



# Employment Protection (Consolidation) Act 1978

## 1978 CHAPTER 44

### PART III

#### MATERNITY

##### *General provisions*

### **33 Rights of employee in connection with pregnancy and confinement**

- (1) An employee who is absent from work wholly or partly because of pregnancy or confinement shall, subject to the following provisions of this Act.—
  - (a) be entitled to be paid by her employer a sum to be known as maternity pay ;  
and
  - (b) be entitled to return to work.
- (2) Schedule 2 shall have effect for the purpose of supplementing the following provisions of this Act in relation to an employee's right to return to work.
- (3) An employee shall be entitled to the rights referred to in subsection (1) whether or not a contract of employment subsists during the period of her absence but, subject to subsection (4), she shall not be so entitled unless—
  - (a) she continues to be employed by her employer (whether or not she is at work) until immediately before the beginning of the eleventh week before the expected week of confinement;
  - (b) she has at the beginning of that eleventh week been continuously employed for a period of not less than two years; and
  - (c) she informs her employer (in writing if he so requests) at least twenty-one days before her absence begins or, if that is not reasonably practicable, as soon as reasonably practicable.—
    - (i) that she will be (or is) absent from work wholly or partly because of pregnancy or confinement, and

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*Status: This is the original version (as it was originally enacted).*

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- (ii) in the case of the right to return, that she intends to return to work with her employer.
- (4) An employee who has been dismissed by her employer for a reason falling within section 60(1)(a) or (b) and has not been re-engaged in accordance with that section, shall be entitled to the rights referred to in subsection (1) of this section notwithstanding that she has thereby ceased to be employed before the beginning of the eleventh week before the expected week of confinement if, but for that dismissal, she would at the beginning of that eleventh week have been continuously employed for a period of not less than two years, but she shall not be entitled to the right to return unless she informs her employer (in writing if he so requests), before or as soon as reasonably practicable after the dismissal takes effect, that she intends to return to work with him.
- In this subsection "dismiss " and " dismissal" have the same meaning as they have for the purposes of Part V.
- (5) An employee shall not be entitled to either of the rights referred to in subsection (1) unless, if requested to do so by her employer, she produces for his inspection a certificate from a registered medical practitioner or a certified midwife stating the expected week of her confinement.
- (6) The Secretary of State may by order vary the periods of two years referred to in subsections (3) and (4), or those periods as varied from time to time under this subsection, but no such order shall be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.

#### *Maternity pay*

### **34 Maternity pay**

- (1) Maternity pay shall be paid in respect of a period not exceeding, or periods not exceeding in the aggregate, six weeks during which the employee is absent from work wholly or partly because of pregnancy or confinement (in this section and sections 35 and 36 referred to as the payment period or payment periods).
- (2) An employee shall not be entitled to maternity pay for any absence before the beginning of the eleventh week before the expected week of confinement, and her payment period or payment periods shall be the first six weeks of absence starting on or falling after the beginning of that eleventh week.
- (3) The Secretary of State may by order vary the periods of six weeks referred to in subsections (1) and (2), or those periods as varied from time to time under this subsection, but no such order shall be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.
- (4) Where an employee gives her employer the information required by section 33(3)(c) or produces any certificate requested under section 33(5) after the beginning of the payment period or the first of the payments periods, she shall not be entitled to maternity pay for any part of that period until she gives him that information or certificate, but on giving him the information or, as the case may be, producing the certificate, she shall be entitled to be paid in respect of that part of the period or periods which fell before the giving of the information or the production of the certificate.

### **35 Calculation of maternity pay**

- (1) The amount of maternity pay to which an employee is entitled as respects any week shall be nine-tenths of a week's pay reduced by the amount of maternity allowance payable for the week under Part I of Schedule 4 to the Social Security Act 1975, whether or not the employee in question is entitled to the whole or any part of that allowance.
- (2) Maternity pay shall accrue due to an employee from day to day and in calculating the amount of maternity pay payable for any day—
  - (a) there shall be disregarded Sunday or such other day in each week as may be prescribed in relation to that employee under section 22(10) of the Social Security Act 1975 for the purpose of calculating the daily rate of maternity allowance under that Act; and
  - (b) the amount payable for any other day shall be taken as one-sixth of the amount of the maternity pay for the week in which the day falls.
- (3) Subject to subsection (4), a right to maternity pay shall not affect any right of an employee in relation to remuneration under any contract of employment (in this section referred to as "contractual remuneration").
- (4) Any contractual remuneration paid to an employee in respect of a day within a payment period shall go towards discharging any liability of the employer to pay maternity pay in respect of that day, and conversely any maternity pay paid in respect of a day shall go towards discharging any liability of the employer to pay contractual remuneration in respect of that day.

