applies when the return of such an employee would result in severe economic loss to the employer.[48] This may further reduce the number of employees who request leave under the Act in practice.

For those who do qualify, they are entitled to a total of 12 normal work weeks of unpaid leave, for either family or medical purposes, during any 12-month period.[49] There are three categories of rights they can utilise: two rights to family care leave; the right to medical leave; and a right relating to having a family member in the armed forces.[50] The family care situations encompass two distinct circumstances: the care of children on entering the family, and the care of family members who are

[44] FMLA, § 101(2)(A).
[45] *Ibid*, § 101(2)(B).
[46] *Ibid*, §104(a)(1). Further defined: 29 CFR 825, (Code of Federal Regulations, The Family and Medical Leave Act), (29 CFR 825) §825.214-§825.215.
[47] *Ibid*, §104(b)(2). Further defined: 29 CFR 825, §825.217.
[48] *Ibid*, §104(b)(1). Further defined in: 29 CFR 825, §825.218.
[49] *Ibid*, §§ 102(a)(1) and (c).
[50] *Ibid*, § 102(a)(1)

ill. For present purposes, the most relevant is the right to medical leave, which can be used because of a serious health condition which prevents them from working. [51]

For those undergoing ART treatments in the US, the question of whether they would be entitled to leave under the FMLA turns on whether this is a serious health condition. This is defined as: 'illnesses, injuries, impairments, or physical or mental conditions which involve inpatient care' or 'continuing treatment by a health care provider.' [52] Continuing treatment is further defined as a period of incapacity of more than three consecutive days and any related treatment or period of incapacity that also includes: two or more treatments within 30 days of the first day of incapacity; or at least one treatment with related course of treatment under the supervision of the health care provider.[53] Infertility and/or undergoing ART treatment can relate to a physical impairment or condition that at times requires inpatient care and/or continuing treatment. This will often include two or more treatments within a 30-day period and/or a course of treatment following an initial procedure. Given that infertility has been recognised within the scope of the ADA it is likely that it would fall within the definition of serious health condition here too.[54] However, the requirement for more than three consecutive days incapacity in the first instance and whether all related appointments and the impact of treatment are included is unclear.

This issue was considered, in part, by the US Court of Appeals, 6th Circuit in *Culpepper v BlueCross BlueShield of Tennessee Inc*.[55] In this case the plaintiff had 13 days of unexcused absence on her record that was contrary to her employer's Incident Report Policy, which permitted dismissal after more than 5 such absences. Culpepper argued that 11 of these were related to undergoing ART treatments and had medical evidence that supported two separate periods of three-day absences relating to treatment, which the employer accepted were covered by the FMLA. Notably, the previous District Court observed that the Act requires more than three days absence in order to amount to a serious health condition but did not consider this further as the employer had waived their right to challenge it by granting leave.[56] The Court of Appeal upheld the District Court decision to grant summary judgment to the employer because there was insufficient medical evidence to support her claim that she was incapable of working, per the requirements of the FMLA, during the other absences.[57] This

[51] FMLA, § 102(a)(1)(D).
[52] *Ibid*, §101(11). Further defined: 29 CFR 825, §825.113-§825.115.
[53] 29 CFR 825, §825.102 and §825.115.
[54] Kerry Van der Burch, 'Courts' Struggle with Infertility: The Impact of *Hall v. Nalco* on Infertility-Related Employment Discrimination' [2010] 81 University of Colorado L Rev 545, 575-577.
[55] No. 08-5204.
[56] *Culpepper v BlueCross BlueShield of Tennessee Inc* No. 1:07-CV-48, fn1.
[57] *Culpepper* (n.55), 9-11.

decision underscores the difficulty of each period of absence meeting the requisite standard of incapability and importance of unequivocal medical evidence to support every absence, even when parts of the period may be included within the scope of the FMLA. While this appears to suggest that undergoing ART treatments can fall within the scope of the FMLA, given that it was not contested here, it is questionable whether anything can be learned from the decision with respect to the rights of those undergoing ART treatments.

While the decision does not directly endorse the employer's decision to accept undergoing IVF treatment within the scope of the FMLA, there are two possible readings of it. Optimistically, the decision can be viewed as supporting the possibility that undergoing ART treatments is within the scope of serious health conditions if sufficient medical evidence is produced to support incapability for work while undergoing treatment. This was the case here with respect to the excused periods. Medical evidence was provided by her doctor who classified undergoing IVF treatment as a serious health condition for the purposes of the FMLA.[58] More realistically, it reinforces the challenges of satisfying this definition in practice. The treatment, and/or its effects, must last at for at least four consecutive days for the FMLA to apply. Thus, meaning that initial investigations, one-off procedures and treatments are unlikely to satisfy this definition. This mirrors the problem in the UK context with the availability of SSP. On balance, it probably reflects a mid-point of view. Some treatments will fall within the scope of the FMLA, but not all,[59] again mirroring the patch-work of rights available in the UK context. With that in mind, what lessons can be learned from the US experience?

