

# Pregnancy or Maternity Discrimination

## In the workplace: your legal rights



### Overview

Women are protected from pregnancy or maternity related discrimination. The main legislative framework was contained within the Sex Discrimination Act 1975, ('the SDA'). As of 1st October 2010, all existing equality legislation (including the SDA) was consolidated into the Equality Act 2010 ('The Act').

### When is discrimination unlawful?

**Who is protected?** - In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. It is unlawful to discriminate against someone because of pregnancy or maternity from the initial job application process through to dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships, Crown employees and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. 'The Act' extends further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others. There is no opt-out clause for small employers.

It is important to note that pregnancy or maternity discrimination claims are now separate claims from sex discrimination and should not be brought as sex discrimination claims unless the pregnancy or maternity provisions do not apply.

**What is prohibited?** - 'The Act' sets out specific protection against discrimination because of pregnancy or maternity. There is no prohibition of harassment related to pregnancy or maternity nor is it possible to bring a claim in respect of indirect discrimination because of pregnancy or maternity. These claims would have to be brought as direct discrimination claims.

### Discrimination

Under Section 18 of 'The Act', direct discrimination occurs where:

A person, during the protected period, treats a woman unfavourably in relation to:

- A pregnancy of hers
- Because of illness suffered because of it.

or

A person treats the woman unfavourably because:

- She is on compulsory maternity leave (which is the first 2 weeks after the birth, or first 4 weeks if the woman is a factory worker)
- She is exercising or seeking to exercise, or has exercised or sought to exercise the right to maternity leave.

### Who is covered?

It is important to note that a person is only afforded protection under this section of 'The Act' in relation to her own pregnancy. Therefore, if a pregnant woman's partner is being discriminated against at work by their employer they cannot seek protection against the discrimination under Section 18 of 'The Act'. However, they may be able to bring a sex discrimination claim.

*For more information about sex discrimination please refer to the 'Sex Discrimination' factsheet in the Employment Law series.*

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### What is the Protected Period?

The Protected Period begins from the start of the pregnancy to the end of the woman's maternity leave. However, in some instances this period can be extended i.e. where a decision was made during the Protected Period, but acted upon after the period had come to an end. For example, where an employer decides to make a woman redundant because of her pregnancy but does not communicate the decision to make her redundant until after she returns back to work following maternity leave, then it is arguable that the act took place in the Protected Period as that is when the decision was taken. In respect of maternity leave, the treatment complained of is not limited to such treatment occurring in the Protected Period. This means that it may be possible to bring complaints about discrimination in respect of maternity leave which occurs after the maternity leave has ended. For example, if a woman is advised that she will not be promoted because she missed important training sessions for the role when she was on maternity leave, this may give rise to a claim.

A woman may be required to demonstrate that her employer knew of her pregnancy or suspected that she was pregnant if she is to successfully claim that she was discriminated against during the Protected Period.

*"Maternity-related pay means contractual pay other than statutory maternity pay to which a woman who is pregnant or on maternity leave is entitled".*



- The calculation of any maternity-related contractual pay to which you are entitled
- Bonus payments during maternity leave, and
- Pay increases following maternity leave.

If your claim relates to any of the above, there is no need for a comparator. Any pay increase you receive or would have received had you not been on maternity leave must be taken into account in the calculation of your maternity-related pay.

Your employer must also pay any contractual bonus payment awarded to you during your maternity leave period, or that would have been awarded had you not been on maternity leave. Further, your employer is required to pay any pay increase or bonus as it would become due.

### Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, 'The Act' provides that the claimant is required to establish clear facts which could enable the Tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non discriminatory based explanation from the respondent, the Tribunal must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

### Unfavourable treatment

As the treatment that is unlawful is unfavourable treatment, 'The Act' does not require a woman to point to a comparator to show that she has been treated unfavourably.

Although it has been long since accepted that a woman does not need to rely on a comparator in pregnancy or maternity related claims, 'The Act' now makes this clear.

