



HR Bulletin

E-Update 74 – July 2017

Everyone seems to be talking about the grand sweeping reform of employment law proposed by the Taylor Review. The Review is certainly interesting and makes some radical proposals, but we shouldn't hold our breath while we wait for them to be implemented. Brexit legislation will take up at least the next two years' worth of parliamentary time – and who knows what the Government will be able to concentrate on after that.

In the meantime it is more productive to keep an eye on the cases being decided every week if we want to keep up with the latest developments in employment law. This month I want to look at two cases. One is a useful illustration of a well-established principle. The other is a potentially radical new take on how employers need to approach maternity and shared parental leave.

Dismissals for poor performance

In *Awojobi v London Borough of Lewisham* the issue revolves around a dismissal for poor performance. We actually see very few appeal-level decisions on this topic. The leading case on the requirements for a fair dismissal based on poor performance is *James v Waltham Holy Cross* from 1973 – which tells us that this is not a fast-moving area of the law.

In *James* it was held that central to a fair dismissal for poor performance was an opportunity for the employee to improve – and a warning of the consequences if no improvement was forthcoming. It is worth bearing mind that the very complex performance management procedures that we often find in local authority employers should have these essentially simple principles at their heart. In *Awojobi* the issue was whether, when it was clear that the required improvements could not be made, the employer needed to consider whether the employee could be redeployed to some other role.

The manager conducting the final hearing ruled out any transfer without considering any individual vacancies. He reasoned that the employee's failures were not specific to the role

she was performing but more about her general approach to the organisation of her work, Transferring her to a new role would simply shift the problem elsewhere. The Tribunal held that this was a fair approach and the EAT agreed. There is no specific requirement to consider alternative work when an employee faces dismissal for poor performance.

Of course the situation might be different if the employee was recently promoted or transferred to a role and proved to be unsuitable. In a case of that sort the employer must bear some responsibility for the situation and you would expect a reasonable employer to consider returning the employee to his or her original job if that was possible.

Maternity and shared parental leave

Generally speaking it is best not to get too excited about cases that have only reached the level of the Employment Tribunal. Every so often however, a case touches a nerve and addresses a question that has been bubbling away under the surface for some time. When that happens, it is worth taking notice.

One such case is *Ali v Capita Customer Management Ltd* which held that a male employee was directly discriminated against when he took shared parental leave but was only paid the statutory minimum rate, when a woman taking maternity leave would have been paid at an enhanced rate.

Many local authority employers pay more than the statutory minimum when it comes to maternity pay – but I know of very few who match that benefit when it comes to shared parental leave. Is that direct discrimination? This case suggests that it could be, but I'm going to stick my neck out and say that it is wrong. Direct discrimination depends on the 'reason why' one person is treated less favourably than another. I don't see how it can be direct sex discrimination to pay both men and women who take shared parental leave the statutory minimum.

In the *Ali* case the employer argued that women who give birth and who therefore qualify for maternity leave are in a different position from parents (of either sex) who take shared parental leave after their partner has had the baby but the Tribunal held that that was not a 'relevant factor'. I suspect that the higher courts (and many mothers) will disagree. Besides which, more favourable treatment of employees in connection with pregnancy or childbirth is specifically allowed under s.13(6)(b) of the Equality Act 2010. Case law suggests that there is a limit to how much more favourable such treatment can be but the Tribunal, in my view, has taken an absurdly limited position in suggesting that three months of enhanced pay for employees who have given birth is disproportionate.

More interesting is the question of indirect discrimination – not at issue in the *Ali* case – where the suggestion is that a provision criterion or practice (PCP) of only paying the statutory minimum rate for shared parental leave puts men at a particular disadvantage. I'm not sure that quite works because it involves comparing them with women who have given birth and I don't think that is a like-for-like comparison. But we should also remember that there is no indirect discrimination if the employer shows that the PCP is a 'proportionate means of achieving a legitimate aim'.

Paying an enhanced rate of maternity pay strikes me as an important tool in ensuring the retention of female employees who need to take time off after giving birth. A requirement to match that enhanced pay for all parents regardless of whether they had given birth or not will just make any enhanced benefits prohibitively expensive.

On balance, we are not yet in a position where local authorities should be looking to equalise the pay for maternity and shared parental leave. But it is clear that we should get something like a definitive answer from the courts in the next year or two.

I'd be astonished if anything comes of the Taylor Review in that timescale. Over the next year, I'll be picking over the Taylor Review as much as anybody, but it is still the case law where the real action lies.

Keep in Touch

Twitter - @ [DazNewman](#)

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3 for 2 on Employment Law

The annual Employment Law update with resident specialist Darren Newman is always popular and is often fully booked before we have even finalised the programme. It is also an event that attracts several delegates from within an authority, so we traditionally offer you a 3 for 2 discount for all bookings received from a single organisation.

The fee for WME members is just £110 + VAT for which you receive an insightful update on the latest employment law issues for our sector and a networking lunch! If you want secure your place early for 20th October 2017 [click here](#) to download our booking form.





10th Coaching and Mentoring Pool Conference

Journeys and transitions – creating the story through coaching and mentoring

9th November 2017
Birmingham Conference & Events Centre



The 10th West Midlands Coaching & Mentoring Conference will celebrate the exciting journey of our coaching and mentoring voice in this region.

To mark the event, we have produced a short three-minute film featuring some of our coaches and people we have worked with over the last decade.



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The theme for this year's conference is on journey's and transitions and will give delegates a chance to reflect, engage and network with each other.

Keynote Speakers

Bob Garvey – Coaching, Mentoring and Culture; are we on the same of different page

Ian Rose, Dame Kelly Holmes Trust – 3 Steps to Success

Jonathan Passmore – A critical review of coaching practice across Europe

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