

# Employment Channel News Script – Shared parental leave and pay

---

Hello, you're watching Addleshaw Goddard's Employment Channel.

In today's programme, we look at a recent headline-grabbing Tribunal decision that an employer's refusal to match shared parental pay with enhanced maternity pay amounted to sex discrimination. We look at the law and what this ruling means for you.

## **Shared parental leave and pay - *Ali v Capita Customer Management Ltd (2016)***

Now, employers have been grappling with whether or not to enhance shared parental pay ever since shared parental leave (or SPL) was first introduced in 2015.

Co-parents taking SPL can share up to 50 weeks' leave and 37 weeks' pay. Statutory shared parental pay (or SSPP) is paid at exactly the same weekly rate as statutory maternity pay (SMP), apart from the fact that the first 6 weeks of SMP are paid at 90% of pay. Crucially though, there's no statutory requirement for employers who enhance maternity pay for female employees to match this for employees taking shared parental leave. The Government's view is that it isn't unlawful to differentiate in this way, but commentators have argued there's a risk this'd be discriminatory.

So far, limited case law to date has supported the Government's approach. Last year in ***Hextall v Chief Constable of Leicestershire Police***, a Tribunal decided that it wasn't discriminatory to pay enhanced maternity pay but only SSPP. The Tribunal rejected the argument that male claimants taking shared parental leave were entitled to compare themselves with women on maternity leave – instead finding that the correct comparator was a woman taking shared parental leave. As a result, the direct discrimination claim failed because there was no less favourable treatment.

However, in this latest case - ***Ali v Capita*** – a different Tribunal has now gone the other way. Mr Ali began working for Capita following a TUPE transfer. While female transferring employees were entitled to an enhanced maternity pay package of 14 weeks' pay followed by 25 weeks' SMP, by contrast, male transferring employees were only entitled to 2 weeks' paid ordinary paternity leave.

After his daughter's birth in 2016, Mr Ali took 2 weeks' of fully paid ordinary paternity leave. When his wife was advised to return to work to combat post-natal depression, Mr Ali asked for more time off. He was told he could take shared parental leave and receive SSPP. However, he argued he should be entitled to the same enhanced payments as female transferring employees – so, up to 14 weeks' full pay. He brought claims for direct and indirect discrimination - and was successful in his claim for direct discrimination.

Controversially, the Tribunal allowed Mr Ali to compare himself to a woman on maternity leave, rather than limiting him to a comparison with a woman on shared parental leave. The Tribunal went on to find that the different approach to pay was less favourable treatment of men taking leave for the purpose of caring for their child, compared with women taking leave for the same purpose. And, although the Equality Act (2010) allows "*special treatment afforded to a woman in connection with pregnancy or childbirth*", the Tribunal couldn't see why enhanced pay should be exclusive to female employees for longer than 2 weeks after the birth, so found that the special treatment derogation didn't apply.

However, the Tribunal dismissed Mr Ali's indirect discrimination claim on the grounds that the provision, criteria or practice relied on was the maternity policy. As this was not a gender neutral policy, there was no indirect discrimination.

**So, where does this leave us?** Well, we now have conflicting Tribunal decisions on this issue, neither of which are binding. However, both cases are to be appealed and the EAT's decision will be binding, so this is an area to watch.

In the meantime, **if you currently offer different pay for maternity leave and shared parental leave**, you'll no doubt want to follow these appeals and consider your response if the EAT upholds the decision in *Ali v Capita*. Options to consider include:

**(1)** First, whether you might want to reduce enhanced maternity pay to statutory pay only (so that it's the same rate as shared parental pay) – the downside being, of course, that this may be pretty unattractive from an employee relations perspective!;

**(2)** Secondly, a better option then might be to equalise maternity pay and shared parental pay by reducing maternity pay and uplifting shared parental pay;

**(3)** Finally, the most expensive option is to uplift shared parental pay so that it matches your existing enhanced maternity pay rates.

You might be wondering "well, what's everyone else doing about this?" Well, research for the Chartered Institute of

---

10-16137860-1

---

[addleshawgoddard.com](http://addleshawgoddard.com)

---

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo\*

\*a formal alliance with Hashidate Law Office

Personnel and Development indicates that the uptake of shared parental leave has been fairly low so far, with only 5% of eligible dads opting to take it. So, you might feel the cost of uplifting shared parental pay is a price worth paying to avoid discrimination complaints and to become an "employer of choice".

Now, a quick straw poll across some of our clients shortly after this decision indicated that many aren't enhancing shared parental pay just yet (although many also don't enhance their maternity pay either, which doesn't present any problems). However, we'd be really interested to hear from you to make this research more meaningful. What approach are you taking? Is this likely to change? If you get chance, please complete our 2 minute survey at the bottom of the screen and send it back to us. We'll treat all responses confidentially but we'll share any general insight we receive – anonymously of course - with everyone who responded. You can find a template survey email to fill out and return at the bottom of your screen now.

**That's all for today from Addleshaw Goddard's Employment Channel! Thank you for watching, and see you next time.**

---

10-16137860-1

[addleshawgoddard.com](http://addleshawgoddard.com)

---

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo\*

\*a formal alliance with Hashidate Law Office