



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Episode 8 – Pregnancy loss and work (Part 1): Does the law reflect expected work cultures? with Charlotte Reid and Eleena Misra KC

- Ellie:** Before we jump into today's episode, we wanted to give our listeners a quick content warning. We'll be discussing pregnancy loss, miscarriage and stillbirth and the impact that that can have on someone's physical and mental health, as well as their working lives, which some listeners might find triggering. With that in mind, we'd advise listener discretion as to whether you feel comfortable listening to this episode.
- Ellie:** Hi, and welcome to the Work Couch Podcast. your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the Employment Equality and Engagement team here at RPC, and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today. We hope by the end of the podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way.
- Today, we're discussing pregnancy loss, specifically how those affected are protected at work. For example, what are the rules on time off for those who have suffered a miscarriage as opposed to a stillbirth? What about others who are affected, for example, non-childbearing partners? And is the law fit for purpose? Miscarriage is undoubtedly a really difficult topic of conversation, not least in the context of the workspace. Research indicates that around one in four pregnancies end in miscarriage, so the likelihood is that actually most of us will know someone who's been through miscarriage or pregnancy loss, and many of us, regardless of our gender, will have been affected ourselves. [Progression of understanding means that the right conversations are being had more and more often](#), both in the workspace and outside it. Businesses are now revising their approach to the topic and issuing policies on the same. But the key question, is the government doing the same? Is the law changing to keep up with the inevitable progression of conversation and understanding? And is it changing to reflect expected cultures at work and to create a safe working environment? Well, joining me today to tackle these questions and more are employment law experts Charlotte Reid, who's a senior associate in the employment equality and engagement team here at RPC, and Eleena Misra, King's Counsel at Old Square Chambers and Chair of the Law Reform Committee of the Bar Council. Hi both, thanks so much for joining me today on the Work Couch.
- Charlotte:** Hi, Ellie.
- Eleena:** Hi there.
- Ellie:** Charlotte, before we look at the law, can we just start by highlighting some of those worries that someone who's experienced a miscarriage might have in relation to their work?
- Charlotte:** Absolutely, Ellie. I think the starting point is that, of course, everyone's experience is different. But I think individuals will typically be thinking along the following lines, as well as coping with grief, shock, and often the sort of physical and mental effects of miscarriage. That they'll be thinking, what shall I say to work? How much time can I take off for? When do I need to go back? Will I get paid for any time off? Who do I need to tell? Who's going to find out about it, and will this go on my absence record?
- Ellie:** So lots of stressful things that they've got to think about. And Charlotte, I know that sadly you speak from personal experience and you've really bravely offered to tell us why this topic is particularly important to you. So tell us about that.
- Charlotte:** Absolutely, yes. This topic is important to me for a few reasons, not least my own personal experience. I had a miscarriage when I was 10 weeks pregnant in 2015. I just turned 30 years old at the time. This was my first pregnancy and I hadn't ever really considered the possibility of miscarrying. So when it happened, it was a

terrible shock. I was, of course, absolutely devastated. I sort of realised what was likely to be happening. And then it took a series of quite time-consuming medical appointments just to confirm that I was right. I was experiencing a miscarriage. And then, of course, I had to have treatment. And just as a side note, it's probably worth mentioning that treatments for miscarriage differ. Some people require no treatment. Others need medication. Others need surgery. And some even require both medication and surgery depending on what's happened. But what I can say is that it's an isolating and scary experience. Often, as I said before, there's that element of shock to contend with. And you're sort of thinking you're stuck in a nightmare, but what could possibly make it worse? Well, worry about work for starters.

Ellie: Absolutely. So how did you take that first step of telling your manager and other colleagues? I can imagine that must have been incredibly hard to take that step.

Charlotte: It was really hard. I was actually on a client's secondment at the time. And I do remember being extremely anxious about firstly, what work would think how I was supposed to tell them. And secondly, about jeopardising my relationship with this particular client who, of course, I was supposed to be working closely with. I didn't want to take time off. But I was very fortunate to have a supportive manager, and team, and employer, and the client was absolutely fantastic. So, for me, the right questions were asked, the right support was given, and there was absolutely no expectation to rush back to work before I was ready. I remember that as soon as I sort of disclosed to people, when I felt comfortable, what had happened in my position that I was having or had had a miscarriage, so many people said they'd been in exactly my position. And I think that wall of silence is really unhelpful. But the conversation and sharing, for me at least, made that burden so much lighter. And the other thing I remember is strongly feeling at the time that that sort of so-called 12-week safety period before which you should allegedly not inform people of your pregnancy, that was very, very unhelpful. I decided that was sort of contrived for other people's comfort rather than the person actually experiencing the pregnancy. I decided it was there to keep people silent about miscarriage and pregnancy loss, just so that other people don't have to have the difficult conversation. And in turn, that feeds into unhelpful attitudes and also people just not knowing what to say or what to do or what kind of support to give.