### Victimisation

It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under 'The Act'. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the SDA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the SDA; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the SDA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act' or the SDA. This would include raising a grievance of maternity or pregnancy discrimination.

So for example, if you have made a complaint about maternity or pregnancy discrimination and are later treated unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

### Maternity Equality Clause

Maternity-related pay means contractual pay other than statutory maternity pay to which a woman who is pregnant or on maternity leave is entitled. Your employer may provide a more generous maternity pay scheme than the statutory minimum.

When you go on maternity leave, a 'Maternity Equality Clause' is automatically read into your contract. The clause deals with:

### Questionnaires: getting the facts together

You can serve a questionnaire on your employer any time before lodging a claim at the Employment Tribunal or within 28 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, the Tribunal may draw an inference of unlawful discrimination.

### Time limits and the correct legislation

A claim for pregnancy or maternity discrimination must be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where a series of acts amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on.

Please note that in most cases, the time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed. You will however need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your

compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code).

If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or Tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

If part of your claim arose before 1st October 2010, you should bring claims under 'The Act' and the SDA. 'The Act' will be used in all cases where the claim arose after 1st October 2010 in its entirety. You should seek legal advice if you are unsure about which legislation applies to your claims.

## Remedies

If the Tribunal finds that you have been unlawfully discriminated against, the Tribunal may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has succeeded in her claim for (automatic) unfair dismissal; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's discrimination.

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## Pregnancy Discrimination – Goods and Services

**Discrimination** – Section 17 of 'The Act' prohibits pregnancy or maternity discrimination in non work environments in respect of:

- Services and public functions
- Premises
- Education
- Associations.

**Discrimination occurs if:**

- A person treats a woman unfavourably because of a pregnancy of hers. Again the protection is against direct discrimination and must relate to the woman's own pregnancy (therefore a partner/spouse/friend treated unfavourably would not be covered under this section of 'The Act' but may be covered under sex discrimination)
- She is subjected to less favourable treatment because she is breastfeeding
- If in the period of 26 weeks from the birth, she is treated unfavourably because she has given birth or is breastfeeding (the definition of birth includes birth to a stillborn child after 24 weeks).

## Victimisation

A person must not discriminate or victimise against the person requiring the service/function by:

- Not providing the service/function (for discrimination claims this includes providing a lesser quality service/function or not providing the service/function in the manner that it is usually provided) as to the terms on which the service/function provider provides the service/function to the person
- By terminating the provision of the service/function to the person
- By subjecting the person to any other detriment.

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## Health and Safety

A service provider may be able to refuse a service to a pregnant woman where the provider reasonably believes that providing the service could create a risk to the woman's health and safety because she is pregnant. Also if they refuse to provide the service to a person with other physical conditions and that the reason for the refusal is the reasonable belief that the service would create a risk to the person's health and safety. For the same reasons the service provider may also be able to impose conditions on the service if the conditions are in place to remove or reduce a risk to the pregnant woman's health and safety. For example, an amusement park may lawfully be able to refuse admission to a pregnant woman on a rollercoaster and they would refuse to provide that service to someone with a heart complaint or Epilepsy.

## Breastfeeding – in non work environments

It is unlawful to treat a woman unfavourably, in the 26 weeks after the birth, because she has given birth or because she is breastfeeding. In this instance a woman would not have to point to a comparator as her complaint would be that of unfavourable treatment which does not require a comparator.


It is direct sex discrimination under Section 13 of 'The Act' to treat a woman less favourably than others are or would be treated because she is breastfeeding a baby who is more than 6 months old. In this instance, as the complaint is about less favourable treatment it would be necessary to show that the woman was treated less favourably than a comparator. A comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical. A useful test is the 'but for' test: would I have been treated the same way 'but for' the fact that I am breastfeeding?


These provisions of 'The Act' will now make it unlawful to prevent women from breastfeeding in public areas such as restaurants, cafes, department stores and shopping centres.

## Contact Us

*Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:*

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