

Guidance

Managing redundancy for pregnant employees or those on maternity leave

May 2018



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About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

'Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word 'must' - for example, a woman made redundant while on maternity leave must be offered any suitable alternative vacancy if you have one.

The word 'should' indicates what Acas considers to be good employment practice.

May 2018

Information in this guide has been revised up to the date of publication. For more information, go to the Acas website at www.acas.org.uk. Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

Managing redundancy for pregnant employees or those on maternity leave

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Managing redundancy for pregnant employees or those on maternity leave

This good practice guide looks at correctly handling redundancy process if you have employees who are pregnant or on maternity leave. It has been developed in partnership between Acas and the Equality and Human Rights Commission.

The Equality and Human Rights Commission enforces equality law in Britain and human rights law in England and Wales. We aim to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We also give guidance to businesses, the voluntary and public sectors, and to individuals.

www.equalityhumanrights.com/advice-and-guidance

A checklist for managing the process fairly

- Identify whether and why there is a redundancy situation. If you are not sure see Acas guidance.
- Consult any Trade Union (if there is one) and employees, including those on maternity leave or who are absent with pregnancy-related sickness.
- Identify relevant employees likely to be affected by the redundancy (may not be limited to the exact same work or grade).
- Draw up criteria for selecting people for redundancy which are: relevant to the job going forward, transparent, objective, and capable of measurement.
- Identify who in your business will select those potentially redundant. The person should make him/herself familiar with the work, experience, qualifications, skills of all affected employees; ensure that employees who are absent due to pregnancy are properly considered; and that a woman on maternity leave will not be disadvantaged by the criteria.
- Consult all affected employees about the redundancy criteria and how they have been assessed according to them so they can correct any mistakes; ensure women on maternity leave are consulted.
- Ensure there is fair procedure for considering suitable alternative work – women on maternity leave should have preference over other workers. Ensure that there is awareness of qualifications, skills, abilities etc. If a woman is asked to attend a meeting during maternity leave, ensure that she is not disadvantaged, e.g. by being unaware of any developments at work.
- Ensure that you have a fair and transparent way of dealing with any appeal. Involve a more senior manager if you can to consider individual grievances and any subsequent remedies. This may allow complaints about selection for redundancy to be resolved locally and help reduce the likelihood of complaints to employment tribunals.

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Understanding pregnancy and maternity protection

What is the purpose of the law?

The purpose of the law is to:

- Protect the health of mothers and their babies
- Minimise the difficulties and disadvantages that working women face because of giving birth and having children.

The beginning of pregnancy to the end of maternity leave is a 'protected period' during which a woman is entitled to special consideration if this is necessary to make good any disadvantage she may otherwise experience.

What does the law say?

The law makes it clear that:

- During the protected period unfavourable treatment of a woman because she is pregnant or on maternity leave is unlawful. This means a woman doesn't have to compare her treatment with anyone else to show direct pregnancy and maternity discrimination, see scenario 1 below.
- A woman on maternity leave has the right to return to the same job before she left; an interim employee cannot be given her job even if you think the person is a better employee.
- Selecting a woman for redundancy because of her pregnancy, maternity leave or a related reason is automatically unfair dismissal as well as being unlawful discrimination.
- Failure to consult a woman on maternity leave about possible redundancy is likely to be unlawful discrimination.
- A woman made redundant while on maternity leave must be offered any suitable alternative vacancy if you have one. She doesn't need to apply for it.
- Special provision for a woman in connection with pregnancy or childbirth is not sex discrimination against a man provided that the action you take does not go beyond what is necessary to rectify her disadvantage. For example, health and safety laws provide for special treatment.

Scenario 1:

Lydia is pregnant and works at a call centre. The manager knows Lydia is pregnant but still disciplines her for taking too many toilet breaks in the same way as the manager would for any other member of staff. This is pregnancy discrimination because the behaviour for which Lydia is being disciplined is linked to her pregnancy. It doesn't require the usual comparison of treatment with other employees so it is irrelevant that other employees have been disciplined for similar behaviour.

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Scenario 2:

A night-shift worker who is pregnant is certified by her GP as unable to work nights. Her employer cannot dismiss or select her for redundancy for this. Instead they need to manage her by either finding her suitable daytime work or, if they cannot do this, putting her on leave with full pay and benefits.

Managing redundancy for women who are pregnant or on maternity leave

If you are reorganising and/or need to make employees redundant and this includes someone who is pregnant or on maternity leave, you need to:

- Check the redundancy is genuine and necessary
- Ensure you consult and keep in touch
- Establish non-discriminatory selection criteria
- Consider alternative work.

Is the redundancy genuine?

You must be careful to ensure that the redundancy is for a genuine reason, is necessary now and is not caused by the pregnancy or maternity leave itself. A reason could be the closure of the business or employee's workplace or because of a diminishing need for the employee to do the available work.

