

How to Support an Employee's Sickness Absence During Pregnancy

Introduction

Employers need to take particular care with the way in which they deal with an employee's sickness absence during her pregnancy. Protection from discrimination, detriment and dismissal for reasons related to pregnancy has long been a part of UK and European law. The law acknowledges that complications that may cause incapacity for work may occur during pregnancy, and provides special protection for employees in such circumstances.

These specific protections do not extend to sickness that is unrelated to the pregnancy. The employer must treat a pregnant employee who is sick for a reason unrelated to pregnancy consistently with other employees who are off sick for other reasons.

Statutory protection for pregnant employees

Section 18 of the Equality Act 2010 provides that an employer discriminates against an employee if, during "the protected period", it treats her unfavourably because of her pregnancy or because of illness suffered by her as a result of her pregnancy. The protected period begins when the pregnancy begins and ends when the additional maternity leave period ends or when the employee returns to work after her pregnancy, if that is earlier. There is no need for the employee to identify a male comparator to show that she has been treated unfavourably, and employers cannot defend a claim by referring to a male comparator who has been treated in the same way. For example, if an employer takes disciplinary action against an employee as a result of her high absence levels, where the absence was related to her pregnancy, the employee could claim pregnancy and maternity discrimination. The employer would not be able to defend such a claim on the ground that it treated all employees with comparable sickness absence levels in the same way.

An employer's actions will not amount to discrimination if it does not know that the employee is pregnant. However, according to the Equality Act 2010: Employment statutory code of practice, the employer will be deemed to have the requisite knowledge if it knows, believes or suspects that the employee is pregnant, "whether this is by formal notification or through the grapevine". In addition to protection from discrimination, under reg.19 of the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312), an employee is entitled not to be subjected to any detriment by her employer because she is pregnant.

Where the employee is dismissed (including by the non-renewal of a fixed-term contract) and the reason or principal reason for the dismissal is connected with her pregnancy, the dismissal will be automatically unfair (s.99 of the Employment Rights Act 1996).

Employers should ensure that line managers are properly briefed about the protection from discrimination, detriment and dismissal afforded to pregnant employees. If a manager discriminates against an employee in the course of employment, the employer will be vicariously liable for the discriminatory act. The employer will be able to raise a defence to such a claim if it can show that it took all reasonable steps to prevent the manager from committing the act.

Establishing the reason for the absence

The employer is entitled to ask an employee about the reason for his or her absence and to record this. While information about an employee's health is sensitive personal data under the Data Protection Act 1998, and must therefore be dealt with in line with the Act, sickness absence will usually be a circumstance where it is necessary for the employer to obtain and record the data to meet its legal obligations.

Pregnancy-related absence

It is particularly important for the employer to establish the reason for a pregnant employee's sickness absence because, if the sickness absence is pregnancy related, the employer will need to ensure that it complies with its duties towards pregnant employees, for example it should ensure that the absence does not result in disciplinary action. Also, if the employee is absent from work after the beginning of the fourth week before her expected week of childbirth (EWC), the employee's statutory maternity leave will be automatically triggered (see Automatic triggering of statutory maternity leave due to pregnancy-related illness).

The employer should ask about the reason for the employee's sickness sensitively.

Miscarriage

Where sickness absence is associated with an employee's miscarriage, this should be treated as pregnancy-related sickness. The employee will be covered by protection from pregnancy and maternity discrimination or sex discrimination in relation to the way that she is treated as a result of her miscarriage. If a miscarriage or stillbirth occurs after 24 weeks of pregnancy, the employee's statutory maternity leave will be triggered (see How to deal with an employee who has a miscarriage or stillbirth or whose baby dies after birth).

Sickness absence unrelated to pregnancy

If the reason for the sickness is unrelated to the employee's pregnancy, there should be no special pregnancy-related protection for the employer to consider and the employer should deal with the employee in line with its normal procedures. However, the distinction between absence that is unrelated to the employee's pregnancy and absence that is related to her pregnancy is not always clear cut. For example, stomach upsets may or may not be pregnancy related. Where there is some doubt, the employer would be prudent to treat the sickness as pregnancy related. Even where the illness is clearly not connected to the pregnancy, the employer should consider carefully any actions that it takes to ensure that they are fair and consistent and do not amount to pregnancy discrimination, detriment or unfair dismissal.

