

## Sex discrimination, enhanced maternity pay and shared parental leave

*Chief Constable of Leicestershire v Hextall; Ali v Capita Customer Management Ltd* [2019] EWCA Civ 900; May 24, 2019

### Facts

These cases sought to establish the right of fathers to receive pay for parental leave at the same rate as mothers who often receive more generous remuneration under the guise of 'maternity' pay.

Mr Madasar Ali (MA) worked for Capita Customer Management Limited (Capita) and claimed indirect sex discrimination as he was not entitled to the equivalent of a higher maternity pay rate for 12 weeks after the first two weeks of pregnancy and instead was only entitled to be paid less under shared parental leave provisions.

Mr Hextall (H) worked for Leicestershire Police and claimed direct discrimination, indirect discrimination and a breach of equal pay regulations for the substantially same reasons as MA. Similarly, his employer only permitted him to claim for shared parental leave paid at the statutory rate while a mother was entitled to maternity leave at full pay for 18 weeks.

### Employment Tribunal and Employment Appeal Tribunal

The claims were heard separately before the ET and the EAT; they were subsequently joined by the CA.

MA succeeded before the ET in his claims against Capita. In the judgment of the EAT (*Capita Customer Management Ltd v Ali* UKEAT/0161/17) Mrs Justice Slade held that the rationale behind the enhanced maternity pay regime was intended to give effect to European legislation (Council Directive 92/85/EEC of October 19, 1992) which has the purpose of safeguarding the health and wellbeing of women who have just given birth. She, therefore, overruled the decision of the ET.

H's claim before the ET failed. Slade J again heard this appeal (*Hextall v Chief Constable of Leicestershire Police* UKEAT/0139/17) but made no substantive decision on the particular issues, instead finding technical errors in the reasoning of the ET and remitting the case to be heard again while pointing to her own judgment in *Capita Customer Management Ltd v Ali* as potentially instructive.

### Court of Appeal

The CA held that it was neither discriminatory nor a breach of the equal pay sex equality clause for employers not to pay male employees enhanced shared parental pay at the same level as any enhanced maternity pay offered by the employer to female members of staff.

Both the ET and EAT had erred in finding that the claims were not founded in equal pay terms. The CA read the claim as being related to a female comparator's more favourable terms of work, specifically her entitlement to take time off to care for her new baby which was also included in the father's terms of work by operation of the sex equality clause in s66 of the Equality Act 2010 (EA). Nevertheless, this claim also failed because the exclusion in paragraph 2 of schedule 7 to the EA prevents the reliance on the sex equality clause as the more favourable terms available to a female relate to special treatment in connection with pregnancy or childbirth.

The direct discrimination claim failed as it was held that statutory maternity leave related to matters exclusive to the birth mother resulting from pregnancy and childbirth. That purpose had not been altered by the introduction of shared parental leave. A woman on maternity leave could not, therefore, be the correct comparator as she had experienced childbirth and therefore was not in a similar enough position to the other parent.

As a result of the finding in the equal pay based claim, the indirect sex discrimination claim was bound to fail due to the effect of section 70(2)(a) EA, which provides that the inclusion of a less favourable term in an employee's terms of work could not be regarded as sex discrimination where it was included as a result of the sex equality clause found at s66 EA. Again, in a similar vein to its finding in relation to direct discrimination, the CA also set out that the correct pool for comparison ought only to be made up of employees on shared parental leave. Therefore, any disadvantage to a father is justified as being a proportionate means of achieving the legitimate aim of the special treatment of mothers who have borne a child.

### Implications for practitioners

Surprisingly, H's application for permission to appeal to the SC was refused. This leaves us with the CA judgment, namely that a failure to provide enhanced pay for shared parental leave in line with maternity pay is presently proportionate and justifiable.

It is of particular interest that the CA was prepared to read in a special treatment exemption in respect of indirect discrimination, basing this on a similar exemption being included in EU law and the previous UK legislation. Significantly any future challenge based in similar grounds would appear to be bound to fail until this particular issue is considered by the SC or a particularly independent minded judge at a more preliminary level.

Slade J's detailed commentary on the relevant legal provisions governing maternity, shared parental leave and pay contained in *Capita Customer Management Ltd v Ali* is a welcome opportunity to see the relevant elements of this complex set of statutes set out in a logical manner.

### Comment

It is disappointing that, in refusing to grant permission to appeal, the SC has seemingly failed to recognise the public importance of these issues and the significant barriers now faced in couching them in terms of discrimination. The reliance on previous regulations to erect this barrier is of particular concern given the rapid (although not rapid enough) changes in societal attitudes to parenting and the government's own acknowledgment of this with its provision for shared

parental leave.

Tempering one of the very few legal/workplace privileges that women enjoy may seem like a counterintuitive way to challenge patriarchy, but this could be one of the rare examples where it could well be the case.

The link between maternity pay and '*connection with pregnancy and child birth*' could, and arguably should, be limited to the amount of time it takes a woman to physically and mentally recover from giving birth, based on the usual prognosis. This would seem to give effect to the requirements of the EU regulations while also making it less likely that families see it as a financial incentive for women who have recently given birth to potentially stall their careers by taking an extended period of time off. In particular, the monetary incentive to do so irrespective of other circumstances fails to take into account the myriad other factors which govern who takes primary responsibility for childcare. This would also combat the apparent reticence of some employers to employ women of a child bearing age, reducing gender bias in recruitment practices as the likelihood of both men and women taking some form of parental leave becomes equalised.

As the route through the courts seems closed for the time being, we will have to look for political solutions to these complex issues. We may face a long wait.

**Ryan Bradshaw & Claudia Almeida**

Solicitor & senior paralegal

Leigh Day