

# MATERNITY LEAVE & REDUNDANCY

## DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

## Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees in **Tasmania** and **Queensland** only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

## Introduction

This Infosheet is designed for national system employees working in Victoria, Tasmania or Queensland who have applied for unpaid parental leave (which includes maternity leave) under the National Employment Standards (see below).

The purpose of this Infosheet is to help employees understand the interaction between maternity leave and redundancy, which is the subject of many inquiries received by JobWatch. In JobWatch's experience, it is not uncommon for an employee to find that their position has been made redundant when they attempt to return to work from maternity leave.

This Infosheet provides options for employees to consider in an attempt to reduce the risk of their job being made redundant while they are on maternity leave, as well as outlining potential legal courses of action if their job is made redundant while they are on maternity leave.

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Hours: Mon-Fri 9am-5pm (Wednesdays until 8:30pm).

## Maternity Leave under the National Employment Standards (NES)

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To better protect your employment rights, you should, if eligible, formally apply for unpaid parental leave (which includes maternity leave) under the National Employment Standards (NES) in the *Fair Work Act 2009* (Cth) (**FW Act**). If you are unsure of this process, please refer to JobWatch's 'Parental Leave' Infosheet as soon as possible.

If you take maternity leave under the NES, your employer has a number of options for dealing with your absence. For example, it may:

- Do without your role and duties while you are absent on maternity leave; or
- Distribute your duties amongst existing employees while you are on maternity leave; or
- Fill your position by hiring a 'replacement employee' pursuant to section 84A of the FW Act.

A '**replacement employee**' is employed on a temporary basis to perform the role of an employee who is on maternity leave and is aware that the person on maternity leave has a right to return to their pre-maternity leave position when their maternity leave has ended.

It may be a reasonable course of action for you to suggest to your employer that it should hire a 'replacement employee' to perform your role while you are on maternity leave because, at least then, your role will still be performed by someone rather than be made redundant (see below).

## Redundancy

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### What is a 'redundancy?'

A redundancy occurs when the job you were employed to do is no longer required to be performed by anyone due to changes in your employer's operational structure. The changes may be caused by economic reasons, for example a downturn in sales or production, or because your employer makes a decision to structure its business differently. An employee whose position is made redundant and who is not redeployed within the employer's business or within an associated entity of the employer, has been '**retrenched**', which means they have been dismissed due to redundancy.

Please refer to JobWatch's '*Redundancy*' Infosheet for more information about redundancy and redeployment, redundancy pay and other entitlements that may be due on termination of employment.

## Your rights while on maternity leave

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### The 'Return to Work Guarantee'

If you have applied formally for unpaid parental leave (which includes maternity leave) under the NES, your employer has an obligation to return you, after your maternity leave, to your pre-parental leave position or, 'if that position no longer exists,' to an available position that you are 'qualified and suited' to fill, and which is 'nearest in status and pay' to your pre-parental leave position. This is called the '**Return to Work Guarantee**' and is prescribed by the NES in the FW Act.

Note: positions that are overseas or within an associated entity of your employer, e.g. a position with a subsidiary company, may be an 'available position.'

## **‘Obligation to Consult with Employees on Unpaid Parental Leave’**

If you have applied formally for unpaid parental leave (which includes maternity leave) under the NES, your employer must consult with you about any decision that is made while you are on maternity leave that will have a significant effect on the status, pay or location of your pre-maternity leave position. So, if your employer decides to make your position redundant, it is obliged to consult with you. This means your employer must take all reasonable steps to give you information about, and an opportunity to discuss, the effect of its decision to make your position redundant.

Additionally, if your employment is covered by a Modern Award or Enterprise Agreement, your employer also has obligations to consult with you regarding major workplace change pursuant to the particular requirements of the relevant Modern Award or Enterprise Agreement (if any). To find out if your employment is covered by a Modern Award or Enterprise Agreement call the Fair Work Infoline on 13 13 94.

For example, if your employer has made a definite decision to make your position redundant and you are covered by a Modern Award, your employer must notify and discuss the matter with you. Measures to avoid or mitigate the adverse effects of the proposed redundancy should be discussed and your employer must give prompt consideration to any matters you raise in relation to the redundancy. These discussions must start as soon as practicable after your employer has made its decision and for the purposes of such discussions, your employer must provide to you, in writing, all relevant information about the proposed redundancy.

During consultation with your employer, a few issues and options that you may consider discussing to attempt to avoid being dismissed due to redundancy may include the ‘return to work guarantee’, redeployment to another job within your employer’s business, returning to work on a part-time basis or with flexible working arrangements or potentially extending your maternity leave to a time when economic conditions may have improved. You may even consider telling your employer that you believe you have legal options and that you are going to obtain legal advice.