Measures to enable the employee to return to work

The employer should investigate whether or not any factors related to the employee's work are causing or contributing to her illness and should consider any measures that would enable the employee to return to work. For example, the employer could allow a pregnant employee to take more breaks or adjust her working hours because of tiredness. This should be done with reference to any risk assessments that the employer has carried out in relation to the employee's work.

Regulation 16(1) of the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) provides that, where there are women of child-bearing age in an employer's workforce, and the work is of a kind that could involve a risk to the health and safety of a new or expectant mother (or her baby) from any processes, working conditions, or physical, biological or

chemical agents, the employer's general risk assessment (which it is required to carry out under reg.3(1) of the Management of Health and Safety at Work Regulations 1999), must include an assessment of this risk (see How to deal with the health and safety rights of new and expectant mothers).

Once an employee has notified the employer in writing that she is pregnant, the employer must also carry out an individual risk assessment for the employee, if the work is of a kind that could pose a risk to her health and safety or that of her baby. Where a risk is identified, the employer is required to: take measures to remove, reduce or control the risk; alter the employee's working conditions or hours of work; or offer the employee suitable alternative work. Ultimately, the employer must suspend the employee from work if this is necessary to avoid the risk.

Employers must keep the risk assessments under review, particularly where an employee goes off sick during her pregnancy. The risk assessments may be useful in identifying steps that would enable the employee to return to work, or the nature of the employee's illness may highlight a risk that was not previously identified.

Absence management procedures

Many employers have an attendance policy that entitles them to commence a disciplinary procedure after an employee has had a certain number of short-term absences. However, to avoid claims of discrimination, detriment and unfair dismissal, employers should disregard pregnancy-related absence for the purpose of attendance management, where a disciplinary procedure may arise as a result. This is the case even where there is a contractual term that entitles the employer to dismiss the employee after a certain number of weeks of continuous absence (*Brown v Rentokil* [1998] IRLR 445 ECJ). This should be reflected in any attendance policy and disciplinary policy.

While the employer should suspend some aspects of its attendance policy, to avoid discrimination, it should continue to apply other aspects of its absence management procedures, covering matters such as timely reporting of absence, the method of contact to be used and the evidence required, equally to pregnant employees as to other staff. Enforcing the absence management procedures is evidence of the employer's ongoing commitment to the involvement of the employee in the workplace. If the employer were not to enforce the procedures, this might indicate that the pregnant employee was in some way "written off". Applying absence management procedures could also aid the employer in identifying steps that it could take to avoid further absences and improve the employee's wellbeing during her pregnancy. The employer should ensure that it applies the procedures in a fair and non-discriminatory manner.

The employee's entitlement to pay during her sickness absence

Statutory sick pay

An employee who is off sick during her pregnancy, but who has not started the statutory maternity pay period, will be entitled to statutory sick pay (SSP), provided that she meets the qualifying requirements (see Employment law manual > Pay and benefits > Sick pay > Entitlement to statutory sick pay). This applies whether or not the sickness is pregnancy related.

SSP is payable where the employee has been sick for at least four days in a row and three "waiting days" (days on which the employee would usually be required to work) have passed.

During pregnancy in particular, there may be periods of intermittent sickness absence. The SSP rules provide that, if the gap between one period of incapacity for work and the next is less than

eight weeks, they are treated as a single period of incapacity for work. This means that where the employee has satisfied the requirements as they relate to consecutive days off and waiting days in respect of one absence, then returns to work and goes off sick again (for a period of four or more days) within the eight-week period, SSP will be payable from the first day of the second absence.

Contractual sick pay

An employee who is absent due to pregnancy-related illness has no automatic right to full pay or pay for a longer period than other employees off sick for another reason. However, the employer should ensure that the employee receives no less sick pay, whether contractual or discretionary, than would otherwise be paid to employees off sick for another reason, for the period in question. In *P & O European Ferries (Dover) Ltd and another v Iverson* EAT/322/98, the Employment Appeal Tribunal held that an employee was unlawfully discriminated against when she did not receive full pay while suspended from working on board her employer's ship due to her pregnancy. This was deemed to be discriminatory because other employees suspended for any specified medical reason other than pregnancy would be paid in full under the employer's sick pay scheme.

