

Shared parental leave – Discrimination against men?

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Ali v Capita Customer Management Ltd, Chief Constable of Leicestershire v Hextall
[2019] EWCA Civ 900

Sir Terence Etherton MR, Bean LJ, Rose LJ – 24 May 2019

Background to shared parental leave

The minimum entitlements to the various forms of parental leave and pay derive from EU law and domestic law.

Statutory maternity leave is available for a maximum of 52 weeks, with the first two weeks being compulsory. Statutory maternity pay is available for 39 weeks. This provided for by Council Directive 92/85/EEC of 19 October 1992 and implemented into UK law by s 71 Employment Rights Act 1996 (“ERA”) and the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312). The Social Security Contributions and Benefits Act 1992 and Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960) define the duration and rate of pay. A higher rate is available for 6 weeks, and a lower rate for the following 33 weeks.

Statutory shared parental leave was introduced by ss 119-126 Children and Families Act 2014 and the Shared Parental Leave Regulations 2014 (SI 2014/3050). Following the two weeks of compulsory maternity leave, a mother can opt to bring her statutory maternity leave to an end and split the remaining time between herself and her partner. The Statutory Shared Parental Pay (General) Regulations 2014 (SI 2014/3051) make pay available in respect of shared parental leave for a maximum of 37 weeks at the lower of the two prescribed rates of statutory maternity pay.

Employers may give entitlements to parental leave that are more generous than those prescribed by law.

***Ali v Capita* – background and decisions below**

Mr Ali is employed by Capita. Under its maternity leave policy, new mothers are entitled to 14 weeks at full pay and thereafter paid the lower statutory rate. Other parents are entitled to shared parental leave (once a mother has opted to bring her maternity leave to an end) only at the statutory rate.

Mr Ali took time off work to care for his new-born daughter and sought to be paid the same rate as a female employee on maternity leave. He was informed that he was only eligible for shared parental leave at the statutory rate of pay. He brought a claim for direct sex discrimination under s13 Equality Act 2010 (“EA 2010”), alleging that, discounting the two-week compulsory leave period that only applied to mothers, he was entitled to 12 weeks’ leave at full pay.

The claim was upheld by the ET, which found that during those 12 weeks Mr Ali wished to perform the same role as the equivalent female employee on maternity leave, namely caring for the child. The EAT overturned the decision, holding that there was a material difference between Mr Ali and a female employee on maternity leave (the latter being provided expressly for the health and safety of the mother following pregnancy and childbirth). Mr Ali appealed to the Court of Appeal.

***CC of Leicestershire v Hextall* – background and decisions below**

Mr Hextall is a serving police constable in Leicestershire Police Force. The police force policy is that new mothers are entitled to 18 weeks of maternity leave on full pay and the shared parental leave policy mirrors the statutory scheme. After his wife gave birth, Mr Ali took shared parental leave and was paid the statutory rate. He brought a claim for indirect sex discrimination under s19 EA 2010, complaining that the provision, criterion or practice (PCP) of paying only the statutory rate of pay for those taking shared parental leave put men at a particular disadvantage compared with women.

The ET rejected that claim. It also rejected the Chief Constable's contention that Mr Hextall's claim was in reality a claim for breach of the sex equality clause under s66 EA 2010. Mr Hextall appealed and the Chief Constable cross-appealed. The EAT rejected the cross-appeal, holding that the claim was correctly characterised as a discrimination claim. However, it disagreed with the ET's conclusion on indirect discrimination, because (1) it was

wrong to find a material difference between Mr Hextall and a female colleague, and that in order to assess disadvantage, the pool of people to which the PCP was to be applied was all officers with a present or future interest in taking leave to care for their new-born child, and (2) the ET had not properly considered the issue of particular disadvantage. The EAT set aside the ET's judgment and remitted the case to be reheard by a differently constituted tribunal.

Mr Hextall appealed to the Court of Appeal seeking an order dispensing with remission and upholding the claim of indirect discrimination. The Chief Constable cross-appealed on the basis that the claim was incorrectly characterised indirect discrimination claim.

Court of Appeal decision

The Court of Appeal had three issues to decide:

- Is the difference between maternity leave pay and shared parental leave pay direct discrimination pursuant to s13 EA 2010?
- Was Mr Hextall's claim better characterised as an equal terms claim pursuant to s66 EA 2010, precluding him from bringing a claim of indirect discrimination by the mutual exclusivity provision in s70?
- In any event, is the difference between maternity leave pay and shared parental leave pay indirect discrimination pursuant to s19 EA 2010?

