

Direct sex discrimination: employer providing shared parental pay at less favourable rate compared to maternity pay (Ali v Capita)

Employment analysis: An employer's policy to pay female employees maternity pay at full pay but to pay only the statutory rate of pay to a father wishing to take shared parental leave was found by the Leeds Employment Tribunal to amount to direct sex discrimination.

Original news

Ali v Capita Customer Management

What is the impact of this case?

This case is of interest because it addresses the question of whether an employer's policy to offer enhanced maternity pay but only statutory shared parental leave pay is discriminatory.

In this case the claimant's wife had been diagnosed with postnatal depression and had received medical advice to return to work to assist her recovery. The claimant wanted to take leave to care for his child, and enable his wife to return to work, but was deterred from doing so because his employer would pay him only statutory rather than full pay. He argued that this was discriminatory on grounds of sex because women (mothers) could have 14 weeks of leave on full pay under the respondent's maternity policy but he was only entitled to two weeks of paternity leave on full pay followed by shared parental leave on statutory pay.

In finding in favour of the claimant the employment tribunal focused in particular on the following factors:

- the period under consideration in this case was after the two weeks of compulsory maternity leave and, as such, the woman (mother) was no longer considered to be in a unique position due to the physical aspects of pregnancy and childbirth which was protected over the compulsory period
- in the 12 weeks of leave following the compulsory two-week period, the claimant would be carrying out the same role as a woman on maternity leave, namely caring for the child, and as such was being treated less favourably in comparable circumstances

This judgment is a first instance decision so does not set a precedent for other tribunals to follow. It is understood that the respondent has appealed the finding of direct sex discrimination to the EAT.

There are also some real question marks over whether or not the tribunal's reasoning will be upheld by the EAT or followed by other tribunals. In particular:

- the tribunal did not appear to consider how the employer would have treated a request for paid parental leave by a female partner of a mother who has given birth who would, arguably, have been a more appropriate comparator than a woman who had given birth. If such a comparator would similarly have been paid statutory rather than full pay it would be difficult to say that the less favourable treatment was on grounds of sex

the tribunal treated only the very limited two-week period of compulsory maternity leave as the proportionate period over which a woman can lawfully be treated advantageously in connection with pregnancy and childbirth under s13(6)(b) Equality Act 2010. The EAT and other tribunals may consider this approach too restrictive, and the two-week period too short, taking into account, for example:

- the physical aspects of pregnancy and childbirth, e.g. recovery and breastfeeding, even if absence from work is not compulsory after the two-week period
- that 14 weeks is the minimum period of maternity leave which women are to be entitled to under the Pregnant Workers Directive 92/85/EEC.

What is the relevant background law?

The shared parental leave and shared parental pay regime introduced in respect of children who were / are expected to be born on or after 5 April 2015 or placed for adoption on or after 5 April 2015.

The right to shared parental leave allows parents to share (if they wish) up to 50 weeks of leave to which the mother or adopter would otherwise be entitled as shared parental leave (the woman is required to take two weeks of compulsory maternity leave as a health and safety measure which is why only 50 of the 52 weeks of potential leave can be shared).

The right to shared parental pay allows the mother and the father (or, as the case may be, the adopter and the adopter's partner) to share up to 37 weeks of the pay that the mother (or adopter) would otherwise be entitled to.

In order to be entitled to shared parental leave and pay, the mother and the father (or, as the case may be, the adopter and the adopter's partner) must meet certain eligibility requirements and conditions as to notice, declaration and evidence

An employer directly discriminates against an employee where:

- they treat them less favourably than they treat or would treat others, and
- they do so because of a protected characteristic (eg sex)

Under s13(6)(b) Equality Act 2010 it is not unlawful to afford special treatment to a woman in connection with pregnancy or childbirth.

Men are therefore not entitled to bring claims of direct sex discrimination in relation to special treatment which would be, or has been, afforded to a woman in connection with pregnancy or childbirth. *Eversheds Legal Services v de Belin* [2011] IRLR 448

However, according to the judgment of the EAT in *Eversheds v de Belin*, the exception only applies to treatment accorded to a woman insofar as it constitutes a proportionate means of achieving the legitimate aim of compensating her for the disadvantages occasioned by her pregnancy or her maternity leave. So, for example, it remains unlawful direct sex discrimination automatically to give a woman on maternity leave a maximum score against a redundancy selection criterion if there are alternative ways of removing the maternity-related disadvantage to her without unfairly disadvantaging the other (male) candidate.

As regards to direct discrimination, where maternity pay is paid at an enhanced rate and shared parental pay is paid to all employees at the statutory rate:

- a male employee who receives shared parental pay at the statutory rate only might assert that he is treated less favourably than a comparator (female) employee
 - the employer could argue in response that this is special treatment afforded to a woman in connection with pregnancy or childbirth (and hence not direct discrimination because of the exception carved out by s13(6)(b) Equality Act 2010).
- even if the employer is unsuccessful in that first argument, the complainant may have difficulty establishing that his less favourable treatment is because of sex, given that shared parental pay is payable to (a) the mother, or (b) the father or partner (who may be male or female)
- having said that, the employee might instead claim indirect sex discrimination, on the ground that the group of employees who can qualify for enhanced rate pay is all female, whereas all men would only be able to qualify for the lower statutory rate (even though some women, who are partners, would also only get that lower statutory rate as shared parental pay). Such a claim would probably be determined on the basis of whether the provision, criterion or practice (the difference in approach to maternity pay as compared to shared parental pay) is justified

What were the background facts?

