

Shared parental leave: new EAT decisions consider whether a failure to match shared parental pay with enhanced maternity pay is discriminatory

Two recent EAT decisions provide employers with further guidance on the question of whether enhancing maternity pay for women but not shared parental pay for men is discriminatory. In [Capita Customer Management Ltd v Ali](#) the EAT held that such a practice was not directly discriminatory because the male employee was not entitled to compare himself to a woman on maternity leave. However, the question of whether it is indirectly discriminatory was left open by the EAT in [Chief Constable of Leicestershire Police v Hextall](#). The EAT overturned a decision that such a practice was not indirectly discriminatory and remitted the claim for rehearing by a different Tribunal.

Background law

Direct and indirect discrimination

Direct sex discrimination occurs where, because of sex, a person treats another less favourably than others (section 13(1), Equality Act 2010 (**EqA 2010**)). However, there is a derogation to this general rule in relation to special treatment given to women in connection with pregnancy or childbirth (section 13(6)(b), EqA). Special treatment given on these grounds should be disregarded, meaning a man cannot claim he has been treated less favourably because he has not received the same treatment. However, any special treatment must be proportionate i.e. limited to that which is reasonably necessary to remove the disadvantages caused by their condition.

Indirect sex discrimination occurs where the employer applies an ostensibly neutral provision, criterion or practice (a **PCP**) which puts persons of the claimant's sex at a particular disadvantage and which also puts the claimant at that disadvantage and where the disadvantage cannot be objectively justified by the employer. Objective justification requires the employer to demonstrate that there was: (i) a legitimate aim that corresponded to a real business need (costs savings alone is not sufficient); and (ii) the PCP was a proportionate means of meeting that aim i.e. it was reasonably necessary and there was no less discriminatory means available.

Shared parental leave and pay

Shared parental leave (**SPL**) and pay was introduced in 2015. Co-parents are able to share up to 50 weeks' leave and 37 weeks' pay. The pay rate for statutory shared parental pay (**SSPP**) is the same as statutory maternity pay (**SMP**) (save that SSPP is paid at a flat rate throughout and there is no enhancement to 90% of pay for the first 6 weeks as there is for SMP). There is no statutory requirement to equalise shared parental pay with any enhanced maternity pay package offered to female staff. The Government's view is that it is not unlawful for employers to differentiate, yet commentators considered there was a risk that this would be discriminatory.

The emerging case law appeared to support the Government's approach. In the case of *Shuter v Ford Motor Company Ltd* (**Shuter**) (a case concerning additional paternity leave (**APL**) and pay, the predecessor to SPL), the Employment Tribunal decided that it was neither directly nor indirectly discriminatory to pay a woman 100% of pay for 52 weeks of maternity leave and to pay a man statutory pay only for a period of APL. Similarly, in the case of *Hextall v Chief Constable of Leicestershire Police* (**Hextall**) the Employment Tribunal decided that it was not directly or indirectly discriminatory to pay enhanced pay for maternity leave compared with SSPP. In both *Shuter* and *Hextall*, the direct discrimination claims failed because the Tribunals rejected arguments that the male claimants on APL and SPL were entitled to compare themselves with women on maternity leave. Instead, the correct comparators were said to be a woman on APL (*Shuter*) or SPL (*Hextall*). However, the clear waters were muddled in 2017 when, in the case of *Ali v Capita Customer Management Ltd* (**Ali**), the Tribunal allowed a man on SPL to compare himself to a woman on maternity leave and went on to uphold his complaint of a direct sex discrimination. This left employers with conflicting first instance decisions on the issue. Both *Hextall* and *Ali* were appealed and we report on the EAT decisions below.

Facts

In *Hextall*, the Claimant was a police officer. Female police officers were entitled to an enhanced maternity package of 18 weeks' full pay. Further, male or female primary carers taking adoption leave were also entitled to enhanced adoption pay of 18 weeks' full pay. After the birth of his child, the Claimant took approximately 3 months' SPL for which he was paid SSPP only.

In *Ali*, the Claimant had begun working for the Respondent following a TUPE transfer. Female transferring employees were entitled to an enhanced maternity package of 14 weeks' full pay, followed by 25 weeks' SMP. After the birth of his daughter the Claimant took 2 weeks' ordinary paternity leave for which he was paid in full. He wanted to take additional time off and was told that he was eligible to take SPL and receive SSPP only.

In both cases, the Claimants went on to bring direct and indirect sex discrimination claims.

