Employment

No discrimination in Shared Parental Leave appeals

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The Court of Appeal ruled on 24 May 2019 in the eagerly awaited appeals by men on shared parental leave who were paid less than women on maternity leave. It held that:

- There is no direct discrimination as a man on shared parental leave (which is for childcare purposes) is not in comparable circumstances to a birth mother on maternity leave (who is afforded special treatment for health and safety purposes)
- It is not indirect discrimination to have a policy of paying statutory pay to men on shared parental leave because men and women in the comparison pool were not placed at any particular disadvantage by that policy, criteria or practice. In any event it would be justified as it was proportionate and legitimate to apply the policy of EU law ensuring special treatment relating to maternity
- A claim that contractual shared parental leave pay is less favourable than contractual maternity pay was properly brought as an equal pay or equality of terms claim – alleging that a sex equality clause should ensure men and women in like circumstances are paid equally
- Any equal pay claim by a man on shared parental leave pay would fail because the sex equality clause does not apply where there is special treatment relating to maternity, even if the terms were truly comparable.

The Issue

The central issue in the combined appeals of *Capita v Ali* and *Hextall v Chief Constable of Leicestershire* [2019] EWCA Civ 900 was whether it is unlawful discrimination on the basis of sex - whether direct, indirect or equal pay - for men to be paid less on shared parental leave (SPL) than mothers are paid on maternity leave (ML). The emphatic answer from the Master of the Rolls, Lord Justice Bean and Lady Justice Rose is that it is not.

Mr Ali was employed by Capita under a policy which entitled him to two weeks' ordinary paternity leave (at basic pay) and SPL at statutory pay rates. Birth mothers were entitled to enhanced 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). He then complained that any SPL should be paid at the ML rate of pay. Mr Hextall was a police officer who in broadly similar circumstances. He took SPL and complained that he was paid less than a female police officer who was taking ML. He alleged that the provision, criteria or practice of paying SPL at the statutory rate put men at a particular disadvantage compared to women in the same material circumstances and was not justifiable. The ET rejected his claim, but it was overturned in the EAT.

A woman's right to paid ML is derived from the 1992 Pregnant Workers' Directive which was introduced by the EU as a health and safety measure. The UK provides for 52 weeks' ML with 39 weeks of pay in compliance with this EU Directive. Both men and women also have the domestic right to take SPL, but only where the birth mother ends her ML, which then entitles either her or a partner to take SPL with pay.

In the test cases of *Ali* and *Hextall* it was alleged to be either direct discrimination or indirect discrimination under the Equality Act 2010 (EqA 2010) to pay men on SPL at a lower rate than women on ML. Before the Court of Appeal both employers agreed that because the complaints were essentially about discriminatory rates of pay, the claims should properly be characterised as equal pay or 'equality of terms' claims.

In a direct sex discrimination claim, s.13(6) EqA 2010 provides that no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth. However, the Court of Appeal noted that EqA 2010 failed to include the same provision in relation to indirect sex discrimination (despite it being in the predecessor Sex Discrimination Act 1975).

The Court of Appeal held that it was significant that s.23 EqA 2010 provides that a comparison in either direct or indirect discrimination can be made only if there is no material difference between the circumstances of the comparable men and women.

The Court also held that where the complaint was about equality of terms of employment, s.66 EqA 2010 implied the sex equality clause into contracts to modify any term (such as the rate of SPL pay) if it was less favourable than a corresponding term of the comparator's contract (arguably - the rate of ML pay). However (as with direct sex discrimination) under s.70 EqA 2010 and paragraph 2 of Schedule 7 (not "Part 2" of Schedule 7 which it held must be a drafting error in the EqA 2010) a sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.

Direct Discrimination

Mr Ali argued that after the first two weeks of compulsory ML after birth, ML for the following 12 weeks is for childcare purposes only and is comparable with SPL under s.23 EqA 2010. He argued that the Court should no longer follow *Hofmann v Barmer Ersatzkasse* [1985] ICR 731 in which 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 when a woman was in a period of voluntary leave rather than compulsory leave. He suggested that ML pay should no longer fall within the provisions of the Equal Treatment Directive providing that sex discrimination was "without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity".