Ellie: Absolutely, I guess that can make the whole experience even more isolating than it has to be. And it's important to bear in mind, isn't it, that partners, although they don't go through the physical effects of pregnancy loss, they often feel a sense of loss and grief as well. And while there's a lack of research on this, a study by University College London in 2014, quite a while ago now, but it found as many as 85% of partners had suffered grief, sadness and shock, with nearly half of them saying it caused sleep problems and it had affected their work. So Charlotte, what was your experience of that aspect?

Charlotte: Yes, I vividly remember my worry for my husband at the time. He was unfortunately not lucky enough to experience support or particular kindness from his then employer. They certainly treated the experience as something his wife was going through rather than something he was personally experiencing as well. For example, I remember he wasn't permitted time off to accompany me to any medical appointments, and I don't think he's actually ever forgotten that. But put it this way, it certainly doesn't help nurture the employee-employer relationship.

Ellie: No, that's really tough. And I'm sure that will resonate with many others too, sadly. But thank you so much for speaking so openly and honestly, I think it really helps put the legal issues into context. So let's turn to the law now. So Charlotte, what are the legal rights and entitlements for those employees who experience a miscarriage or pregnancy loss?

Charlotte: Yes, well, the short answer is there are currently no miscarriage or pregnancy loss specific laws addressing the topic. And that includes time off or pay entitlements for miscarriage. It's possible to sort of cobble together pieces of legislation which give protection, kind of albeit indirectly, to those who are impacted by miscarriage and pregnancy loss. Although for a number of reasons, we say that legislation is probably insufficient.

Ellie: Okay, so just explain to us why is the law as it currently stands insufficient or not fit for purpose?

Charlotte: Yes. So the first thing to know is that all the legal consequences of childbirth, including the right to maternity leave and paternity leave, they all apply where a child is either born or stillborn after 24 weeks of pregnancy or where a child's born alive at any stage of pregnancy, but then sadly dies, which is known as neonatal death. So the starting point is that stillbirth and neonatal death are protected from a certain point in the pregnancy. And certain entitlements stem from that. For example, statutory parental leave, that is not the same for someone who experiences miscarriage.

Ellie: So that's quite a brutal distinction then between those who suffer a stillbirth or neonatal death on the one hand, and those who experience a miscarriage or pregnancy loss on the other hand. And that's really down to the timing of when that loss occurs, Eleena.

Eleena: Yes, that is absolutely right. So, a miscarriage in the first 24 weeks of pregnancies is not classified in law as childbirth, so neither the mother nor her partner has any statutory rights to maternity or paternity leave, and neither do they qualify for parental bereavement leave. Just pausing there for a moment, the law has effectively, I think, struggled to define miscarriage. I don't think it's clear whether it's... pregnancy, bereavement, a health condition, and I think so we've got this arbitrary distinction. And so, there's no law currently specifically dealing with miscarriage, though you can perhaps get time off for miscarriage under certain pregnancy protected leave. And in particular, section 18 of the Equality Act, 2010, provides what's known as a protected period, but that is limited to two weeks after the end of the pregnancy, and there has to be a link with some form of sickness. So, what we have here is a situation in which individuals are effectively being left to fend for themselves. And in these circumstances, the individual has a mix of potentially available options. So for example, annual leave, compassionate leave, if their employer provides it, or unpaid time off. So employees are effectively left to rely on sick leave and or discretionary bereavement leave, or indeed the goodwill of employers. And that might be even harder for someone whose partner has had the miscarriage, but who is very much affected by it. An experience we heard from Charlotte and a not too uncommon attitude from employers, I'm afraid. The situation we've got to is that the law has arguably not caught up with the way in which we as a society view miscarriage and the fact that premature babies born at less than 24 weeks gestation can survive and go on to live and grow up makes it even more stark that we apply this cut-off point to the legal regimes in question. And it's illogical, in my view, that a neonatal death recorded at less than 24 weeks would trigger legal rights, but a miscarriage does not because the law treats the situation as though the miscarried child at whatever age of gestation did not really exist. It also misses the point in terms of the physical, mental and emotional impact that miscarriage can have on the mother and indeed her husband, wife, partner or other non-birthing parent, which should be the anchor point for any legislation in this area. I'm very grateful to Charlotte for sharing her personal experience. She is far from alone. We all know that something like 20 to 25 percent of all pregnancies end in miscarriage and we all know someone, a friend or a relative, certainly I do, who's gone through this. So to me, this is really quite a significant gap in the law.

