

May 2011

# Discrimination during maternity leave and on return to work

The law protects you against unfair treatment and dismissal because of childbirth or because you have taken maternity leave. This information sheet looks at:

- discrimination during maternity leave
- your rights during maternity leave, and
- returning to work.

If you have been dismissed or treated unfairly during pregnancy, see the information sheet [Pregnancy Discrimination](#).

Your rights during maternity leave:

- all employees have the right to 52 weeks maternity leave with the right to return to work.
- you are entitled to all your contractual terms and conditions during maternity leave, apart from your pay.
- you have the right to be offered a suitable alternative vacancy if you are made redundant during maternity leave.
- you have the right to ask for flexible work.
- you are protected against unfair treatment, unfair dismissal and sex discrimination because of pregnancy, childbirth and maternity leave.

See [Pregnant at work 2011](#), for more information on your rights during pregnancy and maternity leave.

This information sheet covers discrimination during maternity leave and on return to work. For information on your rights during pregnancy see the information sheet [Pregnancy discrimination](#).

Examples of less favourable treatment and detrimental treatment include selection for redundancy or dismissal because of changes to your job during absence on maternity leave, failure to consult during maternity leave, refusal of training or promotion opportunities, reduction of pay or hours, pressure to resign and demotion on return to work.

### ***When does pregnancy/maternity discrimination apply?***

You are protected against discrimination on the grounds of pregnancy once your employer knows that you are pregnant until the end of your maternity leave.

### **Discrimination during maternity leave**

#### ***What is sex discrimination?***

The law says that it is sex discrimination to treat a woman less favourably on the grounds of her pregnancy or maternity leave (Sex Discrimination Act 1975 s3A). To show sex discrimination because of pregnancy/maternity leave a woman does not have to compare herself to how a man might have been treated. She must show that 'but for' her pregnancy or maternity leave she would not have been dismissed or treated less favourably. All employees, casual workers, agency workers, freelancers and self-employed women are protected by sex discrimination law from day one of their employment.

Employees are also protected from unfair dismissal and detrimental treatment on the grounds of pregnancy, childbirth or maternity leave (Employment Rights Act 1996 s99 and Maternity and Parental Leave etc Regulations 1999 reg. 19). This is called automatic unfair dismissal and applies to employees from day one of their employment.

### ***I have been dismissed at the start of my maternity leave but my employer says that it is because of poor performance.***

An employer will rarely admit that an employee has been dismissed for being absent on maternity leave. There will be circumstances when a dismissal during maternity leave may be for fair reasons, such as gross misconduct or persistent poor performance. Except in the most serious cases of gross misconduct, the employer will be expected to have warned the employee and conducted a disciplinary hearing. However, if the dismissal or detrimental treatment is because of your maternity leave or for reasons connected to your maternity leave, it is discriminatory. You are entitled to written reasons if you are dismissed at any time during pregnancy or maternity leave. If your employer fails to provide written reasons for your dismissal without a good reason, you can complain to a tribunal and can be awarded up to two weeks pay in compensation.

If you bring a tribunal claim for automatic unfair dismissal and sex discrimination

during maternity leave, your employer will have to prove that the dismissal was for a fair reason and not because of your absence on maternity leave.

***I have been selected for redundancy because I am on maternity leave.***

Your employer can make redundancies at any time, providing jobs are genuinely redundant (i.e. there is less work) and your employer uses fair selection criteria and consults with employees. You are entitled to be consulted even if you are absent on maternity leave. Failure to consult a woman on maternity leave about redundancy is likely to be sex discrimination.

If you are selected for redundancy because you are absent on maternity leave, you may have a claim for unfair dismissal and/or sex discrimination. For full information about your rights, see [Redundancy during pregnancy and maternity leave](#).

If you are selected for redundancy during your maternity leave, you are entitled to be offered any suitable alternative work under regulation 10 of the Maternity and Parental Leave Regulations 1999. You have priority over other employees who are not absent from the workplace on maternity leave and you do not have to attend interviews or selection assessments. If you are not offered any suitable alternative vacancies that exist you may have a claim for unfair dismissal.

