SUMMARY

2017/28 Failure to enhance parental leave pay to level of maternity pay held to be direct sex discrimination (UK)

<p>It was direct sex discrimination for a male employee who wished to take shared parental leave (SPL) to be entitled only to the minimum statutory pay where a female employee would have been entitled to full salary during an equivalent period of maternity leave, according to a first-instance decision from the Employment Tribunal (ET).</p>

Summary

It was direct sex discrimination for a male employee who wished to take shared parental leave (SPL) to be entitled only to the minimum statutory pay where a female employee would have been entitled to full salary during an equivalent period of maternity leave, according to a first-instance decision from the Employment Tribunal (ET).

Background

Since April 2015, employees in the UK who have a baby and satisfy certain other conditions have had the right to take SPL. The amount of parental leave they can take depends upon how much maternity leave the mother takes.

Mothers can take up to 52 weeks of maternity leave. Statutory maternity pay is paid at the rate of 90% of salary for the first six weeks and a flat rate (currently GBP 140.98 per week) for the next 33 weeks. The remaining period is unpaid. It is relatively common for employers to enhance maternity pay. The first two weeks after the birth of the baby is a compulsory maternity leave period during which it is a criminal offence for the employer to allow the mother to work.

The mother can choose to end her maternity leave early and start parental leave to share with her partner (whether male or female). The amount of parental leave the parents can take between them is the same as the balance of the maternity leave not taken by the mother. Parental leave can be shared between the parents, as the parents choose. The compulsory maternity leave period cannot be taken as shared parental leave, so the maximum available period for shared parental leave is 50 weeks.

The government's aim in creating a shared parental leave scheme was to encourage more flexibility in family structures. However, take-up rates have been very low; a number of surveys carried out in 2016 revealed that only a very small percentage (1%-5%) of eligible fathers had taken advantage of their right to take SPL.

Statutory pay for shared parental leave is the same as the flat rate for statutory maternity pay (i.e. currently GBP 140.98 per week). It is less common for employers to enhance SPL than maternity pay. As men cannot take maternity leave, there is an argument that it is sex discrimination to pay different amounts for maternity leave and SPL.

Discrimination is prohibited under the Equality Act 2010 (EqA 2010), of which section 13 states that a person discriminates against another if they treat them less favourably because of a protected characteristic, including sex. Section 23 EqA 2010 adds that, for the purposes of section 13, there must be no material differences between the circumstances relating to each case, and section 13(6) explicitly states that where the protected characteristic relied upon is sex and the claimant is a man, no account is to be taken of special treatment afforded to women in connection with pregnancy or childbirth. It is therefore clear that, in some circumstances at least, favourable treatment offered to a woman whose circumstances are different to a man due to pregnancy or childbirth will be permitted.

However, in Eversheds Legal Services Ltd – v – De Belin [2011] IRLR448 the Employment Appeal Tribunal (EAT) held that there was "no conceptual objection to a man bringing a sex discrimination claim by reference to the more favourable treatment of a colleague on account of her being pregnant or on maternity leave". In fact, in this case the EAT held that there was sex discrimination where a female employee on maternity leave was treated more favourably than her male comparator on the basis of that maternity leave, as the adjustments made went beyond what was reasonably necessary to compensate for the disadvantages occasioned by her condition.

In summary, favourable treatment of female employees due to pregnancy or maternity may be discriminatory where it goes beyond what is reasonably necessary to account for disadvantages attaching to that pregnancy or maternity.

Facts

Mr Ali, the claimant, was an employee of Capita Customer Limited ("Capita") who had transferred as part of a TUPE transfer from Telefonica, his previous employer. Since joining Capita, he had received a promotion on account of his performance and experience. He remained on his original Telefonica terms, as did other employees who had transferred over to Capita.

Telefonica's terms relating to family leave were as follows. Women who took maternity leave were entitled to 14 weeks' paid leave at full pay following the birth of their child, followed by 25 weeks' statutory pay. Men who took ordinary paternity leave were entitled to two weeks' full pay following the birth of their child. However, men who took further SPL in addition to those two weeks received only statutory pay for the duration of that leave, not full pay for the next 12 weeks like women on maternity leave.

On 5 February 2016, the claimant's daughter was born. He took two weeks' paternity leave (on full pay) followed by one week's annual leave. On 7 March 2016 he returned to work and informed his manager that he wished to take time off to care for his daughter. On 9 March 2016, the claimant was informed that he was eligible to take SPL, but that he would only be entitled to receive statutory pay during the leave. The claimant discussed this with his female colleagues who had transferred over from Telefonica, and they confirmed that they were entitled to 14 weeks' fully paid maternity leave.

