

Law at work

Pregnant and redundant

Employment lawyer Michelle Chance has experienced for herself what it's like to be made redundant suspiciously near to taking maternity leave. But, as she explains, there is a right and wrong way to achieve this outcome.

I married at 29 when I was five years qualified and working as an employment lawyer at a City law firm. My husband and I were keen to start a family. In April 2006, when I was nine months' pregnant and one week before I was due to commence maternity leave, I was called to a redundancy consultation meeting. I lost my job seven days before giving birth.

This April, just one year after my dismissal, maternity rights were improved. Statutory maternity pay was extended from 26 weeks to 39 weeks, and all women became entitled to additional maternity leave. This enhancement of employees' family friendly rights recognises the important contribution working women make to society while having and raising a family.

But are some employers merely paying lip service to these "new age" concepts? There is a perception among senior managers in some organisations that female employees who take time off work to have a family are no longer ambitious and committed to their careers. Are their attitudes really likely to change because new legislation is coming into force?

Female professionals in their thirties are tending to hold off starting a family, hoping to be promoted to senior management first. But the promotion goalposts keep moving, while the women's biological clocks keep ticking. Many women fail to obtain the promotion they seek, having sacrificed any hope of meeting a partner and having a family. I chose not to do this.

An employer can make a pregnant employee redundant if need be without serious exposure to successful sex discrimination and unfair dismissal claims. A pregnant employee can leave her employer having been made redundant, believing that she has been treated fairly and that there is a genuine business need for the redundancy. While it is difficult to strike this delicate balance, it is not impossible.

Pregnancy dismissals

An employee who is pregnant and being made redundant needs advice on her legal rights and options, but first she needs to come to terms with her emotions about being made redundant, before deciding whether to seek legal redress. She should not threaten litigation unless she is prepared to see it through. She has to consider whether she would prefer to spend time bonding with her baby, instead of suing her ex-employer. If she decides to use her time off work to pursue the litigation, she should bring her baby to the hearing to gain the employment tribunal's sympathy.

Pregnant women are protected by statute. Dismissing a pregnant woman for redundancy will be automatically unfair if she is selected on the grounds of pregnancy or childbirth, or because she has taken or seeks to take maternity leave.

The woman will be entitled to a statutory redundancy payment, if she has been with by her current employer for two years before her termination date. She may also be eligible for an enhanced redundancy payment, if her employer has such a policy, or if it has been the employer's custom and practice over a period of time to pay redundant employees an amount which exceeds their statutory entitlements.

She should be allowed to work out her notice period, or receive pay in lieu for all or part of it, if her position becomes redundant before the end of the notice period.

A woman who is pregnant or on statutory maternity leave should receive a written statement of reasons for her dismissal if she is dismissed at any time and for any reason. She does not have to request this written statement and there is no service qualification.

Employee actions

Employees considering making a tribunal claim should make a data protection request to obtain disclosure of relevant documents from their employer.

Any employee wishing to issue employment tribunal proceedings must raise a grievance with their employer first.

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Possible claims

The main statutory claims open to a pregnant employee who is made redundant are unfair dismissal and sex discrimination. A woman can bring a tribunal claim against her employer for automatic unfair dismissal if she has been dismissed for a pregnancy-related reason. The compensatory award for unfair dismissal is capped at £60,600.

She can also make a formal complaint to a tribunal if she does not receive the reasons for her dismissal, or if she believes the statement of reasons is inadequate or untrue. If the tribunal finds the complaint justified, it can make a declaration on the employer's reasons for dismissing the employee and can order the employer to pay the employee two weeks' pay.

She could consider claiming sex discrimination as well. If her claim succeeds, compensation is unlimited. Had she not been made redundant, she would have had the right to return to the same job on the same terms. It will be difficult for her to mitigate her loss while on maternity leave, and when this comes to an end she will have been out of the job market for up to a year and will be less marketable. For these reasons, an award is likely to be generous. There is also a separate award for "injury to feelings" ranging from £500 to £25,000.

Employers

It is possible to make a pregnant employee, or a woman on maternity leave, redundant. The following tips should minimise an employer's exposure to legal challenge.

Ideally an employer should wait until the employee is due to return from maternity leave before assessing whether a genuine redundancy situation exists. Tribunals are unlikely to believe that employers can predict up to a year in advance what their staffing requirements will be when the employee returns from maternity leave. Employers paying only statutory maternity pay, will not have to pay out any more money to wait until the end of the employee's maternity leave to see whether or not a genuine redundancy situation exists then. In any case, employers can recoup 92% of statutory maternity pay, or 104% if they qualify as a small employer.

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Whenever a redundancy is implemented, the employer should ensure the redundancy selection pool is appropriate and that fair, objective selection criteria are used to assess the individuals affected. Employers need to take special care when the pool includes pregnant women. An employer is not “entitled to take advantage of a redundancy situation to weed out his pregnant employees,” as the House of Lords said in a decision from the late 1980s.

Employers should document any decisions made during the redundancy selection process and the reasons for them, in case they need to defend a tribunal claim at some point in the future.

Employers are obliged to offer an employee on maternity leave any suitable alternative employment that arises if her job has become redundant; otherwise her dismissal will be automatically unfair.

Common sense

If an employer has to make a pregnant employee redundant, it should not tell clients that the employee is on maternity leave. They are likely to expect her to return to work within a year, so the employer is merely delaying having to explain its actions until a later date.

Employers should not impose a tight deadline on signing a compromise agreement when the employee has just given birth. This would put unnecessary pressure on the employee at a time when she is vulnerable and has her hands full.

Employers should handle a pregnancy redundancy sensitively and to be helpful to the employee. They can provide her with a number of benefits that will not cost much money, but which will make her life post-redundancy considerably easier. They could, for example:

- Provide a detailed reference, instead of a standard one
- Pay for outplacement counselling and allow the employee to retain her laptop. This will help her attempt to mitigate her loss, which will reduce the amount of a tribunal award if one arises.

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