Following her return from her first maternity leave, Mrs A found that her job had been undermined and her responsibilities eroded. A colleague was then brought in to co-head her team and was gradually allocated more and more of her responsibilities. Mrs A was ultimately made redundant when she was on her second maternity leave. She made an application to an employment tribunal and settled her claim with her employer following mediation.

## **Rights during maternity leave**

***My employer has told me that I will not get my car allowance and childcare vouchers during maternity leave.***

Since October 2008, employees are entitled to all their terms and conditions of employment, apart from remuneration, during ordinary and additional maternity leave. This means employees are entitled to continue to accrue benefits such as paid annual leave during 52 weeks maternity leave.

It is not always clear what is included as 'remuneration' but it should normally mean your basic salary or wages. You are entitled to keep other 'non-cash' contractual benefits, such as subscriptions, memberships, lunch vouchers and to accrue annual leave as normal. You are entitled to keep a mobile phone and company car that are provided for personal and business use during your maternity leave. However, it is possible that a car allowance is considered to be part of 'remuneration' and is probably not payable, however, the law is unclear.

Childcare vouchers are regarded as being a non-cash benefit that are payable throughout maternity leave. Childcare vouchers are normally provided as part of a salary-sacrifice scheme, however, your employer is not allowed to make any deductions from your Statutory Maternity Pay, apart from tax, National Insurance and a few authorised deductions such as pension contributions or trade union subscriptions. Therefore, your employer should continue to provide childcare vouchers as a benefit throughout maternity leave. For more information, see [Common Maternity Pay Questions](#).

***I am not sure if my employer is paying my maternity pay correctly and I have been told to go into work to collect my maternity pay.***

If you are uncertain about your maternity pay you can ask your employer for clarification. If you think that your employer has made a mistake you should talk to your employer. You and your employer can get help and

advice from the HMRC Employer's Helpline on 08457 143 143. If your employer is not paying you the correct amount you can raise a grievance with your employer and make a formal complaint to your local HMRC officer.

SMP should be paid in the same or similar way as your remuneration was paid and payment of SMP cannot be replaced by payment in kind or by offering board and lodging. You should not have to collect your pay from work if you were not previously paid in that manner and you should not be treated unfairly as a result of being on maternity leave or receiving maternity pay. For more information on dealing with maternity pay problems, see [Common Maternity Pay Questions](#).

***I will not be able to take all of the annual leave I will accrue during my maternity leave because my maternity leave ends shortly before the end of the annual leave year at my work.***

It is very important to discuss with your employer when you will take your annual leave. Ideally this should be done well before your maternity leave. If you will have accrued a lot of annual leave by the end of your maternity leave you will need to discuss with your employer when you can take it. If your maternity leave ends shortly before the end of your annual leave year, you could give notice to end your maternity leave early and take paid annual leave immediately afterwards.

Your employer's normal rules on how much leave can be carried forward will apply. Under the Working Time Regulations you are not allowed to carry forward statutory annual leave of 28 days, however, in the recent employment tribunal case of Shah, the tribunal decided that if you have been off sick and unable to take your annual leave, you should be allowed to carry it over to the next leave year. Your employer has the discretion to allow any 'contractual' annual leave which is over and above the statutory minimum of 28 days to be carried over or paid in lieu. If your employer does not allow you to take your annual leave or does not

allow you to carry it forward, you should seek advice.

Your employer can refuse annual leave where it co-incides with a busy time of year or a lot of other employees are taking leave at the same time but they should not refuse to allow you to take annual leave because you have been absent on maternity leave as that may be sex discrimination.

***Am I entitled to take Bank Holidays and other fixed holidays that fall during my maternity leave when I get back to work?***

Firstly, you should check your contract to see if you are allowed to take Bank Holidays or fixed holidays that fall during maternity leave, at another time. If your employer allows employees who are sick on a bank holiday to take a day off in lieu, they should also allow women on maternity leave to do the same, as it could be discriminatory not to.

