

# Discrimination and the pregnant employee



The Equality Act 2010 protects employees from discrimination and victimisation because of pregnancy and maternity. This is one of nine types of discrimination known in law as protected characteristics covered by the Act. In addition to the Equality Act, other legislation giving pregnancy and maternity rights includes:

- **Employment Rights Act 1996** - *on health and safety, maternity leave, time off for antenatal care and, from day one of starting a job, against unfair dismissal because of pregnancy and/or maternity*
- **Maternity and Parental Leave Regulations 1999** – *on maternity leave, and*
- **Statutory Maternity Pay (General) Regulations 1986** – *on maternity pay.*

All employees, casual workers, agency workers, freelancers and contractors are protected by pregnancy and maternity discrimination law from day one of their employment. It also applies to applicants for employment and it is not necessary for a person to be an employee of a company in order to raise a claim in the Employment Tribunal. For example, a pregnant woman who feels she has been discriminated against in a job application/interview may also be able to claim.



## What is pregnancy discrimination?

Section 18 of the Equality Act protects women who are treated unfavourably on the grounds of her pregnancy or pregnancy-related illness during the protected period from conception to the end of statutory maternity leave. It is also unlawful to treat a woman less favourably because she wants to take or has taken maternity leave, is undergoing IVF treatment or intends to become pregnant. There is no need for a comparator, she must simply show that her treatment was because of her pregnancy.

You are protected against discrimination once your employer knows that you are pregnant. It is entirely up to you to decide when you want to tell your employer and colleagues about your pregnancy. Legally, you do not have to tell your employer about your pregnancy until the 15th week before your baby is due which is the latest date for giving notice to take maternity leave. Obviously, your employer is very likely to be aware of your pregnancy by then. However, you may need to tell your employer earlier in order to ask for action to protect your health and safety or to take time off for antenatal care. Once you have told your employer of your pregnancy, you are protected against unfair dismissal, unfair treatment and discrimination on the grounds of pregnancy.

## The protected period

The protection against pregnancy discrimination lasts for a specific period of time, which starts when you become pregnant. This is called the protected period. The period ends when your maternity leave finishes or when you return to work, whichever is the earlier.

If you don't have the right to maternity leave – for example, because you're not an employee, the protected period ends two weeks after your child is born.

Unlike other discrimination claims, there is no need for you to show that you have been treated less favourably than a male employee, or a female employee who was not pregnant. The only question you need to address is whether you would have received the same unfavourable treatment if you had not been pregnant or on maternity leave? If the answer is no, then you are likely to have experienced discrimination.

Discrimination against a woman specifically because she is of child-bearing age would usually fall into sex discrimination.

## Some examples of pregnancy discrimination

- Your pay or hours are cut or changed without your permission.
- You are not allowed reasonable time off for ante-natal appointments or pay has been deducted as a result of attending the appointments.
- You are suddenly receiving poor appraisals or being put on performance improvement measures.
- You are being given unsuitable work/no risk assessment is undertaken.
- You are made redundant because of your pregnancy (you might still be made redundant for other reasons).
- You are not being considered for training opportunities/projects/promotions/pay increases.
- You are dismissed when you are shortly due to return from maternity leave (or after you have just returned).
- Your employer is treating days off sick due to pregnancy as a disciplinary issue.
- Your employer retains the person who is covering for you whilst you are on maternity leave, therefore affecting your ability to go back to your old role.

Employees are also protected from detrimental treatment or from dismissal on the grounds that they undertook, considered undertaking, or refused to undertake work during the statutory maternity/adoption leave period (usually known as 'keeping in touch' days).

## Redundancy

If an employee is made redundant whilst on Statutory Maternity Leave, then they have special rights. If a redundancy situation arises, this is one of the few areas of law where an employer is allowed to "positively discriminate". You have the right to be offered any suitable alternative vacancy, if one is available, without an interview. This right is over and above what your colleagues are entitled to that are not on maternity leave, so you could effectively "jump the queue" in relation to a new role. The reality, however, is that employers do not always pro-actively source new positions as much as they should, so this needs to be carefully monitored. If your employer cannot offer you suitable alternative work for genuine reasons, you may be entitled to redundancy pay.

## Pay and terms of employment

When an employee is on maternity leave, only her pay (remuneration) should be affected. She may qualify for statutory maternity pay (SMP), or the rate of maternity pay stated in her contract if that is better, or maternity allowance (MA). An employee who is pregnant or on maternity leave should not lose out on her other terms and conditions – they must continue as if she was not pregnant or on maternity leave. If this does not happen, this could be discrimination.

Examples include:

- You would be able to run a company car while on maternity leave unless it was for business use only
- You are entitled to the same amount of annual leave as if you were at work and it would usually be taken before or after the maternity leave
- You should get the same level of contributions from your employer to your workplace pension during the first 26 weeks of your maternity leave, known as ordinary maternity leave, whether or not you are receiving maternity pay. For the next 26 weeks of maternity leave – known as additional maternity leave – your employer need only make contributions to your pension while you are being paid. So, for example, if you are on maternity leave for 52 weeks and statutory maternity pay for 39 weeks, the employer does not have to pay into your scheme during that 13-week gap if it does not want to.

## Improvements in terms and conditions

If there are improvements in the employee's terms and conditions while she is on maternity leave, she should get them as if she was still at work. Not to do so could again be an example of discrimination. It means an employee should get:

- A pay increase she would have got if not on maternity leave taken into account in working out her company maternity pay
- A bonus at the time she would have got it if not on maternity leave – however, a performance bonus could be reduced pro-rata for the time on maternity leave during the bonus period
- On her return to work, any pay increase in her contractual pay she would have got if not on maternity leave. If the increase is at the employer's discretion or performance-related, the employer must take care not to disadvantage her because of her pregnancy or maternity leave.

## Managing absence during pregnancy

An employer must not include absences because of pregnancy or pregnancy-related illness in 'managing absence triggers' – a trigger is the number of days' absence in an employer's policy when managers would consider disciplinary warnings, and ultimately dismissal, unless attendance at work improves. Neither should absences because of pregnancy or pregnancy-related illness be included in any other kind of absence record. Also, negative comments or warnings about absences because of pregnancy or pregnancy-related illness are likely to be discriminatory.

## Action

**If you are pregnant and you have informed your employer (or you have reason to believe your employer is aware of your pregnancy) and you experience unfavourable treatment, contact the PDA as soon as possible as there are strict time deadlines for making discrimination or unfair dismissal claims. You would need to be able to show that the treatment was connected with your pregnancy/maternity leave, and you should seek legal advice at an early stage.**