Scenario 3:

While Wendy, a part-time librarian, was on maternity leave her employer decided to appoint an information services manager and incorporate Wendy's duties into this post. Wendy was dismissed on ground of redundancy shortly before she was due to return to work. This was found to be unfair dismissal as the new post was still available and she was not genuinely redundant.

You may find during a woman's maternity leave that you can manage without her by redistributing or reorganising the work. This is not a valid reason to make her redundant.

Dismissing her is likely to be unlawful discrimination (and automatically unfair dismissal), because the woman would not have lost her job if she had not had to take time off work to have a baby.

If you have decided that you need fewer employees you need to go through a fair redundancy selection process, ensuring that the woman who has been absent on maternity leave is not disadvantaged.

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How do I consult employees on maternity leave?

You should consult employees at risk who are on maternity leave (or off work with pregnancy-related sickness) about proposed redundancies, giving as much warning as possible. This includes employees on fixed-term contracts.

You need to talk about:

- Reasons for redundancy and the posts affected
- Considering alternatives, such as voluntary redundancies, or reduced working hours
- The selection criteria for those employees at risk of redundancy
- How the employee's redundancy selection assessment was carried out any suitable alternative work.

If you don't consult, even if it's because you have a genuine concern not to worry or disturb an employee during her maternity leave or when she is off work with pregnancy-related sickness, this is likely to be discrimination, as well as making the process unfair.

Scenario 4:

Joan, the manager is aware that Kelly is having a difficult pregnancy and is quite unwell. She learns that Kelly's job is under threat of redundancy. Joan is worried that talking to Kelly about this might cause her distress as Kelly has already indicated to a friend at work that at the present time she doesn't want to speak to anyone or discuss work. Joan decided not to talk to Kelly and consequently didn't find out about a qualification Kelly has for an alternative job. Joan realises that now Kelly could make a claim for discrimination and unfair dismissal.

Try and agree the least intrusive and least stressful methods of keeping in touch before your employee goes on maternity leave.

How do I decide the right selection criteria?

If you use a selection process to decide who to make redundant it must be transparent, known by everyone it applies to and non-discriminatory. The selection criteria should be objective and measurable. Typical criteria include:

- Individual skills, qualifications
- Performance or aptitude for work
- Attendance and absence record
- Disciplinary record
- Customer feedback.

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The criteria you use must not disadvantage employees because of sex, pregnancy or maternity leave. The Acas booklet Redundancy handling provides useful advice on consultation and selection criteria.

If you use attendance or absence as a selection criterion don't forget to discount any caused by your employee's pregnancy or maternity.

Dos and don'ts: applying selection criteria for performance

If you have decided to use performance as one of your main selection criteria, you need to ensure you do not disadvantage pregnant employees or those on maternity leave. For example:

✗ If the last performance assessment was done during pregnancy or maternity leave and showed lower scores than usual for this reason, this should not be taken into consideration against the selection criteria.

✓ If an employee missed the performance review cycle because of pregnancy-related illness or maternity leave you could consider using a previous review.

✗ Do not allow an employee to miss out on what's been happening at work, such as information on workplace developments or any support they may need for an interview.

✓ If an interview process is required, make sure they are given sufficient notice (for example to make childcare arrangements and to catch up with work-related developments).

Scenario 5 - part 1:

Less than a month after Brenda leaves to have her baby, her team have a new manager. Shortly afterwards a redundancy situation is announced and one of the criteria is a review of employees' performance carried out by the new manager. In Brenda's case, the employer decides to use her last review from her former manager as this will ensure she isn't disadvantaged by her pregnancy or being on maternity leave.

Alternatively, the employer could decide to assess everyone's performance over a longer period, which would be an adjustment to reflect her circumstances but may allow for more complete comparisons of performance. How performance appraisal should be conducted in this situation may be part of the consultation process.

You must ensure that the woman is not disadvantaged in the redundancy process, but you should not do more than is reasonably necessary to achieve this where it would prejudice the position of others at risk of redundancy. For example, in the scenario above, it would be unfair on a colleague if Brenda's manager decided to give her a blanket 'maximum

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assessment' for the previous year's report irrespective of the mark she actually got, and as a result of this the colleague was selected for redundancy.

Is there a suitable alternative vacancy?

Sometimes you might have alternative jobs that you can offer to redundant employees. If you do, an employee on maternity leave who has been selected for redundancy must be offered a suitable vacancy before any other employee. If you don't do this, her dismissal may be automatically unfair. If you do offer a suitable alternative and the employee unreasonably turns it down, she loses her right to a redundancy payment.

