



Article

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Redundancies and maternity leave

Recent comments by Marks & Spencer boss, Sir Stuart Rose, that women "have never had it so good" in the workplace contrast other reports that pregnant women and new mothers are being unfairly targeted for redundancy during the recession. What are the issues are faced by employers seeking to make such redundancies?

Risks

If an employee is dismissed (which includes non-renewal of a fixed term contract) while pregnant or on maternity leave, there are risks of a claim for unfair dismissal and/or sex discrimination if:

- There is no genuine redundancy situation, eg she is dismissed ostensibly for redundancy but in reality, the employer prefers the employee who is doing the maternity cover;
- There is a genuine redundancy but the only or principal reason for her dismissal or selection is related to pregnancy, birth or maternity leave;
- She is not consulted because she is on maternity leave.

However, a common misconception held by employers is that they cannot make employees on maternity leave or pregnant employees redundant. There is nothing to prevent an employer making such an employee redundant, provided that it takes care to avoid discrimination, ensuring that the decision has been made on objective selection criteria and that fair procedures are followed.

Selection

The selection criteria used to select those to be made redundant should be objective, rather than subjective. The criteria should be measurable, rather like smart objectives, and not simply based on an individual's personal opinion.

Take care to ensure that the way that the criteria are used can be supported by documents such as personnel records or performance records. Consider involving more than one manager in the process of selecting and scoring to avoid any unfairness. Such documents would be disclosable in any litigation so ensure that not only are your selection criteria objective and fair but that you have appropriate evidence supporting the way in which you have selected employees.

Some employers use attendance records as a criteria. Employers should check the accuracy of information and consider the reasons behind each set of absence. There may be some absence, for example, for example, absence for pregnancy-related illness, maternity or other family (if any) leave, that should be discounted.

Avoid the risks of indirect discrimination. Do not select employees on the basis of their status, such as part time or fixed term, because this will indirectly have an impact on pregnant or maternity leavers. For example, a redundancy policy which selects first for redundancy, those who are not on permanent contracts will be discriminatory not only

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against women but those on fixed term contracts.

Procedure

Don't forget absent employees when consulting as this exposes the business to the risk of claims of sex discrimination and/or unfair dismissal. Employees on maternity leave must still be informed about the proposals and receive the same information in writing as the other employees. Actively involve them in the consultation process and contact them and discuss how they would like to proceed. The employee may want to meet at home or to have meetings outside of office hours. You should consider what you can do in the circumstances to make sure that the consultation obligations are carried out fully, for example, consulting by phone and/or by letter. Also, the statutory right to be accompanied to consultation meetings continues to apply both during ordinary and additional maternity leave.

Alternative employment

If a number of employees have indicated an interest in any available jobs, employees on maternity leave have an automatic right to be offered suitable alternative work where available to start immediately after the existing contract ends. This includes a vacancy within an "associated" employer so take care to ensure that a thorough search is conducted.

Any such new role offered must be suitable and appropriate for the employee to do in the circumstances. The capacity and place in which she is to be employed and the other terms and conditions should be no less favourable to her than if she had continued to be employed in her old job. Of course if the employee refuses an offer of suitable alternative employment and is dismissed, the dismissal is quite likely to be fair. Take advice at this point if you are unsure about whether there has been an unreasonable refusal or if the role is suitable.

Key points:

- Adopt objective and fair selection criteria and ensure that these are consistently applied.
- Ensure that you include pregnant or employees or maternity leave in the consultation process.
- Don't forget the priority position that an employee on maternity leave has in terms of alternative employment.
- Ensure that you deal with the benefits such as redundancy pay and statutory maternity pay appropriately.

More information

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