Ellie: Would the law on pregnancy and maternity discrimination come into play at all here?

Eleena: Well, pregnancy and maternity discrimination protection and sex discrimination protection in law, well, they're really likely to be of cold comfort during a miscarriage itself. They do not in and of themselves provide any direct support, comfort or entitlements on employees. They tend to be what we might describe as the nuclear option. Something has gone very wrong and the employee's then forced to make mention of the fact that they have experienced one of these types of discrimination, probably the last thing they want to do while going through such a thing. So plainly, if someone has a miscarriage, they have been pregnant. And therefore what is known as the protected period I mentioned earlier is triggered for some legal purposes. But what we're talking about is a right to some paid time off and some support, not litigation further down the line, which is not what anyone wants.

Ellie: So there are some real gaps then in the legislation which clearly place many employees in a really difficult place where their recovery could be made all the more problematic. But there are potential changes to the law on the horizon, aren't there?

Eleena: Possibly. Let me come on to the topic of the miscarriage leave bill. So there is currently a private members bill. It was Angela Crawley MP who brought that before parliament. And it proposes three days' paid leave for parents who suffered a miscarriage loss. And that includes miscarriage, ectopic pregnancy or a molar pregnancy before 24 weeks. And you might think that's actually quite a clear and modest objective. Unfortunately, in general terms, unless the government backs a private members bill, for example, the current bill on flexible working, it's likely to be delayed or to flounder, not least because of the very heavy schedule of work for parliament at the moment. But we know that on the 8th of March last year, a House of Commons debate took place to consider paid miscarriage leave and the one in four pregnancies ending in miscarriage figure was mentioned during the debate itself. The following broad points were made during that debate. So employees who are grieving sometimes after multiple miscarriages should not be expected to rely on statutory sick pay, or their employer's flexible working and compassionate leave policies, or indeed to take holiday. Leaving miscarriage provision to the discretion of individual employers leads to inequality. Miscarriage is, as we've discussed today, a personal experience. Some may want to stay at home, others may prefer to continue to work or alternatively may need time off later. And flexible working can sometimes make a difference.

Ellie:	So what's the latest on the bill given as you say there's so much going on at the moment with legislative change?
Eleena:	Well, the first reading took place in the House of Commons on the 6th of July 2022. The second reading was supposed to take place in December of last year and then in March of this year, but it has been delayed again. And somewhat disappointingly, the second reading has now been scheduled to take place on the 24th of November 2023, a day on which the House is not expected to sit. So the bill is not expected to progress. Now something may change, but at present we are in a position of stasis with this bill and that leaves us with this cobbled together approach or using legal creativity around perhaps the implied term of trust and confidence or the duty of care owed by an employer. But it does not provide a clear and as I have said fairly modest legal framework of rights for a worker who's had a miscarriage or for their partner.
Ellie:	I just want to go back to the impact that pregnancy loss can have on someone in the workplace and Charlotte, you've spoken about your own experience, but there are also other challenges that many people face, aren't there?
Charlotte:	Absolutely, there are. And I think anecdotally, there are a few things that I've sort of learned about. For example, people coming back to work too soon or feeling pressured to come back to work too soon with the result that their mental health suffers, their performance suffers, their productivity suffers. I know people worry about or have actually been told they're having too much time off and this then impacts, for example, their attendance record. People also worry about their employers knowing they were trying to start a family and that impacting work opportunities and promotions. There have been instances I've learned of people very sadly miscarrying at work, in other words, attending the workplace whilst physically losing their baby, which is an absolutely terrible ordeal for someone to have to go through. On a practical level, there are examples of sick leave and sick pay entitlements being impacted, particularly in circumstances where sick leave and sick pay have been used to cover leave during a miscarriage. And more generally, they're sort of people feeling unable to talk to their managers about it, experiencing an inconsistency in approach across their employer, for example, depending on the manager's approach to the topic. And there's also the piece of the puzzle to do with the male or non-childbearing partner? Where do they fit in and what about their rights and their mental health?
Ellie:	And while we'll have to wait to see whether the Miscarriage Leave Bill will become law, in the meantime, where do we go from here? Eleena, what can organisations be doing to bring about meaningful change?
Eleena:	Well, we don't need a Miscarriage Leave Bill or legislation for employers to do something right now. Let me just go back to something Charlotte said. I think let's just break down that wall of silence in the first place. Be guided by what the employee wants. So, everything I'm about to say, I would preface with in the same way that I'd say this about health issues or other personal matters, be guided by the employee. They're all, everyone's different. Everyone's experience is different. And they're going to be the expert or the person who's best placed to tell the employer what they need, what's going to be helpful. So, don't, you know, don't clobber your employee with a set piece of things you want to do, because that might not actually be the right thing for that employee. But if you're in a healthy working relationship and you're able to speak about things, you can then offer supportive, thoughtful, and kind management. And I'm sure that that goes such a long way, even in a situation where there aren't legal entitlements in place. Just being considerate, thinking about the mental and physical impact on someone who is going through or has just gone through a miscarriage and not taking the view that, you know, once the miscarriage has happened, that's the end of it. As Charlotte said, some people might want to take time off to attend appointments and to deal with the immediate aftermath of what's going on physically. Other people might have to process things further down the line. Again, be guided by what the employee needs. Considerations of the impact, even if the individual is not the childbearing partner. So this rather archaic view that if you're not the person who's physically gone through the miscarriage, then you know, get into work, what's the problem? I mean, that's, I would like to say that's a completely outmoded way of looking at things. And I would like to think that any employer who has any respect for employees would again take a sort of tailored and considerate approach to that, even if there's not necessarily a physical aspect to what's happening. And finally, the right policies and support system can actually facilitate a quicker and more effective return to work, enhanced motivation and commitment to the company, not to mention supporting mental and physical health of employees, which businesses should be doing as a bare minimum anyway. So, I would like to think that employers would want to be supportive in any event but just as an overall business sense piece, of course, doing the right thing often yields benefits for the employer too.

