Employment

Shared Parental Leave

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Introduction

The EAT has recently handed down two decisions on shared parental leave: *Capita Customer Management v Ali & Working Families (Intervenor)* UKEAT/0161/17 and *Hextall v Chief Constable of Leicestershire Police & Working Families (Intervenor)* UKEAT/0139/17. The two decisions address, but do not fully answer, the question of whether it is unlawful discrimination to pay men on shared parental leave at a lower rate than mothers on maternity leave. It looks likely that both direct and indirect discrimination claims of this nature will fail, on the law as it stands, for the reasons given in *Ali*. However, the decisions ignite a broader debate about equality and the need for legislative change in this area.

Ali v Capita

In *Ali*, the EAT considered whether it is direct discrimination under section 13 of Equality Act 2010 (EqA 2010) to pay a man on Shared Parental Leave (SPL) at a lower rate than a woman on Statutory Maternity Leave (SML).

Mr Ali was employed by Capita Customer Management Limited. When his daughter was born he took two weeks' paid paternity leave. He then wished to take SPL to enable his wife (who was suffering with Post Natal Depression) to return to work and him to care for the baby. He was told that, under his employer's policies, he would not be paid a rate of pay equivalent to what a woman would get on maternity leave. Mr Ali brought a claim in the Employment Tribunal alleging direct sex discrimination. He argued that he should have been paid at the same rate of pay as a woman on enhanced pay rate for the 2-14 period after his daughter's birth.

The Employment Tribunal upheld Mr Ali's complaint of direct sex discrimination. In doing so, the Tribunal found that the appropriate comparator was a female employee who had given birth, and was on SML, after the compulsory 2 weeks' maternity leave for health and safety. From that time onwards the woman was caring for her child, which was the same role that Mr Ali wished to perform on SPL. The Tribunal held that there was a difference in treatment and that the reason for the less favourable treatment was Mr Ali's gender.

The EAT upheld an appeal by Capita. It found that the Tribunal had identified an incorrect comparator. A woman who had given birth and was on SML was not an appropriate comparator for Mr Ali, a man who had not given birth, who was not on SML but SPL. The EAT held that SML and SPL were different types of leave, with different purposes.

The EAT noted that the Pregnant Workers Directive, from which the right to SML originates, was expressly intended to protect the health and safety of new mothers. The Directive requires maternity leave as a health and safety measure for three categories of people defined in Article 2, namely pregnant workers, workers who have recently given birth and workers who are breastfeeding. Under Article 8, Member States are required to take necessary measures to provide for a continuous period of maternity leave of at least 14 weeks to protect such workers' health and safety. The UK implements this, requiring employers to ensure that mothers take a minimum of two weeks' "compulsory" maternity leave and up to 52 weeks' SML.

By contrast, the EAT observed that SPL was introduced at a domestic level by the Children and Families Act 2014 to replace additional paternity leave. SPL is not a freestanding entitlement and is only be available where a woman opts to 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. SPL is expressed as being a childcare provision.

The EAT therefore held that a hypothetical woman on SML was not an appropriate comparator for Mr Ali. There was a material difference in their circumstances, contrary to the requirements of section 23 EqA 2010. Mr Ali was on SPL (for childcare reasons) whereas his comparator was on SML (for health and safety reasons).

Further and in any case, the EAT also found that Mr Ali's claim must also fail due to section 13(6)(b) EqA 2010. That section disapplies any preferential treatment to women because they are on maternity leave because pregnancy and maternity are themselves protected characteristics under EqA 2010. Section 13(6)(b) reflects a derogation in the Equal Treatment Directive for unequal treatment in measures which protect a woman's biological condition during pregnancy and maternity. The EAT found that the Tribunal should have taken "no account … of the special treatment afforded to a woman in connection with pregnancy or childbirth". Capita therefore had a defence under section 13(6)(b) to the discrimination claim. The EAT applied European case law confirming that the section 13(6)(b) derogation goes beyond the first two weeks of maternity leave.

Hextall v Leicestershire Police

In *Hextall*, the EAT considered whether it is indirect sex discrimination under section 19 EqA 2010 to pay men on shared parental leave at a lower rate than mothers on maternity leave.