The claimant therefore raised his concerns with his union, who wrote to Capita setting out a claim of sex discrimination, stating that their proposed application of SPL pay "would put him at a huge financial detriment". The claimant then raised a grievance alleging sex discrimination, on 5 April 2016, stating that Capita's decision to offer only statutory SPL pay where it offered full maternity pay was discriminatory against men. This grievance was not upheld, and in fact the employer's response did not deal with the allegations of sex discrimination.

The claimant, having been told he would receive only statutory pay, did not apply for SPL.

The claimant was absent from work with work related stress from 22 April 2016 to 25 July 2016. During this time, he was allegedly given an ultimatum that if he did not return to work on the expiry of his sick note, he would be removed from the role he had been promoted to and returned to his original role. On his return, he was in fact removed from that role and later told that this was due to his performance. He was also told by his line manager that, if he sought to take further dependant's leave absence, disciplinary action would be taken against him. The claimant brought victimisation claims in regard of each of these events, with his

grievance of 5 April 2016 representing his protected act.

The claimant brought claims of:

direct sex discrimination relating to Capita's decision to pay only statutory pay to men on SPL, but full pay to women on maternity leave. This claim related only to employees who had transferred to Capita from Telefonica, like the claimant, and were therefore on the same terms as him;
indirect discrimination relating to the Telefonica maternity policy; and
victimisation relating to the acts set out above, based on the protected act of him raising a grievance concerning sex discrimination.

Judgment

The ET upheld the claimant's claim of direct sex discrimination.

It held that the claimant could compare himself to a female transferred Telefonica employee who sought to take fully paid leave after the minimum two weeks' leave prescribed by law. The claimant accepted that he would not have been able to compare himself to the same female employee during the compulsory maternity leave period. However, he did not seek to do so and in any event was entitled to two weeks' fully paid leave as a man, so suffered no detriment in this regard.

The ET rejected Capita's argument that the special treatment which employers are entitled to afford to women in connection with pregnancy or childbirth could extend to cover the full additional 12 weeks' fully paid maternity leave. It agreed with the claimant, who argued that any special treatment should be limited to the first two weeks following the birth, which is the period designated in the UK as necessary to protect the health and safety of the mother. The ET held that, after the first two weeks, there were no crucial distinctions between the claimant and his hypothetical comparator: both sought to take leave in order to facilitate the care of a child in its first year of life.

The ET stated that it was "unclear why any exclusivity should apply beyond the two weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances, but the choice should be free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity".

On this point, it is interesting to note that the ET came to this conclusion in spite of the fact that the EU Pregnant Workers Directive does in fact provide a minimum maternity leave period of 14 weeks, and various EU decisions have recognised this period as designed to protect the mother's biological condition and mother-baby bond.

The fact that the claimant had not applied to take SPL, upon discovering that he would not receive full pay during it, was not held to be relevant to the decision of whether or not direct discrimination had occurred.

The claimant's claim of indirect sex discrimination was not upheld. He stated that the provision criterion or practice relied upon was the Telefonica maternity policy. The ET held that this policy was gender specific, applying only to women, and did not therefore make out the requirement of being apparently gender neutral. The ET therefore held that this would have been better presented as a claim of direct discrimination rather than indirect discrimination.

The ET did however uphold all but one of the claimant's claims of victimisation, finding that he had been subjected to various detriments as a result of his having raised issues of sex discrimination.

Commentary

At first sight certainly, this judgment will appear concerning to the many UK employers who choose to retain their policies around enhanced maternity pay while offering only the minimum statutory shared parental pay. However, there are a number of reasons why this judgment may not be applied by other judges. Firstly, it must be borne in mind that this is a first instance decision from the ET, a tribunal whose decisions are not binding on other court and tribunals.

In fact, this judgment itself departs from earlier ET judgments, including Shuter – v – Ford Motor Company Ltd ET/3203504/13. In that case, the ET held that it was not discriminatory to pay 52 weeks' full maternity pay to women on maternity leave, but only statutory pay to employees taking additional paternity leave. While this case did not deal directly with SPL, its conclusions are helpful in a consideration of this topic. The ET held that there was no direct discrimination as the correct comparator was a woman on additional paternity leave (such as a female spouse or partner), not maternity leave. It found that there was a prima facie case of indirect discrimination, but that the employer had made out a justification defence, namely that the different treatment was justified in order for it to pursue its goals of recruiting and retaining women in its male-dominated workforce.