### **36 Complaint to industrial tribunal**

- (1) A complaint may be presented to an industrial tribunal by an employee against her employer that he has failed to pay her the whole or any part of the maternity pay to which she is entitled.
- (2) An industrial tribunal shall not entertain a complaint under subsection (1) unless it is presented to the tribunal before the end of the period of three months beginning with the last day of the payment period or, as the case may be, the last of the payment periods, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the period of three months.
- (3) Where an industrial tribunal finds a complaint under subsection (1) well-founded, the tribunal shall order the employer to pay the complainant the amount of maternity pay which it finds is due to her.

### **37 Maternity Pay Fund**

- (1) The secretary of state shall continue to have the control and management of the maternity pay fund established under section 39 of the Employment Protection Act 1975 and payments shall be made out of that fund in accordance with the following provisions of this Part and section 156(1)
- (2) The secretary of state shall prepare accounts of the Maternity pay fund in such form as the Treasury may direct and shall send them to the comptroller and Auditor General not later than the end of the month of November following the end of the financial year

to which the accounts relate; and the Comptroller and Auditor General shall examine and certify every such account and shall lay copies thereof, together with his report thereon, before Parliament.

- (3) Any money in the Maternity Pay Fund may from time to time be paid over to the National Debt Commissioners and invested by them, in accordance with such directions as may be given by the Treasury, in any such manner as may be specified by an order of the Treasury for the time being in force under section 22(1) of the National Savings Bank Act 1971.

### **38 Advances out of National Loans Fund**

- (1) Subject to the provisions of subsections (2) to (4), the Treasury may from time to time advance out of the National Loans Fund to the Secretary of State for the purposes of the Maternity Pay Fund such sums as the Secretary of State may request ; and any sums advanced to the Secretary of State under this section shall be paid into the Maternity Pay Fund.
- (2) The aggregate amount outstanding by way of principal in respect of sums advanced to the Secretary of State under subsection (1) shall not at any time exceed £4 million, or such larger sum, not exceeding £10 million, as the Secretary of State may by order made with the consent of the Treasury determine.
- (3) No order under subsection (2) shall be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.
- (4) Any sums advanced to the Secretary of State under Subsection (1) shall be re-paid by the Secretary of State out of the Maternity Pay Fund into the National Loans Fund in such manner and at such times, and with interest thereon at such rate, as the Treasury may direct.

### **39 Maternity pay rebate**

- (1) Subject to any regulations made under this section, the Secretary of State shall pay out of the Maternity Pay Fund to every employer who makes a claim under this section and who, being liable to pay, has paid maternity pay to an employee, an amount equal to the full amount of maternity pay so paid (in this section and sections 42 and 43 referred to as a " maternity pay rebate ").
- (2) The Secretary of State may if he thinks fit, and if he is satisfied that it would be just and equitable to do so having regard to all the relevant circumstances, pay such a rebate to an employer who makes a claim under this section and who has paid maternity pay to an employee in circumstances in which, by reason of the time limit provided for in section 36(2) a complaint by the employee has been dismissed, or would not be entertained, by an industrial tribunal.
- (3) For the purposes of subsections (1) and 2) a payment of contractual remuneration by an employer shall be treated as a Payment of maternity pay to the extent that, by virtue of section 35(4) —
  - (a) it extinguishes the employer's liability to pay maternity pay; or
  - (b) in a case falling within subsection (2), it would extinguish that liability if a complaint by the employee were not time-barred as described in that subsection.

- (4) The Secretary of State shall make provision by regulations as to the making of claims for maternity pay rebates under this section and such regulations may in particular—
  - (a) require a claim to be made within such time limit as may be prescribed ; and
  - (b) require a claim to be supported by such evidence as may be prescribed.

#### **40 Payments to employees out of Maternity Pay Fund**

- (1) Where an employee claims that her employer is liable to pay her maternity pay and—
  - (a) that she has taken all reasonable steps (other than proceedings to enforce a tribunal award) to recover payment from the employer ; or
  - (b) that her employer is insolvent (as defined in section 127 for the purposes of sections 122 to 126);and that the whole or part of the maternity pay remains unpaid, the employee may apply to the Secretary of State under this section.
- (2) If the Secretary of State is satisfied that the claim is well-founded the Secretary of State shall pay the employee out of the Maternity Pay Fund the amount of the maternity pay which appears to the Secretary of State to be unpaid.
- (3) A payment made by the Secretary of State to an employee under this section shall, for the purpose of discharging any liability of the employer to the employee, be treated as if it had been made by the employer.