If there is no suitable alternative vacancy, a woman can be made redundant during her statutory maternity leave provided the reason for redundancy is unconnected with her pregnancy or maternity leave and you have followed a fair redundancy process.

If a woman is selected for redundancy it is good practice to discuss the implications – for example, her statutory and contractual maternity rights including pay.

The alternative job must be suitable and appropriate for the employee in the circumstances; if it is not then you do not have to offer her the job. To decide if a job is suitable and appropriate the law says it must be no worse than her previous job with regard to location, terms, conditions and status and she has the capacity for the work.

So if the vacancy is at a different location and poses additional childcare and travelling problems for the employee it may not be suitable, in which case if she refuses it she would not lose her right to a redundancy payment.

If there is only one job and more than one person on maternity leave, you will have to consider for whom it is most suitable.

Myth Busting: key facts about managing pregnancy and maternity at work

Myth: Pregnant women and women on maternity leave cannot be made redundant.

This is not true. In a genuine redundancy situation, and where there is no suitable alternative work available for those on maternity leave, then they can lawfully be made redundant, providing that pregnancy and maternity is not the reason for redundancy, the redundancy is genuine and you have followed the correct redundancy procedures and have considered any redeployment.

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Myth: If a pregnant employee is on a fixed-term contract I can just make them redundant without offering them an alternative job.

Pregnant employees on fixed-term contracts have similar maternity and employment protection rights to permanent employees. If you decide not to renew a fixed-term contract because of pregnancy or maternity leave this would be unlawful discrimination and automatic unfair dismissal. Any suitable alternative work should be offered to an employee who is made redundant while on maternity leave even if she is on a fixed-term contract.

Myth: If I make a pregnant employee redundant, I don't have to pay them maternity pay as well.

If a pregnant employee qualifies for statutory maternity pay and is made redundant before going on maternity leave but after the beginning of the 15th week before the baby is due, you will need to pay her statutory maternity pay (SMP) as well as any redundancy payment. Remember you are reimbursed by the government for the SMP.

If your company has a maternity policy which offers additional contractual maternity pay this would end when the contract ends unless you agree otherwise.

Myth: I treat everyone the same, that's equality so I'm OK.

Equality is not always about treating everyone in the same way, but can involve treating people in a way that takes account of their needs or circumstances to ensure they are not disadvantaged. In relation to pregnancy, the law recognises that it is a unique condition and that sometimes a pregnant employee must be treated differently so that she is not disadvantaged.

Myth: Everyone has to go through the application process for a job after the reorganisation.

This is not always true. In the redundancy process, if suitable alternatives are identified, these should be offered to employees on maternity leave without the need for an application process.

Myth: You can't criticise the performance or conduct of a pregnant employee.

The effects on some women of pregnancy-related illness or fatigue should not be underestimated and should be taken into consideration when reviewing performance. However this does not provide a complete blanket ban on discussing performance or conduct issues. If the performance issues predate the pregnancy and were not dealt with at the time, this

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may raise suspicions that any adverse assessment is linked to the pregnancy and that would be discrimination.

Myth: If an employee is on maternity leave it is illegal for an employer to contact her about any work-related issues.

This is not true. Employers can and should keep in contact with employees on maternity leave especially if the employee is at risk of being made redundant. It is good practice to agree beforehand how this contact should take place, and important to be sensitive to an employee's circumstances and preferences. You could agree to use an employee's Keeping In Touch Days (known as KIT days), and/or agree when is best to telephone, write letters or emails about workplace developments.

Myth: All women returning from maternity go part-time, we don't have part-time roles so I can make her redundant.

Some women may wish to return full-time, in any case a person's work status (full-time, part-time, flexible working etc.) should not affect the likelihood of being made redundant. To do this could be discriminatory or unfair dismissal, both of which could lead to a claim at employment tribunal.

Myth: We are going through redundancy so I can ask pregnant staff and those on maternity leave to 'volunteer' for redundancy first.

Pregnant employees and those on maternity should not be singled out for different or detrimental treatment. As an employer you are entitled to offer some form of voluntary redundancy, but no-one should be pressured into accepting this.

Myth: I have less than five staff so I am exempt from all maternity protection legislation.

The maternity protection and equality laws apply to all employers regardless of size.

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The legal status of this guidance

This guidance applies to England, Scotland and Wales. Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

For more information, check the Acas website: www.acas.org.uk or the Equality and Human Rights Commission website: www.equalityhumanrights.com

The Equality and Human Rights Commission has written a series of guides to explain what employers must do to meet the requirements of equality law. You can find out more about equality law and redundancy at www.equalityhumanrights.com/advice-and-guidance.

For more detailed information on redundancy see the Acas guidance on Redundancy.

If you require this publication in an alternative format and/or language please contact the communications team at the Equality and Human Rights Commission to discuss your needs: communications@equalityhumanrights.com
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