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Redundancy during pregnancy and maternity leave

This information sheet explains your legal rights if you are made redundant while you are pregnant or on maternity leave.

Redundancy

There are three situations in which you can lawfully lose your job because of redundancy. These are:

- when the business closes down either temporarily or permanently;
- when the business moves and you cannot get to the new place of work;
- when fewer employees are required for existing work.

It is unfair dismissal and sex discrimination to select a woman for redundancy because she is pregnant or on maternity leave.

Your contract of employment may give better rights. Always check your contract if you have one.

Some terms used in this information sheet

Ordinary maternity leave (OML): lasts for 26 weeks from the day you start your maternity leave.

Additional maternity leave (AML): starts at the end of OML and lasts for 26 weeks. **Statutory Maternity Pay (SMP):** paid by your employer for 39 weeks if you meet the qualifying conditions. SMP is paid for 6 weeks at 90% of your average salary and for 33 weeks at a flat rate of £117.18 per week (April 2008-April 2009) or £123.06 per week (April 2009-April 2010) or 90% of your average earnings if that is less.

Maternity Allowance (MA): paid by the JobCentre Plus to women who do not qualify for SMP. MA is paid for 39 weeks at a flat rate of £117.18 per week (April 2008-April 2009) or £123.06 per week (April 2009-April 2010) or 90% of your average earnings if that is less.

Redundancy during pregnancy

I am going to be made redundant during my pregnancy. Do I still qualify for Statutory Maternity Pay (SMP)?

To get SMP you must

- have worked for the same employer for at least 26 weeks by the end of the **qualifying week** (the 15th week before the week your baby is due) *and*
- be employed in all or part of your qualifying week, *and*
- earn at least £90 (April 2008-April 2009) or at least £95 (April 2009-April 2010) on average in the eight weeks or two months before the end of the qualifying week.

You will not get SMP if you are made redundant and stop being employed BEFORE your qualifying week (the 15th week before your baby is due) but you may be able to claim Maternity Allowance. If you are made redundant and stop being employed AFTER your qualifying week but before you start your maternity leave, you are still entitled to SMP. In order to claim SMP you must give your employer 28 days notice of the date you want to start your pay. You must also give your employer a copy of your Maternity Certificate (MATB1) stating your expected week of childbirth which your midwife or GP will give you when you are about 20 weeks pregnant. If you are made redundant IN OR AFTER your qualifying week it is likely that you will still get SMP as long as you have met the qualifying conditions set out above.

If you do not qualify for SMP you may be able to claim Maternity Allowance from your local Jobcentre Plus. In order to apply for Maternity Allowance you will need to ask your employer to give you form SMP1 which explains why you were not entitled to SMP.

Once you qualify for SMP you are entitled to receive it for the full 39 weeks even if

your redundancy takes effect during the SMP period.

I was made redundant just before my qualifying week for SMP. Can I claim anything?

If your employer deliberately selects you for redundancy in order to avoid paying you SMP and you would have qualified if they had not done this, your employer automatically becomes liable to pay it. You must apply to your local HM Revenue and Customs office within six months of the first day on which your SMP was due. You will also have a claim for unfair dismissal and sex discrimination (see below) and a claim for unpaid wages for loss of SMP.

However, if your redundancy was not related to the fact that you were about to qualify for SMP, you will not get SMP if you were made redundant before your qualifying week (the 15th week before your baby is due) but you may be able to claim Maternity Allowance from your local JobCentre Plus.

Will I get redundancy pay?

If you have worked for your employer for at least two years, and you are aged 17 or over, you are entitled to a statutory redundancy payment when you are made redundant. Your employer may offer you an additional contractual redundancy payment because they operate their own redundancy payment scheme. You should check your contract of employment. If not, you will get the statutory redundancy payment which is worked out according to a formula: see the box below.

If you qualify for SMP, you will get that in addition to redundancy pay.

Will I get paid notice if I am made redundant during pregnancy?

You are entitled to a paid notice period if you have been in your job for at least one month. The amount you get will depend on your contract of employment. You should check your contract or staff handbook to see how much notice your employer has to give. If nothing is mentioned, you will be entitled to the statutory notice which is one week's paid

notice after one month's service and after two years' service, a week's notice for each year that you have worked for your employer, up to a maximum of 12 weeks.

