Shared Parental Leave – EAT finds no Direct Discrimination

Today saw the much anticipated judgment in Capita Customer Management v Ali & Working Families (Intervenor) UKEAT/0161/17 concerning the question of whether it is direct sex discrimination to pay men on shared parental leave at a lower rate than mothers on maternity leave. Andrew Burns QC and Lucinda Harris report.

In *Capita v Ali* the EAT has confirmed that it is not direct sex discrimination for an employer to make different payments for maternity leave and for shared parental leave. This is because the two types of leave are not comparable – one is mainly provided for the health and safety of a mother, the other is purely for childcare reasons.

The EAT held that the Tribunal's error was to identify a woman on statutory maternity leave (SML) having given birth as an appropriate comparator for Mr Ali – a man who had not given birth, who was not on SML and who was taking shared parental leave (SPL) in order to care for his child.

The EAT explored the different purposes and legal foundations for SML and SPL, which had been disregarded by the Employment Tribunal. The Tribunal had wrongly tried to apportion SML to health and safety and childcare – reaching a problematic conclusion that only two weeks' leave were necessary to protect the health, safety and wellbeing of a new mother and after that leave was purely a matter of choice and childcare needs. That finding was contrary to the Pregnant Workers Directive (92/85/EEC) underpinning the right to SML.

Mr Ali was transferred to Capita from Telefonica in 2013 under a policy which entitled him to two weeks' ordinary paternity leave (at basic pay) and up to 26 weeks' additional paternity leave which "may or may not be paid". Mothers were entitled to maternity pay: 14 weeks' basic pay and 25 weeks' statutory maternity pay.

Mr Ali took two weeks' paid paternity leave after which his wife returned to work (for another employer) and so he asked for leave being paid at the SML rate of pay. However SML is only available for birth mothers – including surrogates and mothers whose babies are sadly stillborn and where there is no need for any childcare. The Directive requires maternity leave as a health and safety measure for three categories of people defined in Art. 2: pregnant workers, workers

who have recently given birth and workers who are breastfeeding. UK implements this, requiring employers to ensure (under criminal sanction) that most mothers take a minimum of two weeks' "compulsory" maternity leave and up to 52 weeks' SML. This complies with the Directive's requirement for a minimum of 14 weeks' maternity leave.

In contrast SPL was introduced by the Children and Families Act 2014 to replace additional paternity leave. A woman may curtail her right to maternity leave and pay and her SML is then available to be taken as SPL by her or her nominated partner. It is a childcare provision.

Slade J held that Mr Ali failed to establish that he had been treated less favourably than a hypothetical comparator. On a comparison of cases for the purposes of direct discrimination "there must be no material difference between the circumstances relating to each case" (s.23 Equality Act 2010). There was a material difference – he was on SPL (for childcare reasons) whereas his hypothetical comparator was on SML (for health and safety reasons).

A further impediment is that as pregnancy and maternity are themselves protected characteristics under the Equality Act 2010, direct discrimination is disapplied to preferential treatment to women because they are on maternity leave under section 13(6)(b). The Tribunal erred in that it should have taken "no account … of the special treatment afforded to a woman in connection with pregnancy or childbirth". This provides a defence to employers to discrimination claims brought in relation to SPL.

The EAT applied European case law confirming that the s.13(6)(b) derogation goes beyond the first two weeks of maternity leave. In *Hofmann v Barmer Ersatzkasse* [1985] ICR 731 the ECJ rejected the father's contention that the nature of maternity leave is changed from leave designed to protect the health and safety of women who has given birth simply because a woman was in a period of voluntary leave rather than compulsory leave. This and the subsequent case of *Betriu Montull v Instituto Nacional de le Seguridad Social* [2013] ICR 1323 suggests that the whole of the UK 52 weeks' maternity leave is for health and safety purposes and therefore cannot be used for a comparison with a person on SPL (contrary to the EAT's obiter thoughts giving support to the Intervenor's submission that the nature of SML may change after 26 weeks). The better view is that maternity leave falls within the scope of the derogation regardless of whether the woman is in a period of compulsory or voluntary

maternity leave, and regardless of whether the domestic right to maternity leave exceeds the minimum requirements prescribed by the Pregnant Workers Directive.

Slade J also heard the appeal in *Hextall v Leicestershire Police*, which is linked with the appeal in *Ali* as it considers the alternative question of whether it is indirect sex discrimination to pay men on shared parental leave at a lower rate than mothers on maternity leave. Judgment in *Hextall* was not handed down simultaneously and so the analysis of indirect discrimination is awaited. While it may seem logical that the result in *Hextall* would follow the same underlying reasoning as *Ali* it was argued on different grounds.

Mr Hextall took SPL paid at the statutory rate while his wife continued to run her own business. He said that had he been a female police constable on maternity leave, he would have been entitled to be paid full salary. The Tribunal pointed out that SPL is available to everyone, not just men but that most mothers take maternity leave rather than SPL. The Tribunal found that his direct discrimination complaint failed because there was no relevant less favourable treatment, it was not because of sex or in any event any relevant more favourable treatment of a comparator was lawful under section 13(6)(b). There was no appeal against the decision on direct discrimination. Mr Hextall challenged on appeal the finding that there was no indirect discrimination; more specifically, he challenged the finding that a woman on SML was not a valid comparator for a man on SPL and that the provision, criterion or practice ('PCP') did not put men at a particular disadvantage. Leicestershire Police did not cross-appeal the Tribunal's finding that, if there had been a PCP which put men at a particular disadvantage, that could not be objectively justified. The issue of objective justification is therefore likely to be a live one even if Mr Hextall is successful on his appeal. The EAT's decision in *Ali* that s.13(6)(b) Equality Act 2010 provides a defence to direct discrimination claims brought in relation to SPL and the rationale underpinning the *Ali* judgment may also provide grounds on which an objective justification argument can be founded to defeat an indirect claim as well.

Andrew Burns QC and Lucinda Harris appeared for Capita Customer Management Ltd.