Mr Hextall was a father, working for the Leicestershire Police, who took SPL paid at the statutory rate while his wife continued to run her own business. He brought a claim before the Employment Tribunal alleging indirect sex discrimination, as he received a lower rate of pay on SPL than a female police constable on maternity leave would have been entitled to.

The Employment Tribunal dismissed Mr Hextall's claim for indirect discrimination. This was on the basis that SPL is available to everyone, not just men (albeit that most mothers take maternity leave rather than SPL). The Tribunal went on to consider whether, if the indirect discrimination had been well founded, Leicestershire Police could have made out an objective justification defence under section 19(2)(d) EqA 2010. The Tribunal dismissed various allegedly legitimate aims put forward, finding that the respondent's real argument boiled down to costs. Cost alone was not held to be a legitimate aim. The Tribunal also found that Mr Hextall's 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).

Mr Hextall brought an appeal before the EAT, challenging the finding that there was no indirect discrimination. In particular, 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. There was no appeal against the decision on direct discrimination or the objective justification defence under section 19(2)(d).

The EAT held that the reasons why a woman on maternity leave is not a proper comparator in a direct discrimination claim is no answer to an indirect discrimination claim. The PCP relied upon was "paying only the statutory rate of pay for those taking a period of shared parental leave" and the EAT found no error in that. The EAT said that the next statutory element is whether the PCP puts or would put persons with whom the Claimant shares the relevant protected characteristic (men) at a particular disadvantage when compared with women. The EAT held that this must be a comparative disadvantage within a "logically relevant pool". People who have no interest in the advantage or

disadvantage of which complaint is made should not be in the pool.

The EAT pointed out the shifting nature of the stated disadvantage as the case progressed through the ET and to the EAT. The final pool identified in the EAT was "police officers with present or future interest in taking leave to care for their newborn child" but the ET had found no facts to decide on that or the appropriate pool. The EAT allowed the appeal on that basis.

It is notable that Leicestershire Police did not cross-appeal the ET'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 not addressed in the *Hextall* appeal and therefore is likely to be a live one in any future indirect discrimination claim.

Comment

The EAT's decision in *Ali* currently provides a defence to direct discrimination claims brought by men under section 13 EqA 2010 in relation to SPL. Although the decision in *Hextall* may appear to be a victory for men in opening up the door to an indirect discrimination claim, it may not prove so in the long run.

Firstly (and contrary to the EAT's analysis in *Hextall)*, it is arguable that the rationale in *Ali* prevents there being any disparate impact on men. To say that 'fathers' have no choice but to take SPL whereas 'mothers' have the option of maternity leave, overlooks the point that a father/mother difference is not necessarily the same as a male/female comparison.

Secondly and perhaps more importantly, indirect discrimination claims may founder on the rock of objective justification, not addressed in *Hextall*. That is because the rationale underpinning the *Ali* judgment may provide grounds on which an objective justification argument can be founded to defeat an indirect claim as well. At the heart of the *Ali* decision is the finding that men on SPL are *not* performing the same role as women on SML. That distinction prevents men on SPL from being compared with women on SML for the purposes of a direct discrimination claim. That same logic could defeat an indirect discrimination.

Compliance with the Pregnant Workers Directive, and treating maternity leave as an effective health and safety measure, is almost certainly a legitimate aim. It could also, arguably, be a legitimate and proportionate aim to provide an enhanced policy where there is a derogation in the Equal Treatment Directive for unequal treatment in measures which protect a woman's biological condition during pregnancy and maternity.

Some commentators argue that the disparity in functions between SPL and SML should only be held to last for a limited time period and that, at some point during a woman's SML, she may come to be performing the same childcare role as a man on SPL. Such an argument finds credence in the obiter comments of Slade J in *Ali*. Slade J observed that the nature of maternity leave may potentially change after 26 weeks, as suggested by the Intervenor. That period would represent Additional Maternity Leave (26-52 weeks) in domestic law when, arguably, the health and safety aspect of maternity leave ceases to apply. If that is right, the door could be opened to both direct and indirect discriminations from 26 weeks onwards.

The difficulty is that such a finding does not sit comfortably with the current case law, including the two ECJ cases referred to in *Ali*. 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. Similarly, in *Betriu Montull v Instituto Nacional de le Seguridad Social* [2013] ICR 1323, the ECJ 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. There does not therefore appear to be any legal basis, at present, for drawing a bright line as to when the health and safety period of SML comes to an end (if at all).

