



Shared parental leave pay – clarity on your requirement to enhance

By **Dónall Breen** and **Jake Fleming** (on secondment from MJ Hudson) - 27 June 2019

The Court of Appeal has held that it is not discriminatory for enhanced shared parental leave pay (mostly claimed by men) to be paid at a lower rate than enhanced maternity leave pay (claimed by women). In two separate appeals, which were heard together, the Court of Appeal found that such arrangements are not unlawful. It is understood that the claimants are now seeking permission to appeal to the Supreme Court but, for now, this decision remains good law.

Facts

The first claimant was the father of a child entitled to two weeks' shared parental leave at full pay before switching to statutory shared parental pay. His female colleagues were entitled to maternity pay comprising of 14 weeks' full pay before moving to statutory maternity pay. The second claimant, also a father of a new born took 14 weeks of shared parental leave paid at the minimum statutory rate. His employer had a policy allowing for 18 weeks of maternity leave at full pay for new mothers.

Both brought claims in the Employment Tribunal of unlawful sex discrimination and equal pay. In the first instance one claimant succeeded and the other did not. On appeal both claimants had their appeal rejected in the Employment Appeals Tribunal. The claimants then appealed to the Court of Appeal who heard their appeals together. In a well-reasoned judgment, the court dismissed their claims on all grounds which we further explain below.

Direct discrimination

Direct sex discrimination occurs where, because of sex, someone treats one person less favourably than they treat or would treat others.

In determining whether a man has been discriminated against because of sex, the Equality Act 2010 stipulates that no account is to be taken of special treatment afforded to women in connection with pregnancy or childbirth. Therefore, a man cannot claim that he has suffered direct sex discrimination because he has not been given the same special treatment. For this reason, the claimants' claims of direct discrimination failed.

Furthermore, the court held that the direct discrimination claim failed because the correct comparator was a female colleague on shared parental leave, not a woman on maternity leave. The court held that the purpose of statutory maternity leave relates to matters exclusive to the birth mother resulting from pregnancy and childbirth (not simply childcare) and that purpose was not altered by the introduction of shared parental leave.

Indirect discrimination

Indirect sex discrimination is concerned with policies, practices or criteria that apply to everyone regardless of sex but have the effect of disadvantaging employees or job applicants of one sex, unless the employer can show that they are objectively justified.

The court held that the indirect sex discrimination claim could not succeed because the Equality Act 2010 provides that if a claim is properly construed as an equal pay claim, a claimant cannot also argue sex discrimination. In this case the court found that the claimants' claims were properly construed as equal pay claims, so their sex discrimination claims were statute barred.

Helpfully, the court did clarify that (even if they were mistaken on this point) an indirect sex discrimination claim would fail because the correct pool for comparison could only consist of employees on shared parental leave who were paid the same amount (not including anyone on maternity leave). In any event, any disadvantage to the claimants could be justified as being a proportionate means of achieving the legitimate aim of providing special treatment to mothers in connection with pregnancy or childbirth (which is a stated aim of both UK and EU law).

Equal pay

The Equality Act 2010 implies a "sex equality clause" into all employees' contracts of employment which provides that less favourable terms which are based on sex are modified so that they apply equally to all (to the benefit of those who were at a detriment).

Here, the claimants were successful in arguing they had a legitimate equal pay claim and the equality clause meant they should be paid the same as a woman on maternity leave. But it was a pyrrhic victory. A claim on this basis could not succeed, as the Equality Act 2010 explicitly bars claims of equal pay if they are based on more favourable terms enjoyed by a woman as a result of pregnancy or childbirth.

In short, the claimants' claims failed on all three grounds.

Comment

This case has divided opinion. Some believe it is a victory for the special place maternity leave has in society, others bemoan the fact that it will keep men from taking on childcare responsibilities and that is ultimately bad for equality. Despite the moral arguments, employers now have some clarity in how they structure any enhanced family leave payments. Those who generously enhance maternity leave pay do not need to worry about extending this enhancement to shared parental leave. For now.

With the case highly likely to be appealed to the Supreme Court we suggest watching this space – as we will be, very closely.

Case

Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police [2019] EWCA Civ 900 (24 May 2019)