Note: your employment actually ends at the end of the notice period (whether you have to work it or not) so that is when your redundancy takes effect. If you are still employed in all or part of your qualifying week (the 15th week before your baby is due) you can still get SMP – see above on getting SMP.

If your employer gives you what is described as a 'payment in lieu of notice', your employment generally ends on that date. However, your employer can only make a 'payment in lieu of notice' if there is a clause in your contract which allows them to do so. If not, you are entitled to a period of paid notice and your contract of employment will end at the end of the notice period.

Statutory redundancy payment

If you are aged 21 or under you get half a week's gross pay for every complete year of employment with the same employer.

If you are aged 22-40 you get one week's gross pay for every complete year of employment with the same employer.

If you are aged 41 or over you get one and a half weeks gross pay for every complete year of employment with the same employer.

There is a maximum limit of 20 years service, no more than 20 years is taken into account.

There is a maximum limit of £330 for a week's pay up to 31 January 2009 or £350 per week from 1 February 2009. Your statutory redundancy pay should be calculated using your normal week's pay or average week's pay received before your maternity leave period started. It should not be based on your SMP or contractual maternity pay.

Redundancy during maternity leave

I have received some of my SMP. The company I worked for has now closed and I have been made redundant. Am I entitled to the rest of my SMP?

Yes, you are entitled to the rest of your SMP. If your employer had still been operating, they would have paid your SMP for the full 39 weeks (even after you have been made redundant). If you have any problems contact your local HM Revenue and Customs office within six months of the first day that your SMP was due. Write a letter explaining what has happened. Keep a record of the payments of SMP that you have received.

If your employer is insolvent or refuses to pay all or part of your SMP, HM Revenue and Customs automatically becomes liable for any outstanding SMP. Contact the Statutory Payments Dispute Team (see useful contacts). If you can, ask the receiver or liquidator to write confirming how much SMP your employer owes you.

Your statutory redundancy pay should be calculated using your normal week's pay or average week's pay received before your maternity leave period started, not a week in which you received SMP or contractual maternity pay. If your employer is insolvent you can apply to the Redundancy Payments Office of the Department for Business, Enterprise and Regulatory Reform for a redundancy payment (see useful contacts).

If I am made redundant while on paid maternity leave, what happens to my contractual maternity pay?

Your right to contractual maternity pay normally stops when your contract ends. If you are made redundant you will probably lose your contractual pay from the date of your redundancy and just get SMP for any remaining weeks. If you are unfairly selected for redundancy because of your pregnancy you will have a claim for unfair dismissal and sex discrimination (see below) and that claim will include compensation for loss of contractual maternity pay.

Am I entitled to paid notice if my job is terminated while I am on maternity leave?

The statutory (legal) period of paid notice is one week's notice for each year of continuous employment with your employer, up to a maximum of 12 weeks. You are entitled to receive **paid statutory notice** when you are on maternity leave. However, if your contract of employment gives you at least one week's notice more than your statutory notice period, you have to rely on the notice period in your contract – **contractual notice**. The law is currently unclear but it may be unlawful to refuse to pay contractual notice pay during paid maternity leave (i.e. the 39 week SMP period) and possibly throughout maternity leave. If your employer refuses to pay contractual notice pay you should seek advice.

If your period of paid notice overlaps with your 39 week SMP period, your employer is entitled to offset SMP against statutory notice pay. However, SMP cannot be offset against a 'payment in lieu of notice' so you would be entitled to receive both.

I am on maternity leave and I have been made redundant but I was planning to return to work in two months time. Do I have any rights?

If you are made redundant during your maternity leave, regulation 10 of the Maternity and Parental Leave etc Regulations 1999 states that a woman on maternity leave must be offered any **suitable alternative vacancy** that exists. Your employer must consider whether a suitable alternative vacancy exists between the time your redundancy becomes known and the time when your maternity leave period is ended by redundancy. The terms and conditions of this new job must be not substantially less favourable than your original job. You should be given first refusal of any suitable alternative job and you should not have to attend interviews as you have priority over other workers being made redundant (who are not on maternity leave).