Direct discrimination

The Court identified that the heart of Mr Ali's appeal was the proposition that, after the two weeks of compulsory maternity leave after birth, the purpose of following 12 weeks is to look after one's child. In that respect its purpose is identical to the purpose of shared parental leave. The Court rejected this proposition and accepted Capita's submissions that the purpose of statutory maternity leave is:

- a) to prepare for and cope with the later stages of pregnancy;
- b) to recuperate from the pregnancy;
- c) to recuperate from the effects of childbirth;
- d) to develop the special relationship between the mother and the new-born child;
- e) to breastfeed the new-born child;
- f) to care for the new-born child.

The Court held that this position is reflected in EU law and rejected the contention that the promotion of shared parental leave has qualified or changed this fundamental point (citing

Hofmann v Barmer Ersatzkasse (C-184/83) [1985] ICR 731, *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* (C-5/12) [2013] ICR 1323, *Griesmar v Ministre de l'Economie, des Finances et de l'Industrie* (C-366/99) [2003] CMLR 5 and *CD v ST* (C-167/12) [2014] IRLR 551) (paras 67-72).

In relation to UK legislation, it was held that no principle of statutory interpretation could make the facilitation of childcare the predominant purpose of the domestic shared parental leave provisions after the two-week compulsory period. The Court accepted Capita's submission that there are important differences between maternity leave and shared parental leave, namely:

- a) maternity leave is in part compulsory whereas shared parental leave is not
- b) maternity leave can begin before birth and is an immediate entitlement
- c) shared parental leave can only be taken with a partner's agreement and is dependent on the mother choosing to donate her statutory maternity leave
- d) maternity leave does not require there to be a child to be looked after, whereas shared parental leave does (para 73)

As shared parental leave did not alter the predominant purpose of statutory maternity leave, the Court concluded that, the correct comparator in Mr Ali's case was a female worker on shared parental leave, rather than a new mother on maternity leave. As such, there was no difference in treatment and therefore no claim for direct discrimination (paras 74-77).

Equal terms

The Court of Appeal held that the ET and EAT had erred in holding that Mr Hextall's claim was not an equal terms claim. The essence of his claim was that the female comparator had more favourable terms of work regarding her entitlement to take time off to care for her new baby, and that these were included in his terms of work by operation of the sex equality clause pursuant to s66 EA 2010 (para 78-94). Therefore, prima facie, he relied on that term to claim that he had not received his contractual entitlement to pay over the period when he was absent from work to care for his new baby and that he had consequently suffered a reduction in pay. However, Mr Hextall's claim framed in these terms could not succeed because sch 7, para 2 EA 2010 excludes terms of work affording special treatment to women in connection with pregnancy or childbirth from a sex equality clause. Therefore, a claim under s66 would fail (paras 95-107).

This conclusion meant that Mr Hextall was precluded from bringing a claim of indirect discrimination by virtue of the mutual exclusivity provision. S70(2)(a) EA 2010 states that the

inclusion of a less favourable term in terms of work is not regarded as sex discrimination for the purposes of s39(2) (discrimination in employment). He could not therefore bring a claim under s39(2) complaining of the difference in treatment between men and women in relation to this term of work (paras 108-110).

Indirect discrimination

While not necessary, the Court of Appeal also considered the claim for indirect discrimination and concluded it was not made out. It identified the correct pool of people to which the PCP applied was men and women taking parental leave, and that women on maternity leave should be excluded as their position is materially different. This meant that the cause of the disadvantage to men was not the PCP of paying only the statutory rate of pay for those taking shared parental leave, but the fact that only a birth mother was entitled to statutory and contractual maternity pay. In essence, it was an attack on the entire statutory scheme. Furthermore, the Court were prepared to hold that any disadvantage to Mr Hextall would have been justified as being a proportionate means of achieving the legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth (paras 114-126).

Comment

At the heart of this appeal is a policy question about the nature and function of parenthood and maternity and parental leave. The Court of Appeal has reaffirmed the distinction, rooted in the statute and case law, between the basis for maternity leave being recuperation from pregnancy, and the basis of shared parental leave being to care for a child. However, given mothers are now allowed to 'donate' their leave immediately after the compulsory two-week period, this health and safety logic is called into question. In an age of ever-increasing equality between parental roles, it may be that pressure will be applied, at a policy level, for more pay equality for new parents.



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