If your employer fails to consult with you as required, your employer may have acted unlawfully by breaching the NES and/or the Modern Award/Enterprise Agreement (if any) and a court may order your employer (including the persons involved in the breach) to pay a financial penalty which could, in certain circumstances, be ordered to be paid to you. You have 6 years to file in the relevant court from the date of the alleged breach. If you are considering this option, please call JobWatch for more information. Any failure to consult with you as required under a Modern Award or Enterprise Agreement (if any) may also make your dismissal due to redundancy an Unfair Dismissal (see page 7).

If you are still employed by your employer, you may also seek to activate the dispute resolution procedure under the relevant Modern Award or Enterprise Agreement (if any) regarding your employer’s failure to consult as required. If your dispute cannot be resolved at the workplace level, you can refer your dispute to the Fair Work Commission which may conciliate, mediate or arbitrate in relation to your dispute. You should act quickly because this option is only available while you are still an employee of your employer.

Any failure to consult with you by your employer while you were on maternity leave could also amount to unlawful discrimination (see page 8).

## **‘Keeping in touch days’**

If you take unpaid parental leave (which includes maternity leave) under the NES, you may, with your employer’s consent, perform work for your employer on up to 10 days during your available period of maternity leave, i.e. up to 12 months, and a further 10 days during any extension of your maternity leave, i.e. up to a further 12 months, by agreement with your employer. These are known as **‘keeping in touch days’**.

You are entitled to be paid for work performed on a ‘keeping in touch day’ and performance of that work does not break the continuity of your unpaid maternity leave. You can request to work a ‘keeping

in touch day' from 14 days after the date of birth of your child and your employer may request you to work a 'keeping in touch day' from 42 days after the date of birth of your child.

The purpose of performing work for your employer on a 'keeping in touch day' is to enable you to keep in touch with your employment in order to facilitate your return to that employment at the end of your maternity leave. It seems reasonable to suggest that if you perform your job for your employer on 'keeping in touch days' during your maternity leave, then it is more difficult for your employer to say that your position has been made redundant while you were on maternity leave when you exercise your right to return to work under the 'return to work guarantee'.

## How can I reduce the risk of my job being made redundant while I am on maternity leave?

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Ultimately, your employer has the right to structure its business any way it thinks fit subject to compliance with relevant laws including unfair dismissal, general protections and anti-discrimination (see below). Nevertheless, there are some simple steps that you can take which may reduce the risk of your position being made redundant while you are on maternity leave including:

- applying formally for unpaid parental leave (which includes maternity leave) under the NES thereby activating the 'return to work guarantee';
- suggesting that your employer fill your position with a temporary 'replacement employee' (possibly someone you know) rather than distribute your duties amongst existing employees;
- reminding your employer that it is obliged to consult with you while you are on maternity leave regarding any decision that will have a significant effect on your job; and
- using your 'keeping in touch days' strategically to create evidence that your job has not been made redundant.

Also, remember that if your employer fails to consult with you as required while you are on maternity leave, you must still be employed by your employer in order to activate the dispute resolution procedure under the relevant Modern Award or Enterprise Agreement (if any), so act quickly if you wish to challenge your employer's lack of consultation.

## What rights do I have if my job is made redundant while I am on maternity leave?

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If, while you are on maternity leave, your employer distributes your duties among existing staff members or does without your job entirely and when you attempt to come back to work after your maternity leave, you are told that your position has been made redundant, you may be able to make a legal claim regarding the termination of your employment.

Whether or not you have a good legal case and which claim you should choose to make will depend upon the facts of your particular situation. You should obtain independent legal advice as soon as possible regarding these issues because you only have **21 days** from the date your dismissal takes effect to file an Unfair Dismissal or General Protections Dispute Termination Claim at the Fair Work Commission or **6 months** to file a discrimination complaint at either the the Australian Human Rights Commission (AHRC) or your States anti-discrimination commission/tribunal (see below). As you can only make one claim regarding the termination of your employment, you will have to choose the claim and the jurisdiction that best suits your particular situation.

Some of your potential legal options are outlined below. These legal options are in addition to any claim for your entitlements on termination such as unpaid pay instead of notice and redundancy pay.

You have **6 years** from the date your entitlements fell due to to file a claim in an eligible court. Please call JobWatch if you have any queries regarding unpaid entitlements.

## General Protections Dispute (Termination) Claim — 21 days

Under the General Protections in the FW Act, it is unlawful for your employer to take '**adverse action**' against you, which includes terminating your employment, because or partly because of a '**prohibited reason**'. Prohibited reasons include the exercise of your workplace right to take unpaid parental leave under the NES, your pregnancy, your family or carer responsibilities or any requests for flexible working arrangements under the NES due to your parental or carer responsibilities.