Ellie: Absolutely. And just to look at that a bit more closely then, Charlotte, what kinds of practical steps can employers take? So just give us some examples.

Charlotte: Practical steps, yes. So as Eleena says, the starting point has to be asking the questions of employees, such as how can we support you? What can we be doing? What will be helpful? Those questions might involve asking whether there are any changes or flexibility or adjustments needed just for a while, just to help. You might want to direct the individual to resources such as counselling, etc, that might help them, suggesting time off, permitting time off, including to attend medical or other appointments. One key thing to do is checking in without pressuring. I know I found it really helpful just to hear from people whilst I was off just saying, how are you doing? Is there anything you need? What can we do? In terms of sort of the HR side of things, the more administrative side of things, businesses should have a policy that helps everyone not just the childbearing person. And making sure that time off for a miscarriage or pregnancy loss doesn't impact an individual's absence record and isn't otherwise used against them. For example, in the context of redundancy selection or disciplinary issues or short-term sickness absence management. And I think as well, making sure that information about what's happened isn't shared without this employee's consent. You cannot overstate the importance of that.

Ellie: So, I mean, I think we've touched on this throughout this podcast, but Charlotte, can you just sum up for us then why pregnancy loss is most certainly a business issue and how can employers get it right when it comes to offering support to their people?

Charlotte: Yes, I think whilst miscarriage and pregnancy loss is deeply personal, it's also something that so many people experience that it's in everyone's interest to develop a thoughtful, kind and supportive approach to it. We know we're not where we ought to be in terms of the law, but businesses, as Eleena has said, have the ability and choice to determine how they wish to support individuals experiencing pregnancy loss. And there are materials and guidance available, so many resources available to businesses who want to support their people, their people being their most important assets.

Ellie: Yeah, absolutely. And just a few resources to mention, there's the [Miscarriage Association](#) and [Tommy's Miscarriage Information and Support](#), just two resources. But as Charlotte says, there are many that employers can access to help. Well, thank you both so much for joining me today. As we've heard, this issue affects all of us in some way, directly or indirectly. But with the right support measures in place, businesses can at least help to reduce that anxiety that employees may have about how their pregnancy loss will affect them at work. Enabling conversations is a key starting point in reducing the stigma and making sure people don't suffer in silence. We'll take a closer look at the support measures employers can put in place in a follow-up to this episode. So do look out for that later in the year. If you would like to revisit anything we discussed today, you can access transcripts of every episode of the Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or if you have any questions for me or Charlotte or Eleena or perhaps suggestions of topics you'd like us to cover in the future, please get in touch by emailing us at: theworkcouch@rpc.co.uk. We'd really love to hear from you. And finally, if you enjoyed this episode, we'd be so grateful if you could spare a moment to rate, review, and subscribe, and please spread the word by telling a colleague about us. Thank you all for listening, and we hope you'll join us again in two weeks.



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