If your employer fails to offer you a suitable alternative vacancy that exists, that would be an unfair dismissal.

If no suitable alternative vacancy exists, you will receive redundancy pay if you have worked for your employer for at least two years. If you are offered a suitable alternative job and unreasonably refuse it, you will lose your right to redundancy pay.

I have been made redundant while on maternity leave. Although the job I used to do no longer exists, the work I did seems to have been merged into two other people's jobs.

It depends on whether this is a genuine redundancy situation, see the legal definition of redundancy on page 1. An employer can reorganise the work so that they need fewer employees to do the work. This can happen even if there is just as much work to be done as there was before. So, there might be a genuine redundancy situation but you might not have been fairly selected as the one to go. Your employer has to use fair selection criteria and cannot automatically choose you because you are on maternity leave. You should have been considered for one of the other two posts that have had their job descriptions changed to include your work. If this happened whilst you were on maternity leave, you should have been offered the job before it was offered to any other member of staff. If your employer did not use fair selection criteria you can make a claim for unfair dismissal and sex discrimination (see below).

I have been made redundant but they are keeping on the woman who replaced me while I was on maternity leave. Where do I stand?

You have been **dismissed** but this is not really a redundancy. Your employer should have dismissed your maternity replacement, not you. You can make a claim to an employment tribunal for unfair dismissal and sex discrimination (see below).

My company has warned employees of impending redundancies. I was hoping to return to work part-time after my

maternity leave. How are my rights affected by the redundancies?

If your job is selected for redundancy, you will need to be satisfied that there is a genuine redundancy situation (see the legal definition on page 1). You will also need to be satisfied that you have been selected for redundancy fairly and, in particular, that any request for part time working has not influenced your employer's decision to select you for redundancy.

If you are made redundant your employer will need to consider whether there is a suitable alternative vacancy on your same (full-time) hours. If so, your employer must seriously consider whether the suitable alternative vacancy can be done in a way that meets your childcare needs and your employer can only refuse to adjust the hours if there is a good business reason why the vacancy could not be done in this way.

If your employer can justify a refusal to adjust your hours and you refuse the full-time vacancy, you will lose the right to a redundancy payment. However, if they are not justified in refusing your request you will still be entitled to a redundancy payment.

I reduced my hours following my return from maternity leave. How will my statutory redundancy pay be calculated?

See the box on page 2 for how to calculate redundancy pay. The weekly wage limit of £330 (£350 after 1 February 2009) is pro-rated if you work part-time. For example, if you work 3 days a week, you get 3/5 of £330 (3/5 of £350 after 1 February 2009).

Unfortunately, even if you have only worked part-time for a short period following a period of full-time work your statutory redundancy pay will be calculated as if the whole of your service was part-time.

Can I claim any benefits if I have been made redundant?

If you are made redundant before you are 29 weeks pregnant you will probably be entitled to contribution-based Jobseeker's Allowance (JSA). To qualify for JSA you must:

- have paid enough National Insurance contributions

- be well enough to work
- be willing and able to look for work.

You will need to claim JSA at your local Jobcentre Plus and you will have to sign a 'jobseekers agreement'. If you are entitled to Statutory Maternity Pay or Maternity Allowance, you should be paid these benefits instead of JSA once you are 29 weeks pregnant. If you are entitled to Incapacity Benefit you will be paid this instead of JSA once you are 34 weeks pregnant. You may also be entitled to means-tested benefits such as income support, Child Tax Credit and the Sure Start Maternity Grant, on top of your JSA and/or your maternity pay. Contact your local JobCentre Plus.

If I am made redundant after my 'qualifying week' for SMP but then do some work for another employer before my baby is born, what happens to my SMP?

Once you have qualified for SMP your SMP will start being paid to you by your employer (employer A) on the Sunday of the 11th week before the week your baby is due. The start cannot be put off until later in the pregnancy. If you start work for a new employer (employer B) before your baby is born you will continue to receive your SMP. However, the SMP will not continue to be paid to you after your baby is born if you do work for (employer B) during the maternity pay period (39 weeks).