There are several other aspects of the US experience that can be drawn from in developing an equivalent right in the UK. For instance, the right to medical leave can be taken on an intermittent basis or on a reduced leave schedule, where is it deemed medically necessary.[60] This enables the qualifying employee to either take separate periods of leave relating to the same condition, or to reduce their working schedule, usually in terms of days or hours, for a specific period.[61] There has to be a medical reason as to why leave should be taken in this way,[62] and the employee must make reasonable efforts to ensure that any treatment scheduled does not unduly interfere with the employer's operations.[63] The overall maximum duration of leave remains 12 normal work weeks, so

[58] *Culpepper* (n.55), 2-3.
[59] Cushing (n.3), 1725-1726.
[60] FMLA, §102(b)(1).
[61] 29 CFR 825, §825.202.
[62] *Ibid*.
[63] *Ibid*, §825.203.

employees do not lose any entitlements by using leave in this way.[64] If those undergoing ART treatments were accepted within the scope of the legislation, this flexibility would be beneficial because often treatments require numerous appointments and absences over a concentrated, but not necessarily continuous period. Given that the required flexibility would be directly related to undergoing treatment, it is likely to be considered medically necessary by their health care provider and so should meet the qualifying criteria here. This reinforces the importance of the possibility of flexible working arrangements that genuinely enable employees to combine work with other life commitments.

The availability of flexibility in notification requirements would also be beneficial for those undergoing ART treatments. Under the FMLA if the requirement for leave is foreseeable, the employee must make reasonable efforts to schedule treatment in such in a way that it does not unduly interfere with the employer's operations and provide the employer with at least 30 days' notice, or as soon as is practicable if treatment must begin sooner, of their intention to undergo treatment.[65] For those undergoing ART treatments, it may be challenging to meet the 30 day requirement because of the sometimes unpredictable and time-sensitive requirements for treatment. While notice should then be given as soon as is practicable, this could result in the employee taking leave before they know if it is covered by the Act, leaving them vulnerable to disciplinary action if it is not.[66] While a degree of flexibility is beneficial here, it is most effective when it enables individuals to exercise rights in practice. Consequently, an expediated decision-making process in those instances would also be useful.

The US experience also highlights that the most limited aspect of this right is the absence of a requirement for paid leave.[67] It is possible for an employer to provide paid leave or for an employee to decide, or an employer to require, that the leave be substituted with accrued leave which has a paid element.[68] However, this often means foregoing another right to paid leave, and many workers will only be entitled to unpaid leave. This reinforces the importance of creating a stand-alone right to paid leave in the UK context, and/or linking this with existing rights to SSP.

While the right to medical leave in the US has many shortcomings and may not actually include those undergoing ART treatments within its scope, it nevertheless provides a useful framework for

[64] FMLA, §102(b)(1).
[65] *Ibid*, §102(e)(2).
[66] As seen in *Culpepper* (n.55).
[67] FMLA, §102(c).
[68] *Ibid*, §§ 102(d). See further: 29 CFR 825, §825.207.

developing a similar right in the UK. It reinforces the importance of creating a right to leave, which clearly includes those undergoing ART treatments within its scope. The qualifying criteria should also not be so onerous as to exclude most employees from its scope. There should be flexibility in the notice requirements, and in how the rights can be utilised in practice. It also should be a right to paid leave, and there should be sufficient employment protection provisions both during leave and on returning to work to not only encourage people to use but also protect them while doing so.

A right to time off work to undergo ART treatments: Possibilities for the UK

The foregoing has shown the importance of creating a clear right to leave that will enable those undergoing ART treatments to take paid time off work to do so, while also ensuring their privacy regarding undergoing treatment. A right to medical leave offers the most suitable solution here. The experiences of the US coupled with the existing frameworks in the UK indicate that a general right to medical leave can offer some potential here. This right could be expressed as: a right to time off work to attend medical appointments and/or undergo treatment relating to a serious health condition. Such treatment may include: investigatory appointments and/or procedures, outpatient and/or inpatient treatments. This would mirror the US framework to some extent. It is acknowledged that the reference to a 'serious health condition' could be problematic, because adopting a narrow interpretation here could exclude those undergoing ART treatments. However, in *Culpepper* the exclusion of absences from the FMLA was largely related to the requirement for a minimum of more than three consecutive days incapacity, rather than the seriousness of the health condition itself.[69] Furthermore, it is likely to be preferable, from a policy point of view, to limit those entitled to this right so that it does not include all routine appointments with health care providers. Consequently, the requirement for treatment to be related to a serious health condition would ensure that it was not overbroad and other steps could be taken to ensure those undergoing ART treatments are included. This could be achieved by including those undergoing ART treatments, for whatever reason, within the scope of the definition of serious health conditions in the legislation.

Given that the rights to attend and accompany those attending ante-natal appointments contain no continuity of employment requirements, the right to medical leave should similarly be a day-one right. This would ensure that all employees are entitled to time off for such purposes. Qualifying conditions shoule relate solely to the production of relevant medical evidence of the dates and times of appointments and/or treatments, as well as confirmation by the medical practitioner that they are related to a serious health condition, as defined in the legislation. This could be framed in such a way

[69] Although this was not directly examined.

that the specific health condition does not need to be identified, to ensure that employee's desire not to disclose would not be compromised but would still require confirmation of such a condition by a prescribed medical practitioner.