All employees are entitled to 28 days statutory annual leave. If your employer provides 28 days annual leave, including Bank Holidays, your employer should probably allow you to take paid holiday at another time, as the European Court of Justice case of Gomez said that a woman is entitled to take her statutory annual leave as well as her maternity leave. This may also apply to fixed holidays that are part of your statutory annual leave entitlement but the law is not clear and you may wish to seek further advice.

***My employer has changed aspects of my job since I went on maternity leave and I feel that I am being sidelined.***

Less favourable treatment can include a wide range of behaviour, such as reducing an employee's workload or refusing certain projects or clients. If your employer has made changes to your job that are to your detriment, for example, you are selected for redundancy, you may have a claim for sex discrimination, unfair dismissal and/or detrimental treatment. Your employer may be cutting work for other reasons, for example, a genuine downturn in the work available, but you should speak to your

employer about the changes you have noticed and, if necessary, you may wish to raise a formal grievance.

In some circumstances, if your employer's conduct is so bad that you feel unable to continue working, you could resign and claim constructive dismissal but you should get advice first as these can be difficult cases to bring.

If you feel that the treatment is related to your maternity leave, you can talk to your HR manager or union representative. If you want to take it further you can raise a grievance with your employer. If you are unable to solve the matter at work you may have a claim in an employment tribunal and you should get legal advice, see 'Useful contacts' below.

## Returning to work

***What is the minimum amount of maternity leave I have to take?***

You must take at least two weeks off work after your baby is born. This is called compulsory maternity leave. You must take at least four weeks compulsory leave if you work in a factory. Otherwise, it is up to you to decide how much leave you wish to take. If you do not wish to take the full 52 weeks maternity leave, you must give at least 8 weeks notice that you are returning to work early. If you do not give 8 weeks notice and you return to work, your employer is entitled to refuse to pay you until the 8 week notice period has ended.

***What are my rights on return from ordinary maternity leave (OML)?***

If you only wish to take 26 weeks OML, you must give your employer at least 8 weeks notice to return to work early. You are entitled to return to exactly the same job on the same terms and conditions if you return during or at the end of your OML period. If you are not allowed to return or you are not given your old job back you may have a claim for unfair dismissal and/or sex discrimination. If your old job has changed for the worse you may have a claim for

detrimental treatment or you may be able to resign and claim constructive dismissal but you should get advice first as these are difficult claims to bring.

**What are my rights on return from additional maternity leave (AML)?**

If you return to work during or at the end of AML you are entitled to return to exactly the same job but if your employer can show that it is not reasonably practicable for you to return to the same job, you are entitled to be offered a suitable alternative job on similar terms and conditions. Your employer must prove that it is not reasonably practicable for you to return. For example, it is likely to be unfair dismissal and/or sex discrimination if your maternity cover is taken on in your role and you are offered an alternative job. If you are offered a different job on return from maternity leave you should get legal advice about a claim for sex discrimination.

You may have a claim for sex discrimination if you were not consulted about changes to your job that were made because of redundancy or a reorganisation or if changes to your job were made because you were absent on maternity leave. If a redundancy takes effect during your maternity leave, you are entitled to be offered any suitable alternative vacancy, see [Redundancy during maternity leave](#) for more information.

***What happens if I am not well enough to return to work after maternity leave?***

You are entitled to take sick leave in the normal way and should follow your employer's normal sickness reporting procedures. If you normally receive full pay during sick leave, you are entitled to sick pay as normal. If your employer pays Statutory Sick Pay, you may not qualify for SSP immediately after unpaid additional maternity leave. For more information, see [Sickness during pregnancy and maternity leave](#).

**What can I do if I am treated unfairly after returning to work?**

If you are made redundant after returning to work in order to avoid the duty to offer suitable alternative work to women on maternity leave or you are dismissed or

made redundant because of changes to your work during your maternity leave or for reasons related to your maternity leave, you should get legal advice as you may still have a claim for automatic unfair dismissal and/or sex discrimination.