The claimant's daughter was born on 5 February 2016. She was born two weeks prematurely but the claimant was able to take his two weeks paternity leave, which was on full pay, immediately following her birth. During that paternity leave he informed his manager that his wife had been diagnosed with postnatal depression. The claimant had booked annual leave to commence on the due date of his baby so was able to take a further week's paid leave to care for his wife and daughter.

On 7 March he returned to work. His wife had been medically advised to return to work to assist her recovery and he wanted to take time off to care for his daughter. He asked his manager about this and she sought advice from the respondent's HR department

On 9 March the claimant was told at a meeting that he was eligible for shared parental leave under the respondent's policy but would only be entitled to statutory pay. The claimant learnt from his female colleagues that they were entitled to full pay for 14 weeks' maternity leave under the respondent's maternity policy and he believed he should get the same.

The claimant raised a grievance which was rejected because the respondent took the view that it did not have a legal obligation to pay the paternal father an enhanced rate of paternity leave.

The claimant brought employment tribunal proceedings which included a complaint of sex discrimination because as a male employee he was entitled to only two weeks of paid leave following the birth of his child, whereas a female employee would be entitled to 14 weeks of pay following the birth of her child.

What were the parties' respective arguments before the employment tribunal?

The claimant accepted that there was a material difference in circumstances between a female employee who has given birth and a male employee during the first two weeks of the 14 week leave period because the female (the mother) was required to take 'compulsory maternity leave' which is related to her biological/ physiological condition and recovery following childbirth. However, he argued that:

- after the two weeks of compulsory leave either parent could care for their baby, depending upon the choices made by the parents and their particular circumstances
- to provide that as a man (a father) caring for his baby he was not entitled to the same pay as a woman (a mother) performing the role took away the choice he and his wife wanted to make as parents for their baby and was directly discriminatory

The respondent put forward three arguments to defend its policy:

- the comparison made by the claimant was not a valid comparison because the claimant had not given birth. The law entitles only female employees the right to maternity leave and the ancillary right to maternity pay for this reason because of the special considerations which stem from that biological fact and which can only apply to women who are pregnant or who have recently given birth
 - applies and the claimant cannot take any account of the special treatment afforded to women in connection with pregnancy/ childbirth. In relation to pay: *Eversheds Legal Services v De Belin*
 - 14 weeks of enhanced pay was reasonably necessary to ensure that women are not disadvantaged by taking maternity leave (relying on *Eversheds v de Belin*)
 - 14 weeks is the minimum period of maternity leave provided under the Pregnant Workers Directive and therefore no account should be taken of this benefit
 - *Baldwin v Brighton & Hove City Council* 2007
 - although the claimant was 'deterred' from applying he did not apply and hence cannot say that he was in fact treated less favourably than his hypothetical comparator because he did not take the leave

What did the employment tribunal decide?

The employment tribunal found that the respondent had directly discriminated against the claimant on grounds of sex. It held that:

- the claimant was entitled to compare his treatment with that hypothetical comparator taking leave to care for her child after the two-week compulsory leave period even though he has not given birth
- in the 12-week period following the initial two weeks, was denied the benefit of full pay, which would have been given to a hypothetical female employee caring for her child
- the claimant could claim sex discrimination by reference to the more favourable treatment given to that female colleague
 - he was denied that benefit (full pay) and was deterred from taking the leave
 - he was treated less favourably because he was a man
- the next question was whether any account should be taken of the special treatment of 12 weeks of full pay afforded to a woman after the two weeks compulsory maternity leave
- maternity leave and pay are also provided in order to facilitate the care of a child and that need or consideration is not exclusive to women who have recently given birth
- it is not clear 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 the babies
- whether that happens in practice is a matter of choice for the parents depending on their personal circumstances, but that 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
- in these particular circumstances, the claimant as the father was best placed to perform that role given his wife's postnatal depression
- the respondent knew those were the circumstances in which he was seeking to take the leave
- the claimant was asking for the leave to perform the same role his female comparator would have performed with full pay
- the caring role he wanted to perform was not a role exclusive to the mother
- the full pay for the 12 weeks following the initial period of compulsory leave was not special treatment in connection with pregnancy and childbirth but was about special treatment given to women for caring for a newborn baby
- the respondent never reviewed the policy when the claimant was complaining of unequal treatment to consider whether it applied to him in a discriminatory way
- by considering any complaint on a case by case basis they could have ensured that the claimant was treated consistently and in a non-discriminatory manner
 - s39 (2)(b) Equality Act 2010 identifies the discriminatory treatment the claimant relies upon which is access to the benefit of full pay under the applicable policies the fact that the claimant did not apply for the leave but was deterred from so doing will be relevant to remedy but does not prevent liability for that discriminatory treatment.

It should be noted that the claimant had also made a claim of indirect sex discrimination. However, the tribunal found that since the claimant was relying on the respondent's maternity policy, which was not gender neutral in its terms, the complaint was one of direct discrimination not indirect discrimination.

Case details

- Court: Leeds Employment Tribunal
- Tribunal Members: Employment Judge Rogerson sitting with Mr Webb and Mr Rhodes
- Date of Judgment: 16 March 2017