

Should employers pay enhanced shared parental pay?



In a landmark judgment, the Court of Appeal has decided that there is no act of sex discrimination or a breach of equal pay principles where an employer does not provide enhanced shared parental pay (SPP) in the same way that it pays maternity pay.

The case of *Ali v Capita Customer Management Ltd and others* considered two cases in which male employees taking shared parental leave (SPL) brought discrimination claims by comparing themselves with female employees on statutory maternity leave who received either statutory or enhanced maternity pay. The first case (*Ali*) involved a customer adviser working for Capita, the second (*Hextall*) a police officer employed by Leicestershire Police.

Direct discrimination

The essential issue for the direct discrimination claim brought by Mr Ali was whether he could validly compare his situation with a female employee receiving the higher rate of statutory maternity pay (and having accepted that there was a material difference in circumstances for the two-week period of compulsory maternity leave).

The Court rejected this argument, based on the principle that the predominant purpose of the minimum period of 14 weeks' maternity leave under the EU Pregnant Workers Directive is to protect a woman in connection with the effects of pregnancy and motherhood. The proper comparator would be a female employee on SPL, and she would not be paid any differently from the male employee taking SPL.



Indirect discrimination and equal pay

Mr Hextall's claim was brought as a claim of indirect discrimination, however the Court decided that it was properly categorised as an equal pay claim. The equal pay claim could not proceed because of the provisions in the Equality Act 2010 which preclude the equal pay principle from having effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.

Enhancing shared parental pay by choice

While this case may have resolved whether employers are legally obliged under discrimination law to enhance payments of shared parental pay, there are wider policy considerations which may encourage employers to do so voluntarily. The greater involvement of fathers in caring responsibilities is viewed as vital to changing workplace cultures and societal norms, and so addressing the "parenthood penalty" which is a barrier to career progression and a major cause of the gender pay gap.

However the take-up of shared parental leave is still extremely low; in 2017-18 fewer than 10,000 new parents took shared parental leave, an estimated 1% of those eligible to do so. Many new fathers do not even take up their rights to two weeks' paternity leave. In this context, a growing number of employers are choosing to provide enhanced SPL as part of their commitment to support working parents among their workforce.

Similar policy considerations may ultimately lead to reform of the current shared parental leave legislation. Last year the Government launched an evaluation of the shared parental leave regime. We await the conclusions for this assessment on what the barriers to take-up of shared parental leave are and how take-up can be increased, including any proposals to uplift statutory pay rates during shared parental leave and paternity leave.

How we can help

Our employment solicitors advise both employers and employees on a variety of different employment matters. To find out how we may be able to assist you, please contact our [employment law team](#).