Upon return from maternity leave, Mrs B was told that her job had been made redundant and that a new job had been created which she would have to apply for. In fact, the new job was almost identical to the one she had been doing but she was told that she had to compete for it, alongside her maternity cover. She felt that her employer was trying to find a way to keep her maternity cover instead of Mrs B. Mrs B made a tribunal claim against her employer. Her employer settled her claim before a tribunal hearing.

***Do I have any rights if I wish to continue breastfeeding on return to work?***

You are entitled to ask for a risk assessment to look at any health and safety risks if you are breastfeeding on return to work.

For more information, see [Breastfeeding on return to work](#).

***I have asked if I can return to work part-time after maternity leave but my employer has told me I will have to take a less senior job.***

You have the right to return to your old job on the same terms and conditions as before. If you wish to change your hours, you have the right to make a request for flexible work, providing you have worked for your employer for at least 26 weeks. You should make a written application. Your employer must seriously consider how you can do your existing job on a part-time basis and can only refuse for certain business reasons. Your employer is expected to hold a meeting to discuss your request and you have the right to appeal if your request is refused. If your employer refuses without a good business reason you should get advice as you may be able to claim indirect sex discrimination claim.

If you and your employer agree that it would be difficult to do your existing job on a part-

time basis, you have the right to return to the same job on the same terms and conditions and on the same hours as before your maternity leave or you could discuss with your employer what other jobs are available on part-time hours.

For more information on flexible work and what to do if your request is refused, see [Child-friendly working hours](#).

***What can I do if I have been treated unfairly during or after maternity leave?***

If you believe that you have suffered less favourable treatment as a result of being pregnant, you should obtain legal advice as soon as possible. You should ask your employer if they have a grievance procedure and raise a formal grievance. If you still cannot solve the problem, you may wish to start tribunal proceedings to be sure that you do not miss the time limit. You may be able to take the matter to mediation or to negotiate with your employer before your case reaches a tribunal hearing.

There are strict time limits for making claims in an employment tribunal. The tribunal must usually receive a claim within three months less one day. Time limits for some claims can only be extended for very good reasons. If you are dismissed during maternity leave you are entitled to written reasons. You must have worked for your employer for a year to make a claim for ordinary unfair dismissal but you can claim sex discrimination and automatic unfair dismissal on the grounds of pregnancy and maternity leave from day one of your employment.

See the information sheet, [Dealing with pregnancy and maternity-related problems at work](#), for more on how to negotiate with your employer and how to bring a claim in a tribunal.

***I have decided not to return to work. What should I do and what am I entitled to?***

You should resign in the normal way, giving the notice period stated in your contract. If there is no agreed notice period at your work you should give at least one week's notice.

If you resign during your maternity leave, you do not have to go into work to 'work' your notice, you can remain on maternity leave. But if you resign after the end of your maternity leave, you should work your notice unless you have agreed to take annual leave or you need to take sick leave.

You do not have to repay any Statutory Maternity Pay or Maternity Allowance. Your employer claims it back from HM Revenue and Customs and it is yours to keep. If your employer paid you extra contractual maternity pay, over and above your SMP or MA, you only have to pay the extra contractual maternity pay if it was agreed in advance or stated in your employer's maternity policy. You continue to accrue all your contractual benefits, apart from remuneration, during maternity leave so you are entitled to continue to receive any contractual benefits until the date your contract of employment comes to an end i.e. at the end of your notice period. Your annual leave continues to accrue until the end of your contract, so you are entitled to payment for any annual leave that you have not yet taken that has accrued up until the end of your employment.

***Are there any other benefits I can claim?***

Once your baby is born you can claim Child Benefit. From April 2013, Child Benefit will not be payable to families with a higher rate tax payer. You may be able to claim Child Tax Credit and/or Working Tax Credit depending on your family income. For more information and an application form, telephone the Tax Credit Helpline on 0845 300 3900.