If you lose your job due to redundancy while you are on maternity leave, consider whether the actual reason for your job being made redundant was or included a 'prohibited reason' or whether your job ceased to be required for a non 'prohibited reason', for example, a downturn in the economy, a loss of clients or contracts which necessitated your employer to restructure its operation.

Even if there are economic or operational reasons for your employer's decision to make your job redundant, if you are selected for redundancy out of a pool of workers doing the same job because or partly because you are on maternity leave, then your employer may still have engaged in unlawful adverse action by selecting your position for redundancy.

### Example - Dismissal

Lucy worked as a receptionist at a hotel. Lucy fell pregnant and took 12 months maternity leave. After six months on leave, the hotel manager decided to terminate Lucy's employment, telling her that she wanted to discourage other employees from taking maternity leave in the future.

If the actual reason for Lucy's dismissal is that she exercised her workplace right to take maternity leave under the NES, then Lucy has been dismissed in breach of the General Protections in the FW Act. Lucy may also have been unlawfully discriminated against and, if eligible, unfairly dismissed.

For more information, please see JobWatch's '*General Protections Dispute (Termination) Claim*' Infosheet and remember you only have **21 days** to file a General Protections Dispute (Termination) Claim with the FWC from the date that your dismissal takes effect.

## General Protections Dispute (Non-Termination) Claim – 6 years

If your employer has taken unlawful adverse action against you, which has not resulted in the termination of your employment, you may still be eligible to make a General Protections Dispute (Non-Termination) Claim.

For example, if your employer refuses to allow you to return to your pre-maternity leave position because you took maternity leave and redeployed/demoted you to a role that is lower in pay and/or status, you may consider making a General Protections (Non-Termination) claim because this may still be unlawful 'adverse action'.

### Example - Demotion

Maria worked full-time as a head chef at a restaurant. When she returned from 10 months of maternity leave, her manager Joe informed her that her new role will be assistant chef, which is a part-time role. Joe tells her that the change will suit her increased family duties.

If the actual reason Maria was demoted is because of her parental or family responsibilities, then her demotion amounts to unlawful adverse action in breach of the General Protections (Non-Termination) provisions. Maria may also have a discrimination claim and a Constructive Unfair Dismissal Claim or a Constructive General Protections (Termination) Claim.

You have **6 years** from the date of the unlawful adverse action occurring to file your claim in the Federal Circuit Court or the Federal Court. You may also seek to have a voluntary conference at the FWC prior to filing your claim in court. For more information, see JobWatch's '*General Protections Dispute (Non-Termination) Claim*' Infosheet.

## Unfair Dismissal – 21 days

If you are eligible to make an Unfair Dismissal claim and you have been dismissed due to alleged redundancy, you should consider whether your redundancy is a genuine redundancy for Unfair Dismissal purposes.

You only have **21 days** to file an Unfair Dismissal claim with the FWC from the date your dismissal takes effect.

An Unfair Dismissal is a claim that:

- you were dismissed at the initiative of your employer;
- your dismissal was 'harsh, unjust or unreasonable'; and
- your dismissal was **not** a case of '**genuine redundancy.**'

For the purposes of an Unfair Dismissal claim, a 'genuine redundancy' will have occurred where:

- your employer no longer requires you, or any other employee, to perform the job that you were doing due to changes in its operational structure; and
- your employer has complied with its consultation obligations under any Modern Award or Enterprise Agreement (if any); and
- it was not reasonable to redeploy you within your employer's business or within the business of an associated entity of your employer.

If your dismissal was a case of 'genuine redundancy', then your employer has a complete defence to an unfair dismissal claim and the FWC cannot look behind the genuine redundancy and take into account any other unfairness or discrimination that may have occurred in selecting you for redundancy.

A redundancy will **not** be a 'genuine redundancy' for Unfair Dismissal purposes if it was reasonable in the circumstances for your employer to redeploy you to another available role within your employer's business, or the business of an associated entity of your employer.

For example, if your employer makes your permanent full-time role redundant but creates a permanent part-time role that consists of the same duties, it would most likely be reasonable to offer you redeployment to that new part-time role. If your employer did not offer you redeployment to the new part-time role, then your redundancy may not be a 'genuine redundancy' for Unfair Dismissal purposes. If your position is made redundant, it is always a good idea to check whether there are any other available jobs that it would be reasonable for you to do.

If your dismissal is due to a 'genuine redundancy' but you were selected for redundancy because you were on maternity leave, the FWC cannot look behind the genuineness of the redundancy to take into account unfairness or unlawful discrimination in relation to the reason you were selected for redundancy as a 'genuine redundancy' is a complete defence to an Unfair Dismissal claim. However, under the General Protections and state and federal anti-discrimination law, the relevant court or tribunal can look behind the reasons for the redundancy to consider any unlawful discrimination.

