



## **Employment Law Brief**

*with*

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**One of the reasons for the introduction of shared parental leave in 2015 was to encourage a more even distribution of childcare responsibilities between two parents.**

Rather than assume that a mother would drop out of the workplace for up to a year, with the father taking a couple of weeks off when the child was born, shared parental leave was intended to foster a flexible approach where a total of 52 weeks' leave could be split between the two parents. Take-up, however, has been disappointing with research commissioned by the TUC suggesting that it might be as low as 1 per cent. This might be because there is something deep-seated in society that prevents men from taking extended leave for family reasons. It might be because the process for taking shared parental leave is more complicated than it needs to be. But there can be little doubt that at least one reason for the low take up boils down to money.

Shared parental leave may be paid, but the statutory rate is fixed at the lower level of statutory maternity pay – currently £148.68. There is no initial period of 6 weeks at 90 per cent of earnings as there is with maternity pay. What is more, the total amount of pay to be taken over both maternity and shared parental leave is 39 weeks. In effect the pay is simply what is left over after the mother has ended her maternity leave. This means in many cases there is no statutory entitlement to pay left by the time-shared parental leave starts.

The difference is even more stark in cases where the employer pays an enhanced rate of maternity pay. The Green Book for example provides for an additional 6 weeks' pay (usually paid at 50 per cent of pay for 12 weeks) after the initial 6 weeks at 90 per cent of earnings. Some employers go even further than this – but relatively few pay over the statutory minimum for shared parental leave.

Some employers have been worried that paying an enhanced rate for maternity leave, but only the statutory minimum for shared parental leave is discriminatory. The Court of Appeal, however, has just emphatically ruled that it is not. In the case of *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* (the two cases were joined together and the Court issued a single judgement) the Court effectively stamps on any argument that an employer might not be permitted to pay someone taking maternity leave more than someone taking shared parental leave.

When it comes to direct sex discrimination the point is quite straightforward. A man taking shared parental leave cannot be compared with a woman taking maternity leave. The Court reaches this conclusion after a lengthy discussion about the *Pregnant Workers' Directive* and the case law of the European Court of Justice. But it actually boils



down to a simple issue. Direct discrimination is less favourable treatment because of a protected characteristic. When an employer pays an employee on shared parental leave less than an employee on maternity leave, that is not because of sex. A man taking shared parental leave after his wife or partner has taken maternity leave is in the same relevant circumstances as a woman taking shared parental leave after her wife or partner has taken maternity leave. Provided both are treated equally, there is no direct discrimination.

A more difficult issue is indirect discrimination. It seems sensible to suppose that although both women and men take shared parental leave, women are more likely to take it after a period of maternity leave. Does that mean that men are placed at a particular disadvantage when the employer pays maternity leave, but not shared parental leave, at an enhanced rate? No says the Court of Appeal. The pool for comparison – the group you look at to determine relative disadvantage – does not include women who have taken maternity leave, because they are in a different position from those who have not. Even in indirect discrimination cases, like must be compared with like. Since men who take shared parental leave after their partner has taken maternity leave are no worse off than women who take shared parental leave in the same circumstances, it cannot be said that men are at a particular disadvantage. Even if they were (and you can see that the Court of Appeal is keen to cover all the bases here) then the employer's policy would be justified as a 'proportionate means of achieving a legitimate aim' and therefore would not amount to indirect discrimination.

There is also another – rather technical – barrier in the way of a discrimination claim. The Court of Appeal held that because the issue over payment for shared parental leave

is one of contractual entitlement, it cannot be the subject of a sex discrimination case at all. Instead it has to be taken as an equal pay claim – or an equality of terms claim as the Equality Act puts it. But any equal pay claim based on comparing yourself with someone who takes maternity leave is doomed to fail. This is because Schedule 7 of the Equality Act provides that the equality clause on which such a claim relies does not apply to terms affording special treatment to women in connection with pregnancy or childbirth.

It is as though the Court of Appeal has gone out of its way to reassure employers that they are free to pay an enhanced rate for maternity leave without having to match that entitlement for shared parental leave. Every possible avenue for challenging that arrangement has been closed off – unless of course the matter is taken to the Supreme Court.

This will be a relief to employers – matching enhanced maternity pay for everyone taking shared parental leave would be a very expensive exercise – but leaves us with the original problem. How do you encourage fathers to take more leave? There is currently speculation that the Prime Minister is pushing for a new right to 12 weeks' paid paternity leave with the first six weeks paid at 90 per cent of earnings. But this would take an Act of Parliament and the commitment of a Prime Minister with more than just a few weeks left in the job. Nevertheless, better paid leave for fathers must certainly be part of the solution. It is now clear that this will not be enforced by the courts, but perhaps it will make its way onto the Government's rather lengthy to-do list.

**Don't forget to check more about Darren Newman on his blog at [A Range of Reasonable Responses](#) or on twitter at [@DazNewman](#)**