Employment Tribunal decisions

Claim	Hextall	Ali
Direct discrimination	<p>The direct discrimination claim failed. The Claimant was not permitted to compare himself to a woman on maternity leave. The Tribunal highlighted the significant differences between maternity leave and SPL, including:</p> <ul style="list-style-type: none"> The EU Pregnant Workers Directive provides that pregnant workers and those who have recently given birth are a specific risk group and the purpose of the leave is to protect their health and safety. No such considerations apply to fathers taking SPL. Maternity leave can be taken before birth, whereas SPL can only be taken after birth. The first two weeks of maternity leave is compulsory, whereas SPL is entirely voluntary. The consent of the co-parent is not required to take maternity leave whereas the mother's consent is required in order for the co-parent to take SPL <p>Instead, the correct comparator was a woman taking SPL. Such a woman would be treated the same as the Claimant meaning there was no less favourable treatment. However, in case they were wrong on this, the Tribunal went on to consider the situation if the comparison was legitimate and concluded that the derogation allowing special treatment of women in connection with pregnancy or childbirth would apply.</p>	<p>The direct discrimination claim succeeded. The Employment Tribunal departed from the approach taken in <i>Shuter</i> and <i>Hextall</i> and allowed the Claimant to compare himself to a woman on maternity leave save in respect of the first 2 weeks' of compulsory maternity leave.</p> <p>Having allowed the comparison, the Tribunal went on to find that the differential approach to pay was less favourable treatment because of sex.</p> <p>On the question of the derogation permitting special treatment, the Tribunal considered that the purpose of leave after the first 2 weeks' of compulsory maternity leave was childcare, and this was not exclusively tied to the mother. The Tribunal concluded that the enhancement of maternity pay was not special treatment in connection with pregnancy or childbirth, meaning that the derogation did not apply.</p>
Indirect discrimination	<p>The indirect discrimination claim failed. Firstly, the Tribunal did not accept that a woman on maternity leave receiving enhanced pay was a valid comparator for a man taking SPL receiving SSPP. Secondly, the PCP relied on was "the payment of statutory pay only to those taking SPL". The Tribunal</p>	<p>The indirect discrimination failed. The PCP relied on was the Respondent's policy of enhancing maternity pay. As this was not a gender neutral policy, the Tribunal held there was no basis for an indirect discrimination complaint.</p>

Claim	Hextall	Ali
	<p>did not accept that this placed men taking SPL at a particular disadvantage compared to women taking SPL (the correct comparator in their view).</p> <p>However, the Tribunal did issue a word of warning: had they found the indirect discrimination complaint to be valid, the objective justification put forward by the Respondent would have failed. The Respondent had put forward four potentially valid "legitimate aims" (a further three were put forward but discounted by the Tribunal). The potentially valid aims were:</p> <ul style="list-style-type: none"> • Giving police officers the same rights relating to shared parental leave and pay as civilian police staff. • Acting consistently with other police forces who did not enhance pay for SPL. • Complying with non-binding guidance issued by the Home Office. • Avoiding "significant discontent" amongst police officers if they took a decision to equalise shared parental pay and maternity pay pending the Home Office's final decision on the issue, only to reduce it again if the Home Office ultimately decided that the applicable rate of pay for SPL should be the statutory rate of pay. <p>The first three aims failed because discriminatory treatment could not be justified by either the fact that others are treated just as badly, or that a third party (here, the Home Office) had suggested the treatment. As to the fourth aim, the Tribunal said that the avoidance of industrial strife was a legitimate aim, but the means of achieving that aim was not proportionate. The Tribunal considered that the Respondent's real motivation for not equalising pay was cost and this, alone, could not justify discrimination.</p>	

EAT decisions

Claim	Hextall	Ali
Direct sex discrimination	The Claimant's direct discrimination claim was not appealed to the EAT.	<p>The EAT overturned the Tribunal's decision and held there was no direct discrimination. The Respondent argued that the Tribunal had fallen into error by failing to consider the <u>purpose</u> of maternity leave with pay which underpins the relevant European and domestic law. The Respondent pointed to the following factors to demonstrate that the purpose of maternity leave was not childcare, but the health and wellbeing of a woman in pregnancy, confinement and after recent childbirth:</p> <ul style="list-style-type: none"> • The EU Pregnant Workers Directive expressly states this to be its purpose and Member States are required to provide a minimum of 14 weeks' paid maternity leave. • The Maternity and Paternity Leave etc Regulations 1999 provides for a 26-week period of ordinary maternity leave, which can commence up to 11 weeks before the expected date of confinement (i.e. before there is a child to care for). • The Paternity and Adoption Leave Regulations 2002 provides that the 26-week period of ordinary adoption leave can only commence on the date on which the child is placed. In other words, an adopter's right to leave is triggered by the need to care for the child, unlike the trigger for maternity leave. • The authorities of <i>Hoffman v Barmer Ersatzkasse (ECJ, 1985)</i> and <i>Gillepsie v Northern Health and Social Services Board (ECJ, 1996)</i> identified the purpose of maternity leave as the protection of: (i) a woman's biological condition; and (ii) the special relationship between a mother and child which follows pregnancy and childbirth. <p>The EAT agreed that the purpose of maternity leave was the health and wellbeing of a woman in pregnancy, confinement and after recent childbirth</p>

