



Employment Matters.....

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Workplace Maternity Discrimination

The Citizens Advice Bureau reports that it has seen a 58% increase in the number of maternity leave queries in the last two years. Below are some of the pregnancy and maternity discrimination issues to be aware of and some claims that commonly come before employment tribunals.

Selecting pregnant employees or new mothers for redundancy

Pregnant employees or new mothers are not exempt from being selected for redundancy in a genuine redundancy situation. However, if you use a sham redundancy as an excuse to dismiss an employee who is pregnant or on maternity leave this amounts to unfair dismissal and direct pregnancy and maternity discrimination. Even where there is a genuine redundancy situation, employers should remember that:

- Employees on maternity leave have special rights, with priority given to them if there is suitable alternative employment available.
- If absence records are used as a redundancy selection criterion, the inclusion of maternity-related absences can result in pregnancy and maternity discrimination.

Mishandling requests for flexible working on return from maternity leave.

The issue perhaps most likely to cause a dispute between an employer and an employee returning from maternity leave is her hours of work. It is common for employers to receive requests to return from maternity leave on a part-time basis.

There is no automatic right to switch to part-time working. However, an unjustified refusal to allow an employee to work part time after having a baby is likely to constitute indirect sex discrimination. Employers also have a legal duty to handle such requests by employees in a reasonable manner.

Key case: In *British Airways Plc v Starmar*, the EAT held that it was discriminatory for an employer to turn down a pilot's request on returning from maternity leave to work 50% of her full-time hours, instead requiring her to work at least 75% of full-time hours.

Inappropriate comments about pregnancy that amount to harassment.

A line manager's inappropriate comments to a pregnant employee can lead to an employment tribunal claim. It may be that the line manager is annoyed at the inconvenience that he or she envisages will be caused by the employee's pregnancy and subsequent absence on maternity leave. However, employers should make it clear in line manager training that this is no excuse for making negative remarks to a pregnant employee.

Key case: In *Wilson v Provincial Care Services Agency and others*, a tribunal in Northern Ireland



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ordered a care worker's former employer to pay her £9,500 after it failed to provide her with a reference. The tribunal accepted the care worker's evidence that a manager said:

- "This is what happens when you have babies" (when she resigned because she could not balance her working hours with her childcare arrangements); and that
- she was "the big girl who wanted a baby and did not want to work" (when she tried to get a reference from her former employer).

Health and safety breaches against pregnant employees or new mothers.

Health and safety legislation makes provision for risk assessments for pregnant employees and new mothers. Employers risk a finding of pregnancy and maternity discrimination if they do not abide by these rules.

The employer may have to alter the employee's working conditions or hours of work if any other action would not avoid a risk that has been identified;

- if it is not reasonable to change her working conditions or hours or this would not avoid the risk, offer the employee any suitable alternative work; or

- as a last resort, suspend the employee on full pay if there is no suitable alternative work available.

Failure to communicate with an employee on maternity leave.

Employees on maternity leave should be consulted over a range of workplace matters, with problems commonly occurring if the employee is "cut off" from communication during maternity leave.

For example, an employee on maternity leave should be:

- consulted about any proposed redundancies or reorganisation, so that she has the same information as those at work; and
- given information about pay rises, bonuses and internal vacancies (including promotion opportunities).

To achieve this, line managers are allowed to make "reasonable contact" with employees who are on maternity leave.

Key case: In *Visa International Service Association v Paul*, the EAT held that an employee was constructively dismissed when her employer failed to notify her, while she was on maternity leave, of a newly created post in her department in which the employee was interested, and considered herself well qualified for.



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Failure to allow a woman to return to her old job after maternity leave.

A common issue for an employee returning from maternity leave is finding that her job has changed beyond recognition. The employee could return to find that she has been given a lower level of responsibility or work that is not appropriate for her skills.

Employers should remember that an employee returning to work after ordinary maternity leave (no more than 26 weeks' leave) has the right to return to the job she occupied before her maternity leave.

If the employee has taken additional maternity leave (more than 26 weeks' leave), she has the right to return to her original job unless this is not reasonably practicable, in which case she has the right to return to another suitable job, on terms no less favourable.

Key case: In *Blundell v Governing Body of St Andrew's Roman Catholic Primary School and another*, the EAT held that a teacher was not entitled to return to the same class that she had been teaching when her maternity leave began. The school operated a policy of rotating teachers' classes every few years and her job essentially remained the same.

Basing recruitment decisions on an employee's family situation.

No line manager training on recruitment is complete without a stark warning of the dangers

of asking a job applicant in an interview about family plans.

For example, line managers should be warned not to ask:

- job applicants with children about their children or childcare arrangements;
- women who are pregnant about their plans for maternity leave and childcare.

Interviewers should stick to exploring the job applicant's ability to perform the job. It is blatant pregnancy and maternity discrimination to base a recruitment decision on an employee's pregnancy or family plans.

Key case: In *Webb v EMO Air Cargo (UK) Ltd*, the ECJ made it clear that it is discriminatory to dismiss a woman who, shortly after her recruitment, is found to be pregnant.

We would advise that you contact us when dealing with maternity matters in order to avoid some of the discrimination issues that can arise.