The right should be framed as a right to paid leave. While it would be preferable to also frame this as a day-one right, other rights to leave in the UK separate the entitlement to leave from that to pay. A similar approach would be consistent with that. As a minimum this could replicate the right to SSP, and its qualifying conditions regarding pay. This would ensure consistency and would also enhance those rights by ensuring that individuals requiring time off to undergo medical treatment and/or attend medical appointments have the right to time off work in order to do so. However, if it were to be intrinsically linked to the right to SSP then individuals would not be covered for one-off appointments, at least under the current legal framework. Given that the requirement for minimum days of incapacity in the first instance has been a potential barrier in the US context, this requirement should not be replicated in UK legislation. Instead, this could be amended to allow payments to be made to those undergoing such treatment, with these periods being deducted from the overall SSP benefit entitlement.

If the right is framed as a specific right to medical leave that can be used in any given 12-month period then it should be long enough to facilitate undergoing a course of treatment, and flexible enough to recognise that not all courses of treatment are continuous and require consecutive periods of absence. The right to 12 weeks medical leave in the US offers a useful comparison here. It is longer than the 28-week benefit entitlement to SSP, which extends over 3 years, but is in any event distinguishable from it because that applies more generally to incapacity for work and not just attending medical appointments and/or undergoing treatment. This again underscores that while there is a potential connection between these rights, there are clear distinctions between the purposes of both. However, the right to medical leave could be mapped onto SSP if the overall period was extended. This could reduce the potential burdens on business in implementing this right in practice.

The possibility for flexibility in the utilisation of the leave, as is possible in the US, would also be beneficial here. This could facilitate a range of flexible working options including: continuous periods of absence; single days; partial days; and reduced daily working hours. Specifying the right in terms of days leave or hours could further support this as opposed to focusing on weekly periods, the problems

with which were evident in the context of the right to unpaid parental leave.[70] While this flexibility is unlikely to be welcomed by employers, a requirement that the medical practitioner treating the employee recommend and/or support the employees use of leave in this way to facilitate treatment should prevent misuse in practice. Framing the right in this way would help address some of the inflexibility concerns raised above with using the right to request flexible working to accommodate treatment, while enabling employees to create flexibility on a temporary basis.

Alongside the right to time off work to attend medical appointments, there should also be a day-one right to paid time off work to accompany someone attending such appointments. This would again be akin to the existing framework relating to ante-natal and adoption placement meetings and could be limited to a certain number or certain kind of appointments, such as when they are undergoing significant forms of treatment, where additional care and/or support may be beneficial and/or required. Again, employers could request a declaration of the appointment information and that the employee is in a recognised relationship with the person undergoing treatment, in the same way as is currently required for those attending ante-natal appointments.

To strengthen these rights, they should be accompanied with both the right not to suffer a detriment and the right to protection against dismissal for utilising, proposing to use or having exercised them. The framework for such protections is also present in the ERA in relation to other rights to time off work and could again be mirrored here. This is even more important if the overarching equality law framework has not been extended to include those undergoing ART treatments.

The foregoing shows that a right to leave that would enable those undergoing ART treatments to take time off work to attend such appointments and/or undergo treatments is both conceptually and practically consistent with the current UK legal framework. Whether this is expressed as a specific right to time off to undergo ART treatments, or a more general right to medical leave, the existing rights around pregnancy and the pre-natal period, as well as right to SSP, offer useful starting points to extend rights in a meaningful way. Drawing from the lessons of the US experience, a flexible, paid, day-one right to leave, that includes employment protection, and that extends not only to those undergoing treatment, but also in some instances their partners and commissioning parents, would ensure that those engaged in treatment can do so without having the additional burden of job insecurity. This is all the more important if a reinterpretation of the boundaries of the equality law frameworks cannot be achieved but remains so even if they are.

[70] *South Central Trains Ltd v Rodway* [2005] ICR 1162.

Conclusions

The right to time off work to undergo ART treatments is integral to the development of a legal framework that both recognises and values the experiences of those engaged in ART treatments. While a specific right aimed solely at those undergoing treatment is preferable, the realities of the difficulties in exercising such a right in practice are acknowledged. These challenges are particularly marked in the absence of an overarching equality law framework that affords protection to those undergoing ART treatments. Consequently, the more general right to medical leave presented here offers a more meaningful solution in the meantime. Drawing from the experience in the US, this analysis has shown that it is possible to expand the current UK work-family rights framework to include such a right. This could easily mirror the other rights that enable employees to take time off work for reasons relating to care and/or impending parenthood. The extension of these rights to either specifically those undergoing ART treatments or in the form of a more general, but still focused, right to medical leave would be both practically and conceptually consistent with the existing frameworks. This would be an important step forward in ensuring that those undergoing ART treatments are both recognised and protected within the UK legal framework, as they attempt to combine treatment while retaining their labour market position. Indeed, it may be the first step necessary to facilitate the broader reinterpretation of the boundaries of equality law.