Claim	Hextall	Ali
		<p>(and the level of pay claimed for that leave was inextricably linked to the purpose of that leave). Although a woman on maternity leave will care for her child, this was a consequence not the purpose of paid maternity leave. This was to be contrasted with the purpose of SPL, which was solely to care for the child. This meant the Tribunal had been wrong to say that a man taking SPL could compare himself to a woman on paid maternity leave. The correct comparator was a woman taking SPL, against whom the Claimant had suffered no less favourable treatment.</p> <p>The rejection of the comparison meant the claim for direct sex discrimination failed. However, in case they were wrong on this, the EAT went on to consider the situation if the comparison was legitimate. They decided that in such circumstances the derogation allowing special treatment of women in connection with pregnancy or childbirth would apply and would justify the payment of enhanced pay to women.</p>
Indirect discrimination	<p>The EAT overturned the Employment Tribunal's decision and remitted the indirect discrimination claim to a differently constituted ET. The EAT held that the Tribunal had fallen into error in their approach to the indirect discrimination claim.</p> <p>The Tribunal's primary reason for rejecting the claim was that a woman on maternity leave could not be a comparator to a man on SPL for the purposes of the indirect discrimination claim (as per their reasoning for rejecting the direct discrimination claim). However, this was not the right approach: identifying a pool for comparing the disadvantage of a PCP on men and women in materially indistinguishable circumstances is a different exercise to that followed in a direct discrimination claim. In an indirect discrimination claim, a "logically relevant" pool is to be chosen. This would be those police officers with a present or future interest in taking leave to care for their newborn child – which could potentially include women on maternity leave. However, the EAT noted that no facts had been found to enable a decision to be taken on the size or composition of the appropriate pool.</p>	<p>The Claimant's indirect discrimination claim was not appealed to the EAT.</p>

Claim	Hextall	Ali
	The second reason the Tribunal had rejected the claim was that they did not accept that the PCP caused a particular disadvantage to men, since men and women receiving SSPP would be treated the same. However, the EAT held that this was the wrong approach. All PCPs are ostensibly neutral; it is the resultant disadvantage that falls to be considered. In this case, the disadvantage was that the only option men have is to take SPL paid at the statutory rate. Whereas the majority of women in materially indistinguishable circumstances (i.e. women on maternity leave receiving enhanced pay) would have the possibility of taking maternity leave paid at the enhanced rate.	

Where does this leave employers?

Whilst there is some comfort here for employers who enhance maternity pay but not shared parental pay, the following risks should be borne in mind.

Direct discrimination - there are limits to the EAT's decision in *Ali*: it really only goes as far as saying that it is not directly discriminatory to pay enhanced maternity pay to a woman and SSPP to a man for a period of 14 weeks (which was the period of paid leave sought by the Claimant). The EAT recognised that there may be mileage in an argument that the purpose of maternity leave morphs from the pregnancy and childbirth to childcare over time. When might that change in purpose arise? Working Families (who intervened in the appeal) suggested that this might occur after the expiry of the 26-week ordinary maternity leave period. However, it is arguable that it occurs after the expiry of the minimum 14-week period of paid maternity leave prescribed by the Pregnant Workers Directive.

Indirect discrimination – the risk remains live: the indirect discrimination claim in *Hextall* will now return the Tribunal for a rehearing. Therefore, the risk remains that the practice of paying statutory pay only to a man on SPL will be found to disadvantage men. It would then fall to the employer to justify the discriminatory treatment (and, remember, in *Hextall* the Tribunal considered that the employer would be unable to do this). This requires an employer to show the existence of a legitimate aim that corresponds to a real business need (costs savings alone will not be sufficient). In *Shuter*, the promotion of recruitment, retention and development of women within a male-dominated workforce was found to be a legitimate aim. However, this kind of aim may not lend itself to more diverse sectors and businesses. And even where a legitimate aim is identified, it would need to be shown that the PCP was a proportionate means of achieving that aim i.e. that it was reasonably necessary and there were no less discriminatory means available.

Therefore, employers should continue to follow this line of cases and ensure that consideration has been given to the question of how different rates of pay can be justified.