Similarly, in Hextall – v – Chief Constable of Leicestershire Police ET/2601223/2015, a male police officer unsuccessfully argued that he should receive full pay during SPL, and the ET held that the correct comparator was a female officer on SPL rather than on maternity leave, who would also have received only statutory pay. The Ali case did not touch on this issue, although it is possible that a woman on SPL at Capita would have received the same statutory pay as the claimant. In this situation, a claim of indirect discrimination would seem more appropriate; while the SPL policy applies equally to men and women, it is more likely to place men at disadvantage as they cannot take the more favourable maternity leave. This would, however, enable employers to defend claims by providing a justification for the policy (for example, retaining female employees in the workforce).

The judgment in this case did not make reference to either of these earlier ET decisions. Hextall has been appealed to the EAT, and it will be helpful to have guidance from a higher court on this knotty issue.

Given the weight the ET in this case clearly placed on the government's intention behind introducing SPL, it may be that the courts and tribunals continue to find in favour of male employees who lose out on full pay as a result of taking SPL compared to their female colleagues on maternity leave. The ET's words regarding the "outdated and stereotypical assumptions" about which parent should care for a baby ring true in the current climate, where arguments for the protection of enhanced pay for women on maternity leave in order to protect their position in the workforce are increasingly met with counter-arguments that if SPL is made more economically attractive to men they will be better able to take a larger share of parental responsibility, enabling their partners to return to work earlier and so protecting their position in the workforce. With countries such as Sweden and Iceland ensuring that fathers receive at least 80% of their salary during parental leave and boasting an increase in uptake as a result, it seems that the issue of pay is a factor in the UK's low take-up rates of SPL. With government proposals about the possibility of extending SPL in the UK to grandparents, it is clear that we are undergoing a fundamental shift in the way we approach family leave, and this case could be the first of many.

Comments from other jurisdictions

Finland (Kaj Swanljung and Janne Nurminen, Roschier Attorneys Ltd): According to the Finnish Employment Contracts Act (55/2011, as amended) the employer is not required to pay the employee during family leave. However, collective bargaining agreements typically include provisions concerning paid maternity and paternity leave which oblige the employer to pay salary to parents during those periods. For example, in the collective agreement for the technology industries, a (female) employee, whose employment relationship has been in place

for at least six months before childbirth, is entitled to receive salary based on average hourly earnings for 56 days from the beginning of maternity leave. However, a father is only entitled to six days' pay during paternity leave. After the entitlement to paid has ended, parents may claim maternity and paternity allowances from the Social Insurance Institution and after that, a parental allowance. The allowances are all calculated in the same way, based on income earned in the previous year.

The above example demonstrates how provisions of collective bargaining agreements may offer unequal treatment. The Supreme Court of Finland has stated that employees who are subject to the same collective bargaining agreement may not be treated in a discriminatory way, but the Ombudsman for Equality has said that women on maternity leave and men on paternity leave are not in a comparable position. Maternity and paternity allowances are different benefits because of the different purposes of the leave. Paying paternity and parental allowances to men encourages fathers to participate in childcare and develop good relationships with their children, whereas maternity leave not only helps mothers care for their children, but helps them to recover from pregnancy and childbirth. Nevertheless, the Ombudsman has stated that men and women should be treated similarly in relation to parental leave, where the purposes are similar.

Under the Act on Equality between Women and Men (609/1986, as amended) the special protection of women due to pregnancy or childbirth is not deemed to constitute discrimination based on gender. Thus, according to the Ombudsman for Equality, the conditions for obtaining maternity or paternity allowances may differ without this being deemed to constitute prohibited discrimination. On that basis, it is possible that a Finnish court would have ruled differently in a case similar to the one heard in the UK.

Italy (Caterina Rucci, Bird and Bird): Under Italian law, whoever takes the parental leave, the pay is the same – 30% of the last normal salary. In Italy, parental leave can be taken during the first six years of the child's life, with six months for the mother and seven months for the father, or 11 months in total for shared parental leave, provided the father takes a minimum of three months.

Only parents with a very low total income are entitled to paid parental leave beyond six years (at 30% of the last normal pay). This can extend up to the first eight years of the child's life. Those who are not entitled to this may still take unpaid leave until the child reaches eight.

The leave is paid for entirely by the National Institute for Social Security (INPS) and therefore costs the employer nothing.

No indemnity at all, notwithstanding the family income, but still the right to enjoy the

(remaining) parental leave is now also granted from 9th to 12th years of age of the child.

These rules would seem to avoid any potential discrimination, as both parents are treated the same.

Subject: Gender discrimination

Parties: Ali – v – Capita Customer Management Limited

Court: Employment Tribunal

Date: 16 March 2017

Case number: 1800990/2016

Internet publication: https://assets.publishing.service.gov.uk/media/592fec3fe5274a5e51000124/Mr_M_Ali_v_Capita_Customer_Management_Ltd_1800990.2016_-_Final.pdf

---

Creator: Employment Tribunal
Verdict at: 2017-03-16
Case number: 1800990/2016