#### **41 Unreasonable default by employer**

- (1) Where the Secretary of State makes a payment to an employee in respect of unpaid maternity pay in a case falling within section 40(1)(a) and it appears to the Secretary of State that the employer's default in payment was without reasonable excuse, the Secretary of State may recover from the employer such amount as the Secretary of State considers appropriate, not exceeding the amount of maternity pay which the employer failed to pay.
- (2) Where a sum is recovered by the Secretary of State by virtue of this section that sum shall be paid into the Maternity Pay Fund.

#### **42 Supplementary provisions relating to employer's insolvency**

- (1) Where the Secretary of State makes a payment to an employee under section 122 (which provides for payments out of the Redundancy Fund in respect of certain debts where an employer is insolvent) and that payment, in whole or in part, represents arrears of pay, then, in ascertaining for the purpose of section 40 the amount of any unpaid maternity pay, section 35(4) shall apply as if the arrears of pay in question had been duly paid by the employer to the employee in accordance with the contract of employment.
- (2) Where the Secretary of State makes a payment to an employee out of the Redundancy Fund under section 122 which, if it had been made by the employer to the employee, would have attracted a maternity pay rebate from the Maternity Pay Fund in accordance with section 39, then, the Secretary of State shall make a payment out of the Maternity Pay Fund into the Redundancy Fund of an amount corresponding to the amount of rebate which would have been so payable.

### **43 Complaints and appeals to industrial tribunal**

- (1) A person who has—
  - (a) made a claim for a maternity pay rebate under section 39, in a case to which subsection (1) of that section applies; or
  - (b) applied for a payment under section 40,may, subject to subsection (5), present a complaint to an industrial tribunal that—
  - (i) the Secretary of State has failed to make any such payment; or
  - (ii) any such payment made by the Secretary of State is less than the amount which should have been paid.
- (2) Where an industrial tribunal finds that the Secretary of State ought to make any such payment or further payment, it shall make a declaration to that effect and shall also declare the amount of any such payment which it finds the Secretary of State ought to make.
- (3) An employer who has made a claim for a maternity pay rebate under section 39, in a case to which subsection (2) of that section applies, may, subject to subsection (5), appeal to an industrial tribunal on the ground that—
  - (a) the Secretary of State has refused to pay a maternity pay rebate; or
  - (b) any rebate paid by the Secretary of State is less than the amount which should have been paid,and if on any such appeal the tribunal is satisfied that it is just and equitable having regard to all the relevant circumstances that a maternity pay rebate should be paid or, as the case may be, finds that a further payment by way of rebate should be made, the tribunal shall determine accordingly, and the Secretary of State shall comply with the determination.
- (4) Where the Secretary of State determines that an amount is recoverable from an employer under section 41, the employer may, subject to subsection (5), appeal to an industrial tribunal; and if on any such appeal the tribunal is satisfied that no amount should be recovered from the employer, or that a lesser or greater amount should be recovered (but in any case not exceeding the amount of maternity pay which the employer failed to pay) the tribunal shall determine accordingly and the amount, if any, so determined shall be the amount recoverable from the employer by the Secretary of State.
- (5) An industrial tribunal shall not entertain a complaint or appeal under this section unless it is presented to the tribunal within the period of three months beginning with the date on which the relevant decision of the Secretary of State was communicated to the complainant or appellant or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint or appeal to be presented within the period of three months.

### **44 Provisions as to information**

- (1) Where an application is made to the Secretary of State by an employee under section 40, the Secretary of State may require—
  - (a) the employer to provide him with such information as the Secretary of State may reasonably require for the purpose of determining whether the employee's application is well-founded; and

- (b) any person having the custody or control of any relevant records or other documents to produce for examination on behalf of the Secretary of State any such document in that person's custody or under his control which is of such a description as the Secretary of State may require.
- (2) Any such requirement shall be made by a notice in writing given to the person on whom the requirement is imposed and may be varied or revoked by a subsequent notice so given.
- (3) If a person refuses or wilfully neglects to furnish any information or produce any document which he has been required to furnish or produce by a notice under this section he shall be liable on summary conviction to a fine not exceeding £100.
- (4) If any person in making a claim under section 39 or an application under section 40 or in purporting to comply with a requirement of a notice under this section knowingly or recklessly makes any false statement he shall be liable on summary conviction to a fine not exceeding £400.

