# Pregnant then screwed? *R (On the application of Motherhood Plan & Anor) v HM Treasury & Anor* [2021] EWHC 309 (Admin)

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## Introduction

1. Shortly after the start of the pandemic, the Chancellor introduced the Self-Employed Income Support Scheme ("SEISS" or "the Scheme") as a way of supporting the self-employed who were to lose income. In addition to other conditions, the primary approach to assessing payments under the Scheme was using an average trading profits of an individual's business over the preceding three full tax years.

2. Two Claimants brought a challenge to the Scheme. The First Claimant is a charity which aims to end discrimination faced by pregnant women and mothers. It is also known as 'Pregnant then Screwed'. The Second Claimant is a self-employed energy analyst and mother of three, who has taken two periods of maternity leave for 39 weeks in the past three years. As a result, her business income was reduced significantly in these years.

3. The Claimants challenged the Scheme on two grounds:

   (a) That it unlawfully discriminates against self-employed women who have taken a period of leave relating to maternity or pregnancy in the three preceding tax years, contrary to Article 14 (protection from discrimination) read with Article 1 of Protocol 1 (the right to protection of property) of the European Convention on Human Rights ('ECHR'), either:

      i. As "conventional" indirect discrimination under the ECHR, or

      ii. As discrimination of the *Thlimmenos* type.

   (b) The Defendant breached the Public Sector Equality Duty in section 149 of the Equality Act 2010 ('EqA').

## Submissions

4. The Claimants' arguments on discrimination were, in summary: (i) Pregnant women and recent mothers have a unique special status and cannot be compared with those who cannot work for other reasons; (ii) that payments under the Scheme come within the ambit of Article 1, Protocol 1 for the purposes of Article 14 (relying on *Stec v UK* (2006) 43 EHRR 47); (iii) that the Scheme has a disproportionately prejudicial effect on women who have taken a period of maternity leave in the previous three years as they would receive smaller payments, and is thus indirect discrimination; (iv) in the alternative, the Defendant should have treated women who have taken a period of maternity leave differently from others who benefitted from the Scheme, applying the approach in *Thlimmenos v Greece* (2000) 31 EHRR 15; (v) and that the Scheme was manifestly without reasonable foundation (the test for justification under the ECHR) as it did not take account of the reason why an individual was absent from work for a period of time.

5. On the public sector equality duty (s149 EqA), the Claimants argued that no regard was given initially to the effect of the calculation on women who had been on maternity leave and the subsequent discussion of this effect was ineffectual and insufficient.

6. In response, on discrimination the Defendant argued that the Scheme did not breach Article 14 ECHR in either way it was put: (i) the calculation treated everyone in the same way and was not harder to satisfy by women who had recently taken maternity leave, compared to women or men who had not taken similar leave in the recent past; (ii) on the *Thlimmenos* point, there was no basis for arguing that women who have recently taken maternity leave must be given special assistance; (iii) if there was discrimination, it was justified taking into account the purpose of SEISS, policy delivery, fraud mitigation, the avoidance of perverse effects and the minimisation of cost.

7. Finally, the Defendant argued that the Chancellor did have regard to general equalities considerations and to the specific impact of the Scheme on women who had recently taken maternity leave, and therefore complied with the public sector equality duty.

## Decision (Whipple J)

### *Indirect discrimination*

8. It was common ground that there are four elements to indirect discrimination in the context of Article 14 ECHR (see *R (Stott) v Justice Secretary* [2020] AC 51, per Lady Black JSC) [52]:

(a) The circumstances must fall within the ambit of a Convention right (other than Article 14)

(b) The difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status"

(c) The claimant and the person alleged to have been treated differently must be in analogous situations

(d) There is no objective justification for the treatment

9. There was no dispute that payment under the Scheme fell within the ambit of Article 1, Protocol 1 ECHR. There was also no dispute that women who had taken maternity leave in the last three years share a protected characteristic which qualifies as "other status" for Article 14 purposes [53].