The Court of Appeal rejected the argument pointing out that the principle in *Hofmann* was relied on with approval in recent ECJ judgments including *Betriu Montull v Instituto Nacional de le Seguridad Social* [2013] ICR 1323 and *CD v ST* [2014] IRLR 551. The protection of maternity was emphasised in the recast Equal Treatment Directive (2006/54/EC). The Court of Appeal held that the domestic introduction of SPL did not alter the purpose of ML and so the proper comparator for Mr Ali was a female worker on SPL. Therefore, there was no direct discrimination, particularly as s.13(6) EqA 2010 permits special treatment relating to childbirth.

Equal Pay

In the *Hextall* appeal the Court of Appeal noted that a police officer's terms are treated by the EqA 2010 in the same way as an employee's terms. It overturned the EAT's judgment that Mr Hextall's terms were identical to a female officer's terms, pointing out that the maternity provisions expressly applied only to female officers. It held that the analysis in *Hosso v European Credit Management Ltd* [2012] ICR 547 of the boundary between the Equal Pay Act 1970 and SDA 1975 did not assist Mr Hextall as that case concerned an allegedly discriminatory exercise of discretion and not discriminatory terms of employment. The Court of Appeal, applying *Hayward v Cammell Laird Shipbuilders* [1988] 1 AC 894, held that Mr Hextall's claim was in reality an equality of terms claim, albeit a fundamentally flawed one as Mr Hextall's term relating to SPL pay was not, in fact, a proper corresponding term to a female officer's ML pay term.

Further the Court of Appeal found that any equal pay claim by Mr Hextall would fail under Schedule 7 para 2 EqA 2010 which provides that a sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.

Indirect Discrimination

As it was really an equal pay claim, Mr Hextall was precluded from bringing a claim of indirect discrimination by the mutual exclusivity provision in s.70 EqA 2010.

For good measure the Court of Appeal went on to explain why they would have dismissed the indirect discrimination claim on its merits in any event. The PCP relied on by Mr Hextall was "paying only the statutory rate of pay for those taking a period of shared parental leave". Relying on *Essop v Home Office* [2017] 1 WLR 1343 the Court of Appeal noted that the PCP did not cause a particular disadvantage to men when compared with women in the pool for comparison. In reality, men in Mr Hextall's position were disadvantaged not by the PCP, but by the fact that only birth mothers are entitled to maternity pay. Those birth mothers could not be included in any pool for comparison as (quoting *Harvey)* the Court of Appeal held that 'the pool of individuals upon whom the effect of the PCP is evaluated must be populated by persons whose circumstances are the same as, or not materially different from, the claimant'. Women on ML are materially different from men or women taking SPL as explained in the *Ali* appeal and should therefore be excluded from the pool.

Finally, the Court of Appeal said (obiter) that any disadvantage to the claimant was justified as being a proportionate means of achieving a legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth. The derogation in recital 24 of the Equal Treatment Directive (2006/54/EC) excluding the special treatment of women in connection with pregnancy or childbirth was transposed into English law by s.2(2) SDA 1975, but omitted when the EqA 2010 was passed. The Court of Appeal held that it was 'extremely unlikely' that in passing the EqA 2010, Parliament intended contractual provisions making special treatment for birth mothers to be subject for the first time to scrutiny under the heading of indirect discrimination and it would be 'very odd' to have to justify each case specifically. The suggestion that employers must equalise payment for ML and SPL would undermine the special treatment afforded to a woman in connection with pregnancy or childbirth which would be contrary to the policy of both EU and domestic law.

Mr Ali and Mr Hextall are both seeking permission to appeal to the Supreme Court.

Conclusion

This comprehensive victory for the employers provides consistency to the treatment of SPL across all heads of sex discrimination. It removes the uncertainty which had been caused by the EAT judgments and the fact that the issue of objective justification was not strictly an issue in either appeal. It clears up two drafting minor errors in the EqA 2010 for good measure. It also ends the suggestion of some (briefly mooted by the EAT in *Ali*) that at some point during the 52 weeks of ML, the leave somehow loses its health and safety rationale and becomes purely leave related to childcare. The rationale for ML contained in *Hofmann* has once more been endorsed. It is to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth – in some women that could be a matter of weeks and others may take the full year or more. ML is also to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. Employers are free to continue to treat maternity pay and ML as a special case without fear of a discrimination claim by men seeking comparable rights.

Andrew Burns QC and Lucinda Harris appeared for Capita.