



HR Bulletin

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Shared Parental Leave

If an employer pays an enhanced rate of Statutory Maternity Pay (SMP), must it also pay an enhanced rate in respect of Shared Parental Leave (SPL)? There was quite a stir caused by a Scottish Employment Tribunal recently in which a male employee successfully claimed indirect sex discrimination and was awarded almost £30,000 in compensation because his employer only paid the statutory minimum rate in respect of his SPL.

We've been waiting for a case to settle this question – but *Snell v Network Rail* isn't it. Crucially, the employer conceded before the hearing began that its SPL policy amounted to indirect sex discrimination – so the Tribunal's job was simply to work out his compensation. This means that there can be no appeal on the question of whether the policy was discriminatory or not and this case cannot be used to set any sort of precedent.

This is frankly a surprising concession from Network Rail and I would be fascinated to know why they made it. The problem may have been that the employer's policy did not draw a clear distinction between maternity leave and Shared Parental Leave. It appears that the two were integrated into an overall shared parental leave policy and that may well have muddied the waters. Maternity Leave and Shared Parental Leave are two distinct rights and an employer's policy on family leave should certainly draw a clear distinction between the two. Nevertheless, many employers worry that paying the minimum statutory rate in relation to SPL but more than the minimum in relation to SMP is discriminatory. I am by no means convinced.

In the first place – at the risk of seeming overly picky – this is a matter of the employee's contractual entitlement.

That means that it should really be taken as an

equal pay claim under the Equality Act rather than an indirect discrimination claim. An equal pay claim requires a clearly identified comparator of the opposite sex doing equal work - and issues of indirect discrimination only arise when the employer has identified the reason for the difference in pay and the question is whether that is 'tainted' in some way by sex discrimination.

But even if we leave aside that point, showing that the employers approach to SPL and SMP is discriminatory is still far from straightforward.

Shared Parental leave is a distinct legal right from Maternity Leave and it is one that is enjoyed by both men and women. A woman taking SPL will often, of course, have taken Maternity Leave first – but not necessarily so. A woman may qualify for Shared Parental Leave as the partner of someone who gives birth and will be in exactly the same situation as a man who qualifies on the same basis. Provided both are paid at the same rate, it cannot be argued that paying a lower rate for shared parental leave than maternity leave amounts to direct discrimination.

That still leaves indirect discrimination to consider. But indirect discrimination is not some consolation prize you get when your direct discrimination claim falls just short.

You have to show that the employer is applying a

'provision, criterion or practice' that puts people who share a protected characteristic - in this case, men - at a particular disadvantage when compared with those who do not share the characteristic – in this case women.

I don't think we can simply assume that men are inherently more likely to take SPL than women. The essence of SPL is that it can be shared. It might be that what often happens is that a woman takes a period of maternity leave and then hands over to her partner (more likely, on average, to be a man than a woman) who then takes Shared Parental Leave. But it is just as likely that after ending her maternity leave, a woman shares the remaining leave with her partner. It is far from clear that an employer's policy of paying only the statutory rate puts men at a particular disadvantage when compared with women.

To make indirect discrimination stick you would have to compare people taking Shared Parental Leave with those taking Maternity Leave. But are the two situations really comparable? Even in indirect discrimination, like must be compared with like - and women on maternity leave have just given birth (or are about to) whereas men on shared parental leave have not. That's a pretty big difference between the two groups and it has always been accepted that women are entitled to special rights and protections in respect of childbirth.

Even if a claimant did persuade a Tribunal that there was a substantial disadvantage, however, that would still leave open the question of justification. There is no indirect discrimination if the employer can show that the provision criterion or practice is a 'proportionate means of achieving a legitimate aim'. So can an employer justify paying an enhanced rate for maternity leave but not for shared parental leave?

The obvious issue to raise here is affordability. If everyone who qualifies for Shared Parental Leave has to be paid at the same enhanced rate, then that could make the benefit prohibitively expensive. Money alone is not a safe basis for justifying discrimination however, so we need to look deeper into why an enhanced rate is paid in the first place.

One key aim of maternity leave is to allow women to remain in post when they have children - and paying an enhanced rate of maternity pay better enables an employer to retain women who might otherwise leave. An employer could avoid the risk of discrimination by simply paying all forms of family-related leave at the minimum statutory rate – indeed there are reports that Network Rail have responded to the Snell case by doing just that. But taking that approach is likely to reduce women's participation in the workforce – particularly at higher grades – and exacerbate the gender pay gap. That seems to me to be a sound basis for operating a system of enhanced maternity pay alongside a system of paying only the statutory minimum in terms of shared parental leave.

We can't be fully confident of the legal position until a properly contested case makes its way to the EAT or Court of Appeal – and that may well take several years. In the meantime, however, it makes no sense to change course just because of this one case. In particular, levelling down the rates of pay so that everyone is just paid the statutory minimum simply to avoid the risk of a discrimination claim would be a huge overreaction and bound to cause more problems than it solves.

Keep in Touch

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The Art of Balancing your Biases



On Monday 17th October West Midlands Employers hosted 'The Art of Balancing your Biases' a workshop designed to understand how biases can play out into organisational decisions and the impact this can have. The workshop was delivered by WM Employers Associate Emma Rees who conveyed the workshop with ***great pizzazz and enthusiasm!***

The workshop was attended by 27 delegates from 11 West Midlands Local Authorities and Organisations.

The workshop itself unravels the naturalness of people having biases and it provided the space and reflection time to understand why this happens. The neuroscience behind this thought process was illustrated for delegates to gain a deeper understanding of biases. Emma shared up to date research and practices to look at how organisations can tackle unconscious bias in the work place and discussions on strategies for individual organisation contexts were also outlined.

Delegates that attended the workshop provided positive feedback on the session and the evaluation feedback from the event produced the following results:

86% showed a positive increase in awareness

76% a positive increase in knowledge & understanding

76% documented 1+ action they would undertake

If you would like to find out more about this workshop and would like this for your managers; please contact **Monica Puri** on 07771 373 202 or email m.puri@wmemployers.org.uk