10. The crux of the decision was on the cause of the disadvantage and analogous cases. Relying *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin) (a recent decision which found that the rate at which statutory sick pay ("SSP") was paid as part of measures to support employees under the Coronavirus Job Retention Scheme was not indirect discrimination), Whipple J considered the disadvantage was not caused by the Scheme itself, rather it was a disadvantage flowing from a reduction in a person's income in the past. It was a fact that for self-employed people, absence from work is likely to translate into lower earnings. This could be because of a period of maternity leave or for many other reasons [62].

11. Whipple J also drew assistance from *Barry v Midland Bank* [1999] 1 WLR 1465 as an analogy. In that case it was held that it was not indirect discrimination for the lower final earnings as a part-time employee to be used to calculate a termination payment. Similarly here, the lower average trading profits of a recent mother could be used to calculate the Scheme payments [63]. In this regard, the judge accepted the Defendant's argument that the reasons for lower earnings in past years, in the context of this Scheme with its stated purpose, were not relevant [64].

***'Thlimmenos discrimination'***

12. The argument based on *Thlimmenos*, that women who have recently been on maternity leave are in a unique situation and therefore must be afforded different treatment, was also rejected for two reasons. First, it relied on a unique situation of pregnant women and those that took maternity leave *in the past*. There was no authority to support the proposition that being in a unique or difference situation in the past could be a basis on which to require

different treatment in the present. Second, as with the *Adiatu* point above, the disadvantage identified by the Claimants follows from the fact that they earned less in past years. The Scheme's failure to take account of and rectify this historic disadvantage could not amount to discrimination [65-67].

***Justification***

13. In case she was wrong on the prima facie case of discrimination, Whipple J went onto consider justification. It was agreed that the appropriate test was whether the measure was 'manifestly without reasonable foundation', as it concerned state benefits (*Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545; see also *Stec*) [69-71].

14. The Defendant advanced five justifications. Whipple J noted that the Defendant had a wide margin of appreciation and accepted that, taking the justifications separately or together, the Defendant's decisions were reasonable when taken in context [85]:

    (a) **Purpose:** The purpose of the scheme was to provide support for self-employed people whose businesses were adversely affected by the pandemic. The judge held that it was reasonable to advance that purpose by relying on average trading profits. She did not accept the Claimants' argument that that purpose would have been better achieved by including an adjustment for those self-employed women who had recently been on maternity leave as this would create a new purpose [72-73].

    (b) **Policy delivery:** The judge accepted the Defendant's argument that the adjustment sought by the Claimants would have introduced complexity, delays and costs, and it was reasonable to take the approach it did in circumstances where quick delivery of the Scheme was required [74-77].

    (c) **Risk of fraud:** The Defendant's position was that it needed to find a balance between simplicity and the potential for fraud. The approach taken allowed claims to be verified by refence to data already held by HMRC. The Claimant's suggested alternative (where women self-certified that they had taken a period of maternity leave) was "wide open to fraud". The judge accepted that the balance taken by the Defendant was reasonable [78-80].

    (d) **Perverse effects:** The Defendant argued that there would be perverse effects if the Claimants' approach was adopted, in particular noting that the Claimants had not put forward a suitable, workable alternative. The judge noted that this tied in with the Defendant's desire for simple policy delivery, was a political decision, and was not a matter for lawyers [81-82].

(e) **Value for money:** The Defendant argued that the Claimant's proposal would have created unjustified expenditure. The judge noted again that simplicity was key to the Scheme and that this kept costs down [83-84].

***Public sector equality duty***

15. Whipple J highlighted that this is a procedural duty only and was satisfied that it had been complied with. The general equality implications and the particular position of recent mothers were raised generally in the ministerial submission of 24 March 2020, and expressly in the submissions of 2 April 2020 and 22 April 2020, prior to the Scheme's introduction on 30 April 2020. The purpose of these submissions was to focus on the detailed implementation of the Scheme and the Chancellor could have made any changes he wished to at this stage.

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