

Redundancy Pitfalls - the maternity question...



With redundancies still coming thick and fast, one area where even those experienced in HR can come unstuck is how to deal with employees on maternity leave. Emily Greswell, Senior Associate and Amy Tudor, Solicitor, from Burges Salmon LLP, consider some of the commonly asked questions.

1 Can I make an employee on maternity leave redundant?

Yes, an employee who is on maternity leave can lawfully be made redundant. However those on maternity leave do have special rights so you need to be careful how you do it. If an employee is selected for redundancy for a reason relating to her pregnancy, the birth or her maternity leave, then the redundancy will be automatically unfair and will also constitute sex discrimination.

2 If an employee is made redundant whilst on maternity leave, is she entitled to a redundancy payment?

Yes. Provided the employee has two years' service, she is entitled to redundancy pay calculated in the same way as for any other employee. She will also be entitled to her notice pay (this will need to be paid at full pay if her notice period is equivalent to the statutory notice period or no more than one week longer). The employee is also automatically entitled to a written statement of the reasons for her dismissal regardless of her length of service and without needing to request it first.

3 What happens to an employee's maternity leave and statutory maternity pay ("SMP") if she is made redundant during maternity leave?

The employee's maternity leave will come to an end as she will no longer be employed. However, she will still be entitled to receive SMP for the remainder of the SMP period.

4 In terms of selecting the employee for redundancy do I use the same selection criteria for the employee as I would for others with the pool?

Yes, you should apply the same selection criteria. Selection is a high risk area, as the employee may try to argue that she was selected for redundancy because she was on maternity leave. To avoid claims of unfair dismissal and/or discrimination you need to make sure that you treat the employee as you treat others in the selection pool and that you make sure that your selection criteria are objective as far as possible. Objective criteria may include reference to performance (supported by appraisal or other documentation), attendance and disciplinary records. Employers should ensure that there is sufficient evidence to justify the individual's scores. Without this evidence, the employer may struggle to show an employment tribunal that the pregnancy/ maternity leave did not play a role in the decision, thus the higher the risk of a successful discrimination claim.

If you are using attendance records as a criterion for selection, it is important not to count any periods of sickness absence related to the pregnancy or, indeed, the maternity leave period itself. To do so will amount to sex discrimination.

5 Should I consult with an employee on maternity leave about a possible redundancy situation?

Yes, you should contact the employee to explain about the possible redundancy situation and should maintain that contact so that the employee is informed about, and involved in, the consultation process.

The employee should receive the same communications at the same time as other employees and, if possible, the consultation process should be the same as for other employees. The individual consultation should ideally take place in person, which may involve visiting the employee at home or at a mutually convenient meeting place. If the employee cannot attend in person then consider consulting by other means such as by telephone or, as a final resort, by correspondence.

6 Do I need to extend the consultation period for employees on maternity leave?

No, employees on maternity leave can be made redundant at the same time as other employees, i.e. when the job disappears. You do not need to wait until the employee returns from maternity leave to start consulting with her.

7 What about suitable alternative employment, are there any special rights?

Yes. If a redundancy situation arises during an employee's maternity leave, the employee is **entitled to be offered** any suitable alternative vacancy that exists. Crucially, the employee is entitled to be offered such a vacancy ahead of other employees.

The vacancy must be suitable and appropriate for the employee to do in the circumstances, and must be offered on terms which are not substantially less favourable than the terms enjoyed under the employee's current contract.

If such a vacancy exists and it is not offered to the employee, then the dismissal for redundancy will be automatically unfair and will, potentially, constitute sex discrimination.

8 What if there are better candidates for an alternative vacancy?

If the role constitutes a suitable alternative vacancy, it is no defence for the employer to show that there were better candidates – the obligation to offer the suitable alternative role to the employee on maternity leave is absolute.

9 What if I didn't know about the suitable alternative vacancy because, for example, it was in another part of our business?

An employer's ignorance of a vacancy is not a defence even if the alternative employment was with another group company. It is therefore important to check vacancies across the whole of the organisation.

10 We normally refer staff to the vacancy list on our Intranet site – will this do?

No. The obligation is on you to offer the vacancy to the employee, it is not enough to ask the employee to review lists of vacancies and apply for any she is interested in. However, it is worth discussing vacancy lists with the employee as she may help in determining which vacancies would be suitable and appropriate.

11 When can I stop searching for jobs for the employee?

The obligation to offer suitable alternative employment continues until the date of termination of employment and so will continue during any notice period.

12 What happens if the suitable alternative vacancy needs to be filled immediately, and the employee is not intending to return for some time?

A need to have somebody start a role immediately would not provide you with a defence to a claim if a suitable alternative role is not given to the employee. The courts have held that an employer must give the vacancy to the employee and cover the position, for example, with a temporary worker in the meantime.

13 I have two employees on maternity leave and only one suitable alternative role. What should I do?

It is not clear from either legislation or case law how an employer should deal with a situation involving two employees with priority rights. Both employees will have an equal right to be offered the suitable available role. The practical approach would be to apply a fair selection process to decide which of the two employees is the better candidate.

14 What if the employee refuses the offer?

If the employee refuses the offer of a suitable alternative vacancy, then the dismissal is likely to be fair. In addition, as with other employees who turn down suitable alternative employment, the employee would not be entitled to a redundancy payment if she unreasonably refuses the offer.

A version of this document has been published as an employer's briefing on the Croner's website.