In *North Western Health Board v McKenna* [2005] IRLR 895 ECJ, the European Court of Justice (ECJ) held that, just as a reduction in pay to a female worker who is absent on maternity leave does not constitute discrimination, so too a reduction in pay to a woman absent during her pregnancy due to a pregnancy-related illness does not amount to discrimination, provided that the employer treats the employee in the same way as it would a male employee who is absent on grounds of illness. However, the ECJ held that any reduction in pay must not be so low as to undermine the objective of protecting pregnant workers. Therefore, pregnant workers who have exhausted their entitlement to sick pay are entitled to a minimum level of pay while they are absent due to pregnancy-related illness. The minimum payment is not specified in legislation and there is a lack of case law around this, but it is likely that payment equivalent to SSP would be sufficient (as the Northern Ireland Court of Appeal held in *Gillespie and others v Northern Health and Social Services Board and others* (No.2) [1997] IRLR 410 NICA).

Automatic triggering of statutory maternity leave due to pregnancy-related illness

An employee's statutory maternity leave period will usually commence on her chosen start date, as notified to her employer. However, where the employee is absent from work wholly or partly because of pregnancy in the four-week period before her EWC, her maternity leave is automatically triggered and will start on the day following the first day of the employee's absence in this four-week period (reg.6(1) of the Maternity and Parental Leave etc Regulations 1999). If the employee is eligible for statutory maternity pay (SMP), this will also start automatically on the day after the first day of absence (reg.2(4) of the Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960)). If the employee is already off sick going into the fourth week before her EWC, SSP and/or contractual sick pay will stop at this point, even if the employee is not entitled to SMP. See Worked examples > Automatic triggering of maternity leave due to pregnancy related illness.

Where the employee is absent from work for a pregnancy-related reason (or there is uncertainty as to whether or not the employee's absence is pregnancy related) in the weeks prior to the fourth week before her EWC, it is advisable for the employer to write to the employee setting out the legal position in relation to the automatic triggering of statutory maternity leave and pay and the automatic end of sick pay. The employer should also consider including information regarding the triggering of statutory maternity leave in its maternity policy.

Regulation 4(3) of the Maternity and Parental Leave etc Regulations 1999 states that, if an employee's absence begins during, or continues into, the four-week period before her EWC, she must notify the employer as soon as is reasonably practicable that she is absent from work wholly or partly because of pregnancy and of the date on which her absence for that reason began. The employer can require this notification to be in writing. The employer must respond to the employee's notification and inform her of the revised end date of her additional maternity leave period within 28 days of receiving such notification.

The employee will not be entitled to statutory maternity leave until she provides the employer with this notification. In practice, this is usually satisfied by the employee's notification under the employer's absence reporting procedures. However, this may not always be the case, for example where at the time the employee reported her absence, she was not sure that her illness was pregnancy related. In these circumstances, in addition to informing the employee of the potential triggering of her maternity leave, the employer should request that the employee notify it as soon as reasonably practicable if her absence is wholly or partly because of pregnancy and the date on which her absence for that reason began. If the employee is still uncertain whether or not her absence is pregnancy related, the employer should advise the employee to seek advice from her GP or from its own occupational health adviser (if it has one).

The employer and employee may not wish for the statutory maternity leave to start automatically before the employee's chosen date, for example if the employee has a mild pregnancy-related sickness but does not wish to start her statutory maternity leave as this would also bring forward her return to work at the end of the maternity leave period. The employer and employee can agree that the maternity leave period is not triggered in these circumstances (reg.21 of the Maternity and Parental Leave etc Regulations 1999). The employer should record the details of the agreement in writing to avoid uncertainty over the start and end dates of the agreed maternity leave period.

Statutory maternity pay calculation

An employee's entitlement to SMP, and the amount of SMP that is payable during the first six weeks of her statutory maternity leave, is calculated on the employee's normal weekly earnings for the eight-week period ending with the week immediately preceding the 14th week before the EWC. This means that if an employee is absent due to sickness during this eight-week period, and receiving less than her normal pay, her entitlement to SMP will be affected. Where the employee's normal weekly earnings dip below the lower earnings limit for national insurance contributions (see Statutory rates > National insurance) in this period, the employee will not qualify for SMP and will need to apply for maternity allowance from Jobcentre Plus. Where the employee is entitled to SMP, the SMP that she receives during the first six weeks of her maternity leave will be reduced, as this is calculated as 90% of her normal weekly earnings. Employers should highlight this in their maternity policy.