**Example – Redundancy**

Sarah works as a retail sales assistant in a jewellery store with ten other sales assistants. When Sarah went on maternity leave the owner and manager, Bill, redistributed her duties among the other assistants. While Sarah was on leave Bill decided that he must cut costs as sales had been dropping. Bill decided that he can only afford to employ ten assistants. Bill then informed Sarah that her position has been made redundant.

If Sarah's position is no longer required to be done by anyone and it was not reasonable to redeploy her and the employer had consulted with her as required under the relevant Modern Award or Enterprise Agreement (if any), then Sarah has not been unfairly dismissed. This is regardless of whether the reason she was selected for redundancy was because she was on maternity leave.

If the real reason for Sarah's position being made redundant is that the employer could do without her position because of a downturn in sales, then Sarah may also not have a discrimination or General Protections claim (excluding any consultation issues).

If the real reason Sarah was selected for redundancy was because of her family or carer responsibilities, then Sarah may have a General Protections or discrimination claim.

Please see JobWatch's '*Unfair Dismissal*' Infosheet for more information about eligibility to lodge an Unfair Dismissal claim, process and remedies.

**State & federal anti-discrimination law – 12 months**

Generally speaking, under State and Federal anti-discrimination laws, it is unlawful for your employer to discriminate against you because you are pregnant or intend to become pregnant, because of your family responsibilities or parental and/or carer status, or by unreasonably refusing your request for flexible working arrangements to meet your responsibilities as a parent/carer.

Discrimination can be '**direct**' or '**indirect**'. Generally speaking, **Direct** discrimination occurs if a person treats, or proposes to treat, a person with an attribute, such as pregnancy, unfavourably because of that attribute. Treating a person unfavourably includes dismissing the person.

**Indirect** discrimination occurs if a person imposes, or proposes to impose, an unreasonable requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute, such as parental/carer status. An example might include requiring all work to be done on a full-time basis and/at in the office/worksite.

State and federal anti-discrimination law is complex and there are many exceptions to discrimination that may apply. You should obtain specific legal advice regarding your particular situation before deciding in which jurisdiction to file your claim.

You have **6 months** to file a discrimination claim with either the Australian Human Rights Commission ('AHRC') or, in Victoria, the Victorian Civil and Administrative Tribunal (via the Victorian Equal Opportunity and Human Rights Commission) or, in Tasmania, Equal Opportunity Tasmania or, in Queensland, the Anti-discrimination Commission from the date of the discriminatory conduct. You should also obtain independent legal advice before choosing which claim to make, as there may be differences between the state and federal jurisdictions, which could affect your claim.

For further information, (see 'Where to get help' below).

## Where to get help

Australian Human Rights Commission (AHRC)	Complaints Infoline: 1 300 656 419 General enquiries: 1 300 369 711 <a href="https://www.humanrights.gov.au">https://www.humanrights.gov.au</a>
Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94 <a href="http://www.fairwork.gov.au/">http://www.fairwork.gov.au/</a>
Fair Work Commission Helpline	1 300 799 675 <a href="https://www.fwc.gov.au/">https://www.fwc.gov.au/</a>
JobWatch Telephone Information Service	Metro: 9662 1933 Rural: 1 800 331 617 <a href="http://www.jobwatch.org.au">www.jobwatch.org.au</a>
Law Institute of Victoria (for referral to a lawyer)	(03) 9607 9550 <a href="http://www.liv.asn.au/Mobile/Home/Referral">http://www.liv.asn.au/Mobile/Home/Referral</a>
Victorian Civil and Administrative Tribunal (VCAT)	(03) 9628 9900 Toll Free: 1 300 079 413 (Country callers only) <a href="http://www.vcat.vic.gov.au/">http://www.vcat.vic.gov.au/</a>
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	(03) 9281 7111 1 800 134 142 <a href="http://www.humanrightscommission.vic.gov.au">http://www.humanrightscommission.vic.gov.au</a>
Victoria Legal Aid – Legal Help Phonenumber	1 300 792 387 <a href="http://www.legalaid.vic.gov.au/">http://www.legalaid.vic.gov.au/</a>
Queensland Law Society (for referral to a lawyer)	1 300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133
Equal Opportunity Tasmania	1 300 305 062
Anti-discrimination Commission Queensland	1 300 130 670

**If you are unsure about any information in this infosheet, it is important to obtain legal advice as soon as possible**



JobWatch acknowledges and is grateful for the financial support of the State and Federal Governments, the Office of the Fair Work Ombudsman and Victoria Legal Aid.



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Victoria Legal Aid

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.