If you or your partner are receiving Income Support, income-based Jobseekers Allowance or Child Tax Credit of more than the family element you may be entitled to a Sure Start Maternity Grant of £500 for your first child (or if there are no other children aged under 16 in your family). Claim on form SF100 (Sure Start), available from Jobcentre Plus offices, from 11 weeks before the baby is due until 3 months after the birth.

## Useful contacts

### Maternity Action

Advice on maternity rights and benefits  
[www.maternityaction.org.uk](http://www.maternityaction.org.uk)  
Helpline 0845 600 8533

### ACAS

Free employment law advice  
Telephone: 08457 47 47 47  
[www.acas.org.uk](http://www.acas.org.uk)

### Citizens Advice Bureau

You can find your nearest Citizens Advice Bureau (CAB) if you look in your local telephone book or see  
[www.citizensadvice.org.uk](http://www.citizensadvice.org.uk).

### Community Legal Advice

For free legal advice and help with finding a solicitor or legal adviser in your area  
telephone: 0845 345 4 345 or see  
[www.communitylegaladvice.org.uk](http://www.communitylegaladvice.org.uk)

### Department of Business, Innovation and Skills

For information on employment law and applications for flexible work (form FW(A) see [www.bis.gov.uk](http://www.bis.gov.uk).  
For an interactive guide to maternity rights (TIGER) see the Direct Gov website:  
[www.direct.gov.uk](http://www.direct.gov.uk)

### Employment Tribunal Public Enquiry Line

For information on bringing a tribunal claim and ET1 application forms telephone 0845 795 9775  
[www.employmenttribunals.gov.uk](http://www.employmenttribunals.gov.uk)

### Equality and Human Rights Commission

For information on sex discrimination see  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)  
Helplines:  
0845 604 6610 England  
0845 604 8810 Wales  
0845 604 5510 Scotland

### Health and Safety Executive.

Health and safety at work Information Line  
0845 345 0055.  
[www.hse.gov.uk](http://www.hse.gov.uk)

### HMRC Employer's Helpline

If you have a dispute about your Statutory Maternity Pay you can ring the HMRC Employer's Helpline 08453 147 147.

### Law Centres Federation

To find out if there is a Law Centre in your area telephone 020 7428 4400 or see [www.lawcentres.org.uk](http://www.lawcentres.org.uk).

*This information sheet was produced in May 2011. It is always important to get up-to-date advice.*

## More Maternity Action information sheets

[Pregnant at work 2011](#) – a brief guide to your rights to maternity leave and pay

[Rights at work for fathers and partners](#) – a brief guide to rights for fathers and partners

[Additional paternity leave and pay](#) – new rights for fathers and partners

[Time off for working parents](#) – rights to paternity leave, adoption leave, parental leave and time off in an emergency

[Child friendly working hours](#) – rights to ask for changes in your working hours to fit with your childcare or other caring responsibilities

[Money for parents and babies](#) – benefits for families

[Common maternity pay questions](#) – how to qualify for Statutory Maternity Pay, Maternity Allowance and Employment and Support Allowance.

[Rights for parents with more than one job](#) – rights for parents working more than one job

[Redundancy during pregnancy and maternity leave](#) – your rights if you are made redundant

[Dealing with pregnancy and maternity-related problems at work](#) – how to deal with problems at work

[Pregnancy discrimination](#) – what is pregnancy discrimination and what you can do about it

[Discrimination during maternity leave and on return to work](#) - what you can do about discrimination during maternity leave

[Pregnant during maternity leave](#) – your rights if you become pregnant on maternity leave

[Breastfeeding on return to work](#) – your rights if you wish to continue breastfeeding on return to work

[Sickness during pregnancy and maternity leave](#) – rights and benefits during sick leave

[Breastfeeding in public places](#) – your right to breastfeed when you are out and about

[Polish language information](#) - rights at work for mothers, fathers and partners; your right to breastfeed when you are out and about

[Maternity rights for migrants](#) – information for EU nationals and other migrants

[Maternity rights for refugees and asylum seekers](#) – information for refugees, asylum seekers and refused asylum seekers

Available at [www.maternityaction.org.uk](http://www.maternityaction.org.uk)