If you work for employer B after your baby is born and you also worked for employer B during the 15th week before your baby was due, you will continue to receive SMP from employer A as normal.

Unfair dismissal and sex discrimination

If you are made redundant because you are pregnant or have taken maternity leave you can make a claim for unfair dismissal and sex discrimination. There is no qualifying period, you are protected from the first day of your employment.

Should I have been chosen as the one to be made redundant?

Your employer should have fair selection criteria which they must follow when selecting employees for redundancy. For example:

- 'Last in first out' (person with least service is first to go)
- Ability, experience and respective hardship are examples of other factors which may be taken into account.
- The fact that you are pregnant or on maternity leave should be ignored.
- Criteria which may indirectly discriminate against women (e.g. selecting part-timers ahead of full-timers) may be unlawful.

You should think about:

- How many redundancies are being made?
- Is it only you being made redundant?
- Who is being made redundant?
- What reason is being given for the redundancies?

If you think you may have been unfairly selected for redundancy, you can ask your employer what criteria were used to select for redundancy and how you were assessed against those criteria. You are entitled to a written statement of the reasons for your dismissal.

Regulation 10 of the Maternity and Parental Leave etc Regulations 1999 states that if a woman is to be made redundant during her OML or AML she must be offered any suitable alternative jobs that may be available. This means that you have the right

to be offered any suitable alternative vacancies before others who are not on maternity leave and you do not need to go for interviews. If you are not offered a suitable vacancy that exists, you will have a claim for unfair dismissal and sex discrimination. Note that if you unreasonably refuse suitable alternative work you would not be entitled to receive compensation for unfair dismissal or to receive a redundancy payment.

Has my employer used a fair procedure?

Your employer should give as much warning as possible of impending redundancies to enable trades unions and employees to consider alternative solutions. You have the right to be individually consulted even if you are on maternity leave. In addition, the law says that if you work for an employer who is proposing to make 20 or more people redundant who work at one workplace within a period of 90 days or less, your employer must consult all the appropriate representatives of any of the employees who may be affected at least 30 days before the first redundancy. If they are proposing to make more than 100 employees redundant within 90 days or less, they must begin consultation at least 90 days beforehand. You may have a tribunal claim for a protective award of not more than 90 days salary. If you are made redundant without any consultation, you are likely to have claims for unfair dismissal and sex discrimination.

As part of the consultation process, you should be given an opportunity to contest your selection for redundancy. This may involve explaining to your employer any factors which may have led to your selection and of which your employer is unaware (e.g. a personal crisis at home which may have affected your performance temporarily or bullying at work). It is also an opportunity to consider other vacancies within the organisation which may be suitable for you.

Summary

If you are made redundant while you are pregnant or on maternity leave you may have a claim for unfair dismissal and sex discrimination if:

- There was no genuine redundancy situation.
- You were selected for redundancy because you are pregnant or on maternity leave.
- You were not offered a suitable alternative vacancy.
- You were selected in contravention of an agreed selection procedure.
- The selection criteria were unfair in themselves or were unfairly applied.
- There was a failure to consult and warn.

This information sheet was produced with support from UNISON.

Useful Contacts

ACAS

For general employment law advice
08457 47 47 47
www.acas.org.uk

Citizen's Advice Bureau

For general help and advice. You can find your nearest CAB in your phone book or
www.adviceguide.org.uk

Community Legal Advice

0845 345 4345 for advice on employment law and benefits and how to find an adviser in your area.
www.communitylegaladvice.org.uk for information and how to find a legal adviser.

HM Revenue and Customs SMP Helpline

08457 143 143. For queries about SMP.

Redundancy Payments Office Helpline

0845 145 0004. Claims for redundancy pay when employer is insolvent.

Statutory Payments Dispute Team

Room BP 3202, Benton Park View,
Longbenton, Newcastle upon Tyne, NE98
1YS. Claims for SMP when employer is insolvent or refuses to pay SMP.

Working Families

www.workingfamilies.org.uk
Advice on maternity rights and benefits.
Helpline 0800 013 0313.

This factsheet was produced by Maternity Action in February 2009. It is always important to get up-to-date advice.