#### *Right to return to work*

### **45 Right to return to work**

- (1) The right to return to work of an employee who has been absent from work wholly or partly because of pregnancy or confinement is, subject to the following provisions of this Act, a right to return to work with her original employer, or, where appropriate, his successor, at any time before the end of the period of twenty-nine weeks beginning with the week in which the date of confinement falls, in the job in which she was employed under the original contract of employment and on terms and conditions not less favourable than those which would have been applicable to her if she had not been so absent.
- (2) In subsection (1) " terms and conditions not less favourable than those which would have been applicable to her if she had not been so absent" means, as regards seniority, pension rights and other similar rights, that the period or periods of employment prior to the employee's absence shall be regarded as continuous with her employment following that absence.
- (3) If an employee is entitled to return to work in accordance with subsection (1), but it is not practicable by reason of redundancy for the employer to permit her so to return to work she shall be entitled, where there is a suitable available vacancy, to be offered alternative employment with her employer (or his successor), or an associated employer, under a new contract of employment complying with subsection (4).
- (4) The new contract of employment must be such that—
  - (a) the work to be done under the contract is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances ; and
  - (b) the provisions of the new contract as to the capacity and place in which she is to be employed and as to the other terms and conditions of her employment are not substantially less favourable to her than if she had returned to work in accordance with subsection (1).

**46 Enforcement of rights under s. 45**

The remedies of an employee for infringement of either of the rights mentioned in section 45 are those conferred by or by virtue of the provisions of sections 47, 56 and 86 and Schedule 2.

**47 Exercise of right to return to work**

- (1) An employee shall exercise her right to return to work by notifying the employer (who may be her original employer or a successor of that employer) at least seven days before the day on which she proposes to return of her proposal to return on that day (in this section referred to as the " notified day of return ").
- (2) An employer may postpone an employee's return to work until a date not more than four weeks after the notified day of return if he notifies her before that day that for specified reasons he is postponing her return until that date, and accordingly she will be entitled to return to work with him on that date.
- (3) Subject to subsection (4). an employee may—
  - (a) postpone her return to work until a date not exceeding four weeks from the notified day of return, notwithstanding that that date falls after the end of the period of twenty-nine weeks mentioned in section 45(1); and
  - (b) where no day of return has been notified to the employer, extend the time during which she may exercise her right to return in accordance with subsection (1), so that she returns to work not later than four weeks from the expiration of the said period of twenty-nine weeks;  
if before the notified day of return or, as the case may be, the expiration of the period of twenty-nine weeks she gives the employer a certificate from a registered medical practitioner stating that by reason of disease or bodily or mental disablement she will be incapable of work on the notified day of return or the expiration of that period, as the case may be.
- (4) Where an employee has once exercised a right of postponement or extension under subsection (3)(a) or (b), she shall not again be entitled to exercise a right of postponement or extension under that subsection in connection with the same return to work.
- (5) If an employee has notified a day of return but there is an interruption of work (whether due to industrial action or some other reason) which renders it unreasonable to expect the employee to return to work on the notified day of return, she may instead return to work when work resumes after the interruption or as soon as reasonably practicable thereafter.
- (6) If no day of return has been notified and there is an interruption of work (whether due to industrial action or some other reason) which renders it unreasonable to expect the employee to return to work before the expiration of the period of twenty-nine weeks referred to in section 45(1), or which appears likely to have that effect, and in consequence the employee does not notify a day of return, the employee may exercise her right to return in accordance with subsection (1) so that she returns to work at any time before the end of the period of fourteen days from the end of the interruption notwithstanding that she returns to work outside the said period of twenty-nine weeks.
- (7) Where the employee has either—



- (a) exercised the right under subsection (3)(b) to extend the period during which she may exercise her right to return; or
- (b) refrained from notifying the day of return in the circumstances described in subsection (6),

the other of those subsections shall apply as if for the reference to the expiration of the period of twenty-nine weeks there were substituted a reference to the expiration of the further period of four weeks or, as the case may be, of the period of fourteen days from the end of the interruption of work.

(8) Where—

- (a) an employee's return is postponed under subsection (2) or (3)(c), or
- (b) the employee returns to work on a day later than the notified day of return in the circumstances described in subsection (5),

then, subject to subsection (4), references in those subsections and in sections 56 and 86 and Schedule 2 to the notified day of return shall be construed as references to the day to which the return is postponed or, as the case may be, that later day.

#### **48 Contractual right to return to work**

- (1) An employee who has a right both under this Act and under a contract of employment, or otherwise, to return to work, may not exercise the two rights separately but may in returning to work take advantage of whichever right is, in any particular respect, the more favourable.
- (2) The provisions of sections 45, 46, 47, 56 and 86 and paragraphs 1 to 4 and 6 of Schedule 2 shall apply, subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite right described in subsection (1) as they apply to the exercise of the right to return conferred solely by this Part.