If any line is to be drawn between health and safety and childcare at some point during the 52 weeks of SML, it would also be preferable for such a decision to be taken at a political level.

The task of delineating the health and safety and childcare functions of maternity leave is a complex one which must be

taken with due regard to all relevant evidence and stakeholders. It must take into account the varied and individual nature of a woman's recovery from pregnancy and childcare. It must also address other possible functions of SML beyond simply health and safety or childcare, such as the arguably special relationship between mother and child.

It is crucial that any decision to limit the period of SML designated to health and safety does not disadvantage women who are pregnant or have recently given birth. In particular, that is does not result in a levelling down or reduction in maternity benefits. As Working Families made clear in their intervening submissions in *Ali*, women are faced with considerable disadvantages in the workplace as a result of pregnancy and childcare. Women must therefore be afforded adequate advantages to offset that disadvantage.

It is equally important, however, that the advantages and disadvantages to women of men being paid a higher rate of pay on SPL are weighed up properly in the round. Thinking of pay differentials between SML and SPL as beneficial to women (because they receive a higher rate of pay and avoid the risk of a levelling down) is short-sighted.

SPL is clearly about more than just childcare. The courts will always be constrained to treat it as such because, construing the legislation, SPL is expressed solely as a childcare provision with no reference to supporting the mother's health and safety or wellbeing. This may be contrasted, for example, with ordinary parental leave (OPL), which allows eligible employees to take up to two consecutive weeks' leave within 56 days of a child's birth (or placement for adoption) to care for the child or to support the child's mother (or adopter). The inclusion of 'support' for the child's mother appears to recognise a function beyond childcare for at least 56 days; such as physical, emotional or social support for the mother. However, in reality, SPL is often just as much about supporting the mother as it is about childcare.

There will be many cases where a partner's support is necessary to ensure the mother's physical or emotional wellbeing beyond the period of ordinary parental leave. Indeed, Mr Ali sought to take SPL partly to support his wife's recovery from post-natal depression. Crucially, many mothers will also benefit from a socio-economic perspective if a partner takes SPL. The Shared Parental Leave Regulations 2014 were introduced with the very aim of supporting families and achieving greater equality between men and women. The Explanatory Notes stated that, as well as giving families greater flexibility on childcare, the policy objective was "to create more equity in the workplace and reduce the gender penalty resulting from women taking long periods of time out of the workplace on maternity leave". Working Families' Briefing for Employers on the Shared Parental Leave Regulations also noted that lack of support for SPL would reinforce female carer/male breadwinner-stereotypes. SPL take up is therefore crucial for the achievement of true gender equality.

Take up rates for SPL are exceptionally low in the UK, at around 1% in 2012/2013 and 2% in 2017, and the Government has recently launched a £1.5 million campaign to improve those figures. Studies show that the rate of pay is a significant factor in the low number of couples signing up to SPL; employers that enhance shared parental pay are twice as likely to receive a shared parental leave request as those who offer only the statutory rate. This suggests that the current SPL legislation is failing in its aim of improving gender imbalances. The courts, forced to construe any pay differentials through the lens of the EqA 2010 and on the particular facts in front of them, can never truly address this broader issue.

The European Parliament have long acknowledged that true equality is only possible if there is a genuine partnership in the sharing of responsibilities between men and women, removing motherhood as an obstacle to women's careers. The European Parliament and European Commission have repeatedly attempted to amend the Pregnant Workers Directive. A new Maternity Leave Directive was also proposed by the European Commission in 2008 but, as agreement could not be reached, was withdrawn by European Commission in 2015. A new Work Life Balance Directive is being considered at present, with the European Parliament's Employment and Social Affairs Committee (EMPL) expected to start consideration of a draft report on the proposed directive in spring 2018. If introduced, the directive will strengthen rights in respect of parental leave and pay. However, arguably, it will not go far enough towards levelling the playing field for men and women in terms of equity in the workplace.

This area is ripe for change but that change must come at a political level. Until then, sex discrimination claims in relation to SPL seem likely to fail. If they do, it is not only men like Mr Ali and Mr Hextall who will be losing out, but women too.

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