

EAT considers there is more than one way for an employee to have ‘sought’ to take parental leave

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[Hilton Foods Solutions Ltd v Andrew Wright \[2024\] EAT 28](#)

Legal Background - Parental Leave

1. Parental leave is a type of statutory leave, like maternity leave or shared parental leave provided for by the Maternity and Paternity Leave etc. (“MPL”) Regulations 1999. An employee with parental responsibility for a child under 18, who has worked for their employer for a year is eligible for parental leave. A parent is entitled to take up to 18 weeks of unpaid leave in relation to each of their children. This leave can be taken any time before the child’s eighteenth birthday although no more than 4 of the 18 weeks can be taken in any given year. Unless the employer agrees otherwise, or the employee’s child is disabled, this leave must be taken in whole weeks rather than individual days.
2. Often an employment contract will provide for parental leave on more generous terms than the provisions under the MPL Regulations, for example allowing a parent of a non-disabled child to take leave in individual days. For employees wishing to take parental leave provided for under contractual terms, the process for doing so would usually be provided in the contract.
3. For those employees whose employment contract does not provide for parental leave, the default statutory scheme applies. If the statutory scheme is engaged the employee must notify the employer of the beginning and end dates of their parental leave at least 21 days before the leave begins as detailed in Schedule 2 of the MPL Regulations.
4. An employer cannot refuse to grant leave but, in some circumstances, can postpone the leave where taking leave at the employee’s preferred time would unduly disrupt the business.
5. An employee will be regarded as unfairly dismissed if the reason or principal reason for the dismissal is connected with the fact that the employee took, or sought to take, parental leave. This is regarded as an automatically unfair reason and no qualifying period of employment is

required to bring an unfair dismissal claim in these circumstances. (Employment Rights Act (“ERA”) 1996 s99; MPL Regulation 20).

Background to the appeal

6. The Claimant’s case was that he had been unfairly dismissed and the real reason for his dismissal was that he had sought to take parental leave. The Claimant had informal discussions with his employer about taking parental leave in late 2019 and early 2020. In early February 2020, the Respondent’s HR officer sent an email to the Claimant outlining the notice requirements for taking parental leave. In mid-February 2020 the Claimant met with his line manager to discuss that he would be seeking parental leave. The Claimant was dismissed in mid-March 2020 by the Respondent with the Respondent citing redundancy.
7. The Claimant accepted that he had not made a formal written application for parental leave and confirmed that he knew that before taking parental leave he would need to make a formal application in writing. The Claimant told the Employment Tribunal that he was in discussions with his ex-wife to work out how the arrangements would work for the family. The Claimant’s case was that the real reason for dismissal was that he had ‘sought’ to take parental leave.
8. The Respondent’s case was that the Claimant had failed to comply with the provisions of Schedule 2 of the MPL Regs. It submitted that such a failing was fatal to the Claimant’s case that he ‘sought’ to take parental leave and the Respondent asked the Employment Tribunal to strike out the claim based on no reasonable prospects of success.
9. The Employment Tribunal did not consider there were ‘no reasonable prospects’. On the contrary Employment Judge Mason considered that it was ‘certainly arguable’ that the Claimant ‘sought’ to take parental leave given that he had made enquiries with his employer and made it clear that he intended to take parental leave. On this basis, the ET refused to grant a strike-out or deposit order.
10. The Respondent appealed on the basis that the EJ had erred in law in concluding that ‘sought to take parental leave’ does not require the Claimant to have submitted a written application to take parental leave under Schedule 2 of the MPL Regulations.

Employment Appeal Tribunal

11. The EAT considered that the Respondent's arguments were not persuasive for the following reasons:

- (1) If Parliament had intended to limit protection to employees who had given formal notice it could very easily have defined the protection by requiring compliance with Schedule 2 of the MPL Regulations.
- (2) A wide and purposive approach should be adopted when interpreting the MPLR (*Atkins v Coyle Personnel PLC [2008] IRLR 420*). The EAT considered that adopting the Respondent's analysis would result in consequences incompatible with the purposive approach and gave the following examples:
 - a. An employee could make their decision to take parental leave crystal clear to their employer and find themselves dismissed as a direct result of that communication. Under the Respondent's interpretation, the protection would not apply in the absence of the employee's formal application.
 - b. An employee who has sought to take parental leave under more generous contractual provisions would be obliged to follow the contractual process as the default statutory scheme and its notice requirements would not apply. The term "sought" would have a different meaning depending on whether there is a contractual provision or if the default statutory scheme applies.
 - c. An employee may have complied with the statutory scheme's notification requirements and later lose the right to take parental leave for another reason such as failing to provide information requested by the employer.
 - d. An employee may have complied with the notification requirements but made it clear that they do not intend to take parental leave. In such a case an employee could not sensibly be described as having 'sought' to take parental leave.
- (3) The word 'sought' should be given its ordinary English meaning. Whether or not an employee has 'sought' to take parental leave is best determined by the ET after consideration of all the relevant facts.

12. The Employment Appeal Tribunal concluded that on a straightforward reading of the legislation, there is not an absolute requirement that an employee must have given notice

compliant with Schedule 2 of the MPL Regulations to have 'sought' to take parental leave. Notice compliant with Schedule 2 will usually demonstrate that an employee has sought to take parental leave, but it is not the only way that the fact that the employee has sought to take parental leave can be evidenced.

Commentary

13. The Employment Appeal Tribunal's judgment might be considered unsurprising given the purposive approach to be adopted when interpreting the MPL Regulations. However, it does indicate that practitioners should be careful in attempting to frame issues as questions of